

**The Charter
Implications of Bylaw
Enforcement on People
with Low Incomes in
Alberta**

2017

ACLRC



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Alberta
Civil Liberties
Research
Centre

The *Charter* Implications of Bylaw Enforcement on People with Low Incomes in Alberta

by the

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Executive Summary¹

In Alberta, bylaws are passed under the authority of the *Municipal Government Act* to govern the affairs of citizens in municipalities, and are supposed to be aimed at ensuring order and the health and safety of the municipality's citizens. Low-income or homeless people are often unequally affected by bylaws, particularly when they accumulate fines and face the possibility of jail time as a result of the enforcement of bylaws. Bylaw enforcement and police services, together with individuals in civil society, are increasingly concerned about the significant negative effects of bylaw enforcement experienced by low-income and homeless individuals.

This paper seeks to look at the bylaws in question through a *Canadian Charter of Rights and Freedoms (Charter)* lens. We start by looking at the circumstances of low-income Albertans who are most directly affected by some bylaws. Second, we summarize the content of some representative bylaws (there is a chart in Appendix A that compares Edmonton and Calgary bylaws, and Appendix B contains a list of comparable bylaws from other municipalities in Alberta), and we discuss ways that the bylaws may have an adverse effect on low-income persons. Next, we set out how *Charter* cases work in our court system. Fourth, using hypothetical situations, we summarize the existing applicable legal decisions and principles and how they might be used to argue that the *Charter* rights of persons of low income have been violated. We also suggest possible remedies for these violations. We end with some recommendations for law reform (or bylaw reform).

Currently, there exists a lack of definitional precision and agreement with respect to describing "poverty" as experienced by low-income and marginalized populations of Alberta. An absolute, encompassing definition would describe "poverty" as struggling to provide for the basic necessities of life. Albertans struggling to provide for the necessities of life include homeless people, low-income workers, single parents, women, youth and children, Aboriginal populations, people with disabilities, seniors, and new immigrants and refugees.

¹ In the interest of brevity, citations are omitted from the Executive Summary. These are provided in the body of the report.

ACLRC (and others) have received many anecdotal reports about individuals from these demographic groups suffering adverse (negative) effects not experienced by others when they are given bylaw infraction tickets. A group of researchers involved with the Justice Sector Constellation, Enough for All, Calgary's Poverty Reduction Initiative, (including the Elizabeth Fry Society and Carolyn Green from the Criminal Justice Program at Athabasca University) is currently performing qualitative and quantitative research of stakeholders to confirm these anecdotal reports. The legal analysis performed in this report proceeded on the assumption (which seems well supported by anecdotal evidence) that individuals in the groups set out above are adversely impacted by bylaw enforcement in Calgary and other Alberta centres.

Bylaws dealing with public behaviour, uses of public parks and transit, and uses of streets, have offences and penalties that often adversely affect low-income and homeless persons. Individuals across Canada have accumulated very large fines for violating these types of bylaws, yet often their behaviours are based on survival (e.g., riding transit without a ticket because they used the money for rent). Because they are poor and/or homeless, persons with low incomes are unable to pay the fines, which have accumulated to thousands of dollars.

All *Charter* cases proceed on a similar set of analysis steps. First, there are three pre-requisites. After *Charter* cases meet the pre-requisites, the court follows the following stages of analysis:

1. What is the scope of the right or freedom in issue?
2. Is the right or freedom infringed?
3. Can the government nevertheless justify the infringement under *Charter* s 1?
4. If the right is violated and the government cannot justify its infringement of the right, what is the appropriate remedy?

Canadian courts have developed legal principles to assist in deciding all of these issues.

Before a *Charter* case is commenced, there are three requirements that must be met: the case must be against the government ("government" is given a fairly large definition); the case must be justiciable (based on a legal question and not a political one); and, the individual or group bringing forward the case must have standing. If any of these is missing, the case cannot proceed.

First, since bylaws are passed under the authority of provincial legislation, the *Charter* clearly applies to them, and thus the first pre-requisite is met (case is against the “government”). Second, in *Tanudjaja v Canada (Attorney General)*, the Ontario Court of Appeal was asked to decide on the question of justiciability in the context of the issue of whether people have the right to adequate housing. Speaking for the majority, Justice Pardu concluded that the question was one of legislative accountability and was non-justiciable. This effectively closed the door to assessing the extent to which a government has positive economic and social obligations towards those who experience *Charter* violations.

Third, private interest standing is generally a matter of right if a challenged law or action directly affects someone. Standing may also be expanded to include a discretionary public interest standing. For public interest standing to be granted, the issue must be justiciable (see above). Second, the issue presented must be serious and the party presenting the issue must have a genuine interest in its determination. Third, the court examines whether the current case is a “reasonable and effective way” in which the issue may be brought before the court. In *British Columbia/Yukon Assn. of Drug War Survivors v Abbotsford City*, the British Columbia Court of Appeal upheld the decision of the trial court that the Drug War Survivor’s Group had public interest standing and could obtain a remedy under section 24(1) of the *Charter*. This challenge constituted the most reasonable and effective way for multiple homeless people to challenge the constitutionality of the city’s bylaws and conduct.

In suggesting *Charter* challenges to bylaws that adversely affect individuals living in poverty, and analyzing whether the bylaw provisions or the effects of imposing bylaw fines or penalties are found to violate the *Charter*, we start with *Charter* section 7, as we believe that this section currently shows the most promise. Next, we address *Charter* subsection 15(1) and finally *Charter* section 2(a). To date, *Charter* arguments that put forth both section 7 and subsection 15(1) claims have been most successful. Given the comparable lack of success of subsection 15(1) challenges, the greatest potential for a successful subsection 15(1) claim may lie in combining the action with a section 7 challenge, if the facts of the case work in favour of this. All *Charter* analyses also include *Charter* section 1 arguments, and discussion about appropriate remedies once it is found that the *Charter* is violated.

Charter section 7 reads:

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 Supreme Court of Canada (SCC) cases provide guidance on the meaning of “life, liberty and security of the person” in various contexts, and also set out important considerations for when these rights may be deprived “in accordance with the principles of fundamental justice”. In addition, the *Abbotsford v Shantz* case applies the SCC principles on *Charter* section 7 to homeless individuals.

In summary, the right to life includes the right to be alive, as well as the right to control one’s body. The right to liberty includes the right to act without restraint and the right to make personal choices. The right to security of the person includes bodily and psychological integrity, bodily control and privacy. These rights are both procedural (the procedures followed must guarantee the rights) and substantive (relating to the legal principles of life, liberty and security of the person). Finally, the principles of fundamental justice include arbitrariness (laws should not be arbitrary); vagueness (laws should be clear and understandable); overbreadth (the means used to achieve a societal purpose or objective must be reasonably necessary); and gross disproportionality (laws cannot be so extreme as to be disproportionate to any legitimate government interest).

We next summarize the legal principles surrounding *Charter* subsection 15(1), which reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charter subsection 15(1) has had a difficult and complicated history. We set out some of the key applicable principles that have evolved in the context of cases involving social condition, poverty or homelessness. First, as with many *Charter* cases, there have been preliminary issues involving justiciability and standing. Social and economic issues such as the right to housing can easily be presented to the Court in a way that is political (and

thus not justiciable). *Adams* provides guidance regarding the types of legal issues that courts may address with respect to sheltering the homeless.

The current two-part legal test for determining whether there is a violation of *Charter* subsection 15(1) is outlined in *R v Kapp* and affirmed in *Withler*. First, the courts ask if the law creates a distinction based on an enumerated or analogous ground, and second, the court asks whether the distinction creates a disadvantage by perpetuating prejudice, stereotyping, or historical disadvantage. The *Kapp* test is a contextual inquiry (e.g., the particular circumstances of the claimants must be examined when determining if there is discrimination). Thus, once we overcome the hurdles of justiciability, an additional hurdle in establishing a subsection 15(1) equality claim includes placing marginalized groups, such as homeless and low-income people, into an enumerated or analogous ground for discrimination.

The enumerated or listed grounds of discrimination include: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The enumerated grounds are based on personal characteristics that are difficult or impossible to change and historically have often been the target of prejudice and stereotyping. New grounds of discrimination may be created by analogy to the enumerated grounds. Like the enumerated grounds, they are based on personal characteristics that are difficult or impossible to change, or if they are changeable it would be at great personal cost. Thus far, courts have only accepted the following additional analogous grounds: citizenship or non-citizenship; marital status; sexual orientation; and off-reserve Indian status.

Individuals who are homeless and impoverished often have very little control over that way of being and could appear to fit within analogous grounds. However, in order to advance homelessness and poverty as analogous grounds, the courts must free themselves from the obstacles that have been in place when it comes to applying definitions, and must recognize greater diversity within the groups that make *Charter* challenges. Homelessness was denied as an analogous ground in *Tanudjaja ONSC*.

As for the second branch of the *Kapp* test, the court in *Quebec (Attorney General) v A* elaborated and clarified the meanings of prejudice and stereotyping. A government law or

action may perpetuate prejudice by “promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian Society.” An adverse distinction becomes discriminatory by perpetuating prejudice when it sheds a negative light onto a person or persons who belong to one of the enumerated or analogous groups. The perpetuation of prejudice does not have to have intention behind it; it is measured only in its adverse effects on these particular groups.

Stereotyping is another form of substantive inequality that is distinct from the perpetuation of prejudice. Stereotypes are defined by the SCC in *Quebec v A* as:

...inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group.... Negative characteristics, such as a lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominately to members of a particular group. It is then the negative characteristic that becomes the focus of contempt.

Adverse effects discrimination, another important part of the subsection 15(1) analysis, is very important in the context of low-income persons. The disproportionately negative effects of bylaws on a city’s more vulnerable populations, such as the homeless, are illustrated in the case *Abbotsford (City) v Shantz*. *Abbotsford* is a case that challenges the constitutional validity of Abbotsford City bylaws that concerned the use of public spaces and the prohibition of the erection of temporary shelter for the homeless.

In *Abbotsford*, DWS challenged certain sections of the city’s bylaws and their enforcement, alleging that they targeted the homeless population and infringed their *Charter* rights and freedoms (including sections 2(c), 2 (d), 7 and 15(1)). The Court concluded in *Abbotsford* that homeless individuals should be allowed to erect temporary shelters and to camp overnight in city parks when there is not enough shelter space available.

The court in *Abbotsford* applied the two part legal test from *R v Kapp* to determine whether the subsection 15(1) rights of the homeless were violated by the City. Justice Hinkson noted that homeless people are heterogeneous in character, which increases their

vulnerability. The homeless are composed of many types of people, including the physically and mentally disabled, addicts, the poor, Aboriginal peoples, and a combination of these types. DWS asserted that there was a lack of available shelter accessible to the homeless. Further, they argued that there are many barriers to accessible shelter and housing for the homeless. Some prefer to live in small groups together in encampments. However, it did not follow that a preference for encampments means that it is a choice to be homeless. The assumption that homelessness is a choice ignores the reality of how difficult it is for people to extract themselves from low-income and impoverished circumstances. DWS also argued that although the City had valid public health and safety concerns in homeless encampments, the impugned bylaws might have had the effect of masking the visibility issue of homelessness and disorder within the City.

In *Abbotsford*, DWS challenged the constitutionality of the City bylaws and their enforcement by referring to their adverse effects on the City's homeless people. The Court noted that: "DWS seeks declarations that the City's homeless have a *Charter* right to exist and obtain the basic necessities of life, including survival shelter, rest and sleep, community and family, access to safe living spaces and freedom from the risks and effects of exposure, sleep deprivation and displacement.."

DWS submitted that the impugned bylaws and displacement tactics by the City discriminated against the homeless and perpetuated and exacerbated substantive inequality, thus violating their subsection 15(1) equality rights under the *Charter*. DWS continued to argue that the effect of the challenged bylaws was to impose a disproportionate and differential burden on the City's homeless. There was a further imposition of a direct discriminatory impact on the homeless since they were targeted as a discrete minority on the basis of their personal characteristics. The bylaws and tactics discriminated against the homeless by preventing them from obtaining the basic necessities of life in the camps and streets of Abbotsford. Lastly, there was a compounding effect on the homeless who generally are composed of vulnerable groups, such as persons with disabilities, Aboriginal peoples, other racial minorities, and vulnerable economic and social beginnings.

DWS requested that the court determine the equality issue on a substantive basis, not merely on a formal equality basis. While formal equality concerns only the wording of the impugned bylaws and their enforcement on its face, substantive equality examines the effects of the suspected discriminatory law on people. Unfortunately, the court's analytic approach to the substantive equality issue in this case did not address adverse effects discrimination, and the court did not go beyond the mere recognition of substantive equality as not requiring like or similar treatment. Instead, the court's analysis shifted to an examination of the distinction on enumerated and analogous grounds.

In *Abbotsford*, the contextual factors were never addressed in the substantive equality analysis. Justice Hinkson briefly acknowledged the historical mistreatment of Aboriginal people and persons with disabilities, yet he did delve deeper into a formal equality analysis. Although Chief Justice Hinkson acknowledged the impugned bylaws might have a greater impact on the homeless, he concluded that they are treated in the same way as everyone else. Unfortunately, in this case, the court missed what could have been an excellent opportunity to look at substantive equality through an adverse effects discrimination lens, and to apply this analysis to the bylaws in question and their effect on homeless people.

Unfortunately, the way that courts approach a subsection 15(1) analysis is far from settled law, particularly with respect to the finer details within each analysis. The area where there appears to be the most contention is the understanding by courts of the difference between the adverse effects of discriminatory provisions and the discriminatory nature of the provisions themselves. However, as Professors Watson-Hamilton and Koshan note, an analysis related to the perpetuation of historical disadvantage is perhaps the key to an effective subsection 15(1) bylaw challenge.

Third, there have recently been a number of cases involving persons who are homeless (or temporarily homeless) relying on *Charter* section 2(b), freedom of expression, to defend from a bylaw ticket or other charge. For example, cases involving the Occupy Movement in 2011 often involved individuals who were protest camping in various city-owned locations. Individuals used *Charter* section 2(b) to defend from court injunctions to stop their protest

camps or the police officers' removal of their protest encampments under the authority of parks bylaws.

Section 2(b) of the *Charter* protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication." Under the *Charter*, freedom of expression protects all non-violent activity that conveys a meaning. However, the time, method, and location of the expression do place some limitations on the freedom to express oneself.

In public spaces, the freedom of expression may be limited if the "expression impedes the function of the place or fails to promote the values underlying freedom of expression." The test, from *Montreal (City) v 2952-1366 Quebec Inc*, for the application of *Charter* section 2(b) with respect to freedom to express oneself on public property ("*Montreal* test") is:

Whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth-finding and (3) self-fulfillment. To answer this question, the following factors should be considered: (a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

In *Montreal*, the SCC considered whether a Montreal city bylaw concerning noise limited freedom of expression, and if so, whether the limit could be saved under section 1 of the *Charter*. The appeal stemmed from a noise complaint; a police officer walking by a dance club, which had set up speakers outside the club on the street that amplified the music from inside, issued a ticket for violation of articles 9(1) and 11 of the City's noise bylaw. The respondent argued that these provisions violated its section 2(b) *Charter* right to freedom of expression, among other administrative arguments.

The SCC considered whether amplified sound was protected by section 2(b) such that it has expressive content, and whether the "method or location of this expression remove(s) that protection," as outlined above in the *Montreal* test. The court found that the amplified sound had expressive content. In considering whether an activity is expressive, the consideration is not for the particular theme or type of message of the activity, but whether, as the definition

suggests, the content actually *delivers* a message of some kind. At this stage of the analysis, the fact that the sound has expressive content means that the expression is protected under section 2(b) of the *Charter*.

The Court then considered the method and location of the expressive content. While freedom of expression in some public places is protected, this protection generally does not extend to private property. In this case, the respondent owned the property on which the amplification equipment was located, but the amplified sounds travelled out onto the street, which is public and within government control. This led to the argument that for the purposes of the expression, the amplified sound is a government act, and must be protected under section 2(b). The counterargument is that some spaces, such as places of public business and offices, are private in nature even though they are government owned and controlled, and the section 2(b) protection of expression does not extend to these spaces.

On the method and location stage of the test, the court agreed with the first argument and found that “the emission of noise onto a public street is protected by s. 2(b)” and that the method of expression allows the public area, in this case the city streets, to function normally without issue. Further, the expression does not “fail to promote the values that underlie the free expression guarantee.” People are able to use the streets and roads as they normally might without interference, and “amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment” regardless, in this case, of content.

Finding that the expression was in fact protected under section 2(b) of the *Charter*, the court turned to the question of infringement, and found that the bylaw in question infringed the protected freedom in effect, because the effect of the bylaw was to restrict the expression. In this case, the bylaw restricted the expression by restricting the ability of passersby to hear the amplified sound, which encouraged “passersby to engage in the leisure activity of attending one of the performances held at the club,” particularly because in engaging in leisure activities is a method of self-fulfillment.

Despite finding that the bylaw limited freedom of expression, the court found that the limitation was justified under section 1. The objective of the bylaw was to address the issue of

noise pollution, and the court found that “the objective of the limitation [was] pressing and substantial” in a free and democratic society, particularly because “noise pollution is a serious problem in urban centres, and cities like Montreal are entitled to act reasonably and responsibly in seeking to curb it.” The court found that the means, namely, limiting noise from amplified sound, was rationally connected to the City’s objective of providing citizens with a small degree of protection from noise in city streets. With respect to the minimal impairment portion of the test, the court found that the City used only the most reasonable means to handle the issue of noise. As a result, the measures that the City took to legislate regarding noise impaired the rights of the respondent in a minimal way because it was the only reasonable action to take under the circumstances. Finally, the court found that the prejudicial effects of infringing on freedom of expression were proportional with the benefits of the bylaw.

If, on application of the relevant analysis, a court finds that the government action or legislation does not interfere with a protected right or freedom, there is no need for any further consideration in the matter. The case is finished once the applicant fails to establish that an infringement has occurred. However, if the court finds that the claimants have met their burden of proving that there is in fact an infringement, the analysis continues and the onus of proof shifts from the applicant to the government. In each *Charter* case, the government is given the ability to ‘answer’ the claimant by attempting to justify the infringement of the protected right or freedom. This is done via section 1 of the *Charter*, which states that the *Charter* “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.”

In analyzing whether the government’s actions are justified, courts often consider whether the limit or infringement is prescribed by law, and whether the impugned provision is too vague. With respect to the requirement that a limit is prescribed by law, the Supreme Court notes in *R v Therens* that this requirement ensures that the infringement is not situational or arbitrary, but “expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.” At this stage of the analysis, a court will also look at whether the limit is clearly explained or whether it is so vague that it cannot meet the prescribed by law requirement under section 1 of

the *Charter*. If the impugned provision is shown to be prescribed by law and provides individuals with enough guidance regarding the law itself, courts will next analyze whether the limit is demonstrably justified in a free and democratic society. This stage of analysis involves the application of various principles that the SCC set forth in *R v Oakes* (the *Oakes* test). First, the government must be able to show that the impugned law or provision has a pressing and substantial objective that is important enough to warrant limiting the right in question.

The next stage of the analysis requires the court to consider whether the means by which the government operates to limit the rights or freedom in questions, in some cases the impugned provisions, are proportional to the object that the provisions are aiming to achieve. Proportionality is demonstrated by asking several questions. The court in *Carter* reiterated this portion of the *Oakes* test, and stated that “a law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.”

As assessment of minimal impairment involves an inquiry into whether there are any other ways for the government to achieve its objective that do not impair an individual’s *Charter* right. At this stage, if the court concludes that the effects of the violation are not minimally impairing, there would be no need to consider the third step of the analysis from the *Oakes* test. If the government is able to demonstrate that the challenged provisions were minimally impairing, the court would analyze the proportionality between the negative effects that the provisions have on the *Charter* rights of individuals and the importance of the objective that the government seeks to protect.

The hypothetical scenarios that immediately follow apply the legal principles under either *Charter* section 2(b), subsection 15(1) and/or section 7 to two situations involving low-income and homeless persons.

Hypothetical #1: We set out a hypothetical case involving a low-income single mother who has received several bylaw infraction tickets and fines (that she cannot pay) for riding the transit without paying the fare. In the *Charter* section 7 challenge before the court, the woman would seek a declaration that the *Calgary Transit Bylaw 4M81* or the penalties that are imposed on her infringe her section 7 *Charter* rights to life, liberty and security of the person,

and cannot be saved by *Charter* section one. A successful challenge would result in a declaration by the court that the bylaw is unconstitutional. The declaration would result in the invalidation of the tickets and fines.

In applying *Charter* section 7 to this hypothetical, we conclude that the single mother was imprisoned for her inability to pay fines due to her low-income status and this would have the effect of violating her liberty. It could possibly also be argued that her security of the person has been infringed when she is forced to choose between paying for transit to work and feeding herself and her family. Next, the single mother must also demonstrate that this interference is not in accordance with the principles of fundamental justice. This means that the bylaw cannot be arbitrary, overbroad, or grossly disproportionate in effect. We conclude that while there may be some argument that the law is arbitrary or overbroad, it is most likely to be found to be grossly disproportionate to the objectives of the bylaw (safety, freedom of harassment by other passengers and the effective and efficient operation of transit). The single mother's inability to pay a transit ticket, resulting in an accumulation of fines and possible imprisonment, is arguably beyond the objective of the Transit Bylaw. Thus, it would be argued that the liberty of the single mother was deprived in a manner that is not in accordance with the principles of fundamental justice.

We would also expect that since it is very difficult for the government to justify a *Charter* section 7 violation under *Charter* section 1, the government would face an uphill challenge satisfying the burden of justifying the infringement. The bylaw and its punishment may be rationally connected to the objective of the law (safe and efficient operation of the transit system), as low-income Calgarians would likely be discouraged from travelling on the LRT without paying as required if they are given large fines and the possibility of imprisonment. However, the City would likely not pass the "minimal impairment" limit and the "proportionate in effect" arguments developed in caselaw that interprets *Charter* section 1.

Once it has been found that the woman in question has had her *Charter* section 7 rights violated and that the government cannot justify the infringement under *Charter* s 1, the Court will order a remedy under *Constitution Act*, 1982, section 52 or under *Charter* section 24(1).

Hypothetical #2: involves a group of advocates for homeless people (ADWS), some of whom have addiction issues. A protest tent camp is set up, which includes a temporary safe injection site. Statistics indicate that Aboriginal persons are overrepresented among Calgary's homeless population. Protest campers are unable to pay for the permit required under the *Parks and Pathways Bylaw*. The City of Calgary Bylaw officers gave notice to ADWS to cease the construction of the structure for the safe injection site and to vacate the tent encampment within 24 hours. When ADWS did not comply, the City Bylaw Officers impounded the tents and issued summonses to several individuals. The officers dismantled the safe injection wooden structure. As a result of these events, hundreds of homeless people were left without any shelter and many had to sleep without protection from the elements. There were several reported cases of frostbite and pneumonia as well as drug overdoses following the seizure.

Challenges to the actions of the officers are launched under *Charter* sections 2(b), 7 and 15(1). We conclude that actions of police, such as seizing the tents and dismantling the safe injection site, would be subject to *Charter* scrutiny, as police are considered part of government under section 32 of the *Charter*. The court would address whether the Calgary *Parks and Pathways Bylaw* infringes subsection 15(1) of the *Charter* on the grounds that it establishes a discriminatory distinction based on the proposed analogous grounds of low-income and homelessness or on the basis of enumerated grounds such as race (Aboriginal persons), and mental and physical disability. While the enumerated grounds of race and disability may be recognized as grounds in this case, it is still an issue for the courts to expand analogous grounds to include homelessness and poverty.

This report contends that the homeless, the impoverished, Aboriginal persons, persons with disabilities, and drug addicts are adversely impacted by the City of Calgary *Parks and Pathways Bylaw*. The effect of the Bylaw on these disadvantaged groups results in the perpetuation of prejudice and is based in the stereotypical beliefs of the City about the homeless and poor, Aboriginal persons and the disabled. Further, it violates the subsection 15(1) equality rights of these groups.

While we have indicated that similar cases have not been successful in relying solely on *Charter* subsection 15(1), we proceed on the assumption that the *Charter* subsection 15(1)

argument is successful. The next phase of inquiry moves to the question of whether the City can justify the violation under section 1 of the *Charter*. This is discussed below after we analyze infringements of *Charter* sections 7 and 2(b).

Under a section 7 analysis for a breach of a *Charter* right, it is the person or persons whose rights are being infringed who bear the burden of establishing that the bylaw or bylaws deprive them of life, liberty, and security of person in a manner that is either not rationally connected to the object of the law or grossly disproportionate to the object of the bylaws. The ADWS would claim that the removal of all the tents and temporary shelters jeopardizes the health and safety of the vulnerable groups. With respect to the proposal for the model safe injection site, the ADWS claim that the actions of the City Bylaw Officers in ordering the halt of construction on the structure and further dismantling it amounts to a violation of the ADWS' section 7 rights under the *Charter*. We conclude that the right to life in section 7 of the *Charter* is engaged. The many barriers that the homeless face put their lives in jeopardy and increase the risk of death. The demographics of homeless people consist of many vulnerable groups, including drug addicts and disabled persons. Sleeping outside is likely to cause serious harm to a homeless person's physical and mental health. It is often suggested that the homeless choose to sleep outside. However, often there is not enough adequate shelter space available, or drug addicts may not be able to access shelter due to restrictive rules. Homelessness increases the risk of exposure to communicable diseases, violence, frostbite, and hypothermia, and leads to sleep deprivation over long periods of time. Sleep deprivation may increase the risk of diabetes, cardiovascular disease, obesity and depression. Additionally, many homeless people suffer from drug addictions. The model safe injection site proposed by ADWS is intended to help save the lives and increase the health of homeless drug addicts. The government action by Calgary Bylaw Officers in notifying the AWS to cease construction of the model safe injection site and the dismantling of the structure by the officers left the lives of many homeless drug addicts in peril. Following the dismantling of the safe injection site there were several reported overdoses from fentanyl.

Alongside the dismantling of the safe injection site, the City Bylaw Officers were ordered to remove the tent encampment. Further to this, Calgary Bylaw Officers impounded tents and

issued summonses to several homeless individuals within Olympic Park plaza. The actions of the City Bylaw Officers left many homeless people without any shelter from the elements during a period of harsh Calgary weather. Following these actions, there were several reported cases of frostbite and pneumonia at local Calgary hospitals. In *Carter*, the SCC was asked to balance competing values, which includes the need to protect the vulnerable. The actions of the City Bylaw Officers led to increased risk of death for vulnerable and marginalized populations. The *Carter* decision allows for an opening by the courts in future decisions to acknowledge that government actions may indirectly affect vulnerable groups. Following this reasoning, the actions of the City Bylaw Officers at Olympic Park Plaza increased the risk of death as a result of lack of adequate housing and access safe injection methods.

The liberty interest in section 7 of the *Charter* is engaged when there is the possibility of imprisonment. However, liberty interests are engaged beyond mere physical restraint. The main principle underlying liberty is to protect “the right to make fundamental choices free from state interference.” However, the SCC in *Blencoe* caution that freedom in making personal choices is not without constraints. The interests of the public must also be considered in balancing the consideration of personal freedoms. In *Morgentaler*, the SCC brings to light the idea of human dignity finding expression throughout the *Charter*, and the right to choose is the common thread that runs throughout the different rights and freedoms contained within the *Charter*. The government must attempt to respect the right to choose to the greatest extent possible, as this is an integral aspect of human dignity. In turn, the right to choose is integral to the right to liberty. Liberty “grants the individual a degree of autonomy in making decisions of fundamental importance.”

The elements of choice, causation, and harms that flow from the bylaws within vulnerable and marginalized groups apply to government laws and actions rather than the ‘choice’ to be homeless or an addict. Deciding where to live and seek adequate shelter applies to human dignity and the right to choose. The lack of adequate shelter space contributes to the decisions that homeless people will have to make in seeking out shelter. In from the Cold and the Calgary Drop-In Centre report they are often over-capacity and homeless individuals and families have to sleep on mats on the floor. Calgary’s Aboriginal homeless population is

increasing. The Drop-In centre acknowledges that they cannot provide adequate shelter to meet the needs of homeless Aboriginal people. The homeless have a right to choose to sleep in tents when shelters are full. In *Adams* (BCSC), Justice Ross acknowledged that many homeless people have no choice but to sleep outside. The City of Victoria's bylaws prevented the homeless from erecting temporary overhead shelter at all times. The Bylaw had a greater impact on the homeless and put their health at significant risk.

The security of the person interest in section 7 of the *Charter* is engaged when a law or a government action creates a risk to someone's physical and psychological health. The right to security of person and liberty are overlapping rights. The City of Calgary's Bylaws heighten the risk of the homeless persons by not allowing them to set up tents and camp. *Bedford* establishes that by limiting the homeless person's right to camp and erect temporary shelter the City Bylaw is actually imposing dangerous conditions on an already risky activity. Homeless people often suffer from pre-existing physical and mental health problems. Sleeping outside, particularly without any overhead shelter causes serious physical and mental health problems. Further, the dismantling of the safe injection site prevents homeless addicts from accessing sterile supplies. They are more likely to share needles and to contract HIV and Hepatitis C, to develop infections, and to overdose. Drug use, an inherently risky behaviour, becomes more risky without a safe injection site.

The City of Calgary's Bylaws violate the right to life by the lack of provision for adequate shelter and by not allowing access to a safe injection site. The homeless are positioned for greater risk of death by the City's actions and legislation. The City of Calgary's bylaws violate the right to liberty by restricting the right to choose where to live and ways to provide for adequate shelter. Additionally, the cost of obtaining a permit is prohibitive for homeless people, thereby excluding them from any real meaningful choice. The City of Calgary's bylaws violate the right to security of person by lack of adequate housing and a lack of a safe injection site, thereby diminishing the physical and psychological health of the homeless. At the next stage of the inquiry, the Court will ask whether these deprivations are in accordance with the principles of fundamental justice.

At this stage, the Court inquires whether the limits on life, liberty and security of the person are in accordance with fundamental justice. Procedural aspects that are relevant in this hypothetical example are the City Bylaw Officers' interim injunction from the Alberta Court of Queen's Bench, requiring removal of all shelters and tents that had been erected, including the model safe injection site. The homeless, or ADWS on their behalf, will have to go to court to challenge the injunction. One has the right to know the case against oneself and the right to answer that case, but it is difficult for homeless people to navigate the legal system. From a procedural perspective, the court will have to inquire whether the procedures adopted by the City are fair to the homeless or whether they deprive them of life, liberty and security of person.

The courts are also entitled to inquire into the substantive portion of deprivation of life, liberty, and security of person. Specifically the Court asks whether the bylaw and the actions of the City Bylaw officers are arbitrary, overbroad, and/or grossly disproportionate.

The test for arbitrariness involves two steps. First, the claimant must identify the law's objectives, and second, he or she must identify the relationship between the government's interest and the law or action by the government that are in question. A court will ask whether the law or action is rationally connected to the purpose the law or act is said to serve. The stated purpose of the City of Calgary's *Parks and Pathways* Bylaw is to protect the value and quality of Calgary's parks and pathways, while ensuring they remain safe, aesthetic, comfortable and accessible for the enjoyment of all. The Court will inquire into whether the activities of the ADWS and vulnerable groups within the Park correspond to the objectives of the bylaw. The City of Calgary's *Parks and Pathways* Bylaw is meant to ensure the health and safety of all Calgarians visiting the parks, to preserve the Parks' value and quality, and to ensure that they are safe and accessible for all visitors. It is likely that the Court will find there is a rational connection to the purpose and effect of the Bylaw on Calgarians.

Overbreadth is another means by which a law or government action that has no connection to the law's objective could interfere with the conduct of people. In order for the homeless to seek overhead shelter in City parks, they must comply with a permit scheme as outlined in section 9 of the City *Parks and Pathways* Bylaw. The City of Calgary should be able

to oversee the park's overnight use without intruding on the City's homeless population by their outright removal and dismantling of their tents and safe injection site. The City could have drafted other options into the scheme, taking into account the homeless person's inability to pay for any permit or even to possess the knowledge of the process for obtaining a permit. The Court in *Abbotsford* also concluded that the bylaws in question deny the homeless any access to public parks without permits and prevent them from erecting temporary overhead shelter without permits, and as a result, are overbroad.

According to the majority, the test for gross disproportionality that was applied in *PHS* was such where "the government actions or laws are so extreme as to be disproportionate to any legitimate government interest." In our hypothetical scenario, the effect of the City of Calgary *Parks and Pathways Bylaw* permit scheme on the homeless is grossly disproportionate to the City's objective of protecting the park and safety of the users.

If the court determines that *Charter* section 7 is violated in this situation, the government then has the opportunity to defend its law or actions under section 1 of the *Charter*, which is discussed below.

The third potential violation we examine is *Charter* section 2(a) freedom of expression. In Olympic Park at the City of Calgary, ADWS began a movement called Occupy Calgary. The intention of the Occupy movement is to push for a safe injection site. Alberta has the highest rate of drug overdose deaths in the country from fentanyl, an opioid that is typically injected. ADWS decided to rally Calgary's homeless population, including those who want a safe injection site, to occupy Olympic Plaza. Occupy Calgary set up tents, and the homeless population was invited to move in and live there. Regular public meetings were held to discuss the plight of the homeless population, the need for adequate spaces for the homeless, and the need for a safe injection site in Calgary.

As a reaction to complaints by the public, the City of Calgary Bylaw Officers notified the ADSW leadership that construction of the model safe injection site must cease immediately, and later posted notices that the tent encampment must be removed within 24 hours. Two days later when the encampment hadn't moved, Calgary Bylaw Officers obtained an interim injunction requiring removal of all shelters and tents that had been erected. Many tents were

impounded and summonses were issued. The officers dismantled the almost completed safe injection site.

Olympic Plaza has many public use features to be enjoyed by all Calgarians and the public more generally. It was built in 1988 for the Olympic Winter games. It has an outdoor ice-skating surface, a reflecting pond, a sculpture of the Famous Five, a stage, waterfalls, public washrooms, and an independently owned concession stand. Olympic Plaza hosts many special events and festivals year round and is often used by Calgarians as a place to enjoy a lunch break or family picnic.

In movements like Occupy Calgary, groups of people acting in solidarity for a singular purpose of conveying a message are doing an expressive activity that falls under the protection of section 2(b) of the *Charter*. In order to establish whether there is a violation of the freedom of expression by ADWS and the Occupy Calgary movement, the court will ask whether the activity conveys meaning in a non-violent way. The protest for a safe injection site and the setting up of tents does not convey a violent message. The message is one of protest for the rights of the homeless to have adequate shelter and the protection of people with addictions and the right to a safe injection site.

Next, the Court will examine whether the method and location of the expression is consistent with the purposes underlying *Charter* s 2(b). Olympic Plaza is a public space where one should anticipate freedom of expression. However there are some limits imposed on freedom of expression in public spaces. Arguably the Occupy movement in Olympic Plaza may impede the use of the park by other visitors. Some members of the public complained about their inability to use Olympic Plaza and expressed concerns about the wooden tent's future attraction to injection drug users. In applying *Montreal* test for freedom of expression in public spaces, the Court will inquire whether the expression is promoting of values that include the promotion of truth, democratic dialogue, and individual self-fulfillment. The ADWS and Occupy movement are interested in promoting the truth, demonstrating democratic dialogue and individual fulfillment. By openly occupying Olympic Plaza, the ADWS and homeless are bringing about public awareness of their situation. The prior use of Olympic Plaza was generally intended for sporting activities. However, the right to freedom of expression is broadly

interpreted by the courts and any public impediment to the use of Olympic Plaza by others would likely be assessed for justification under section 1 of the *Charter*.

There is nothing to indicate an intention on the part of the government in the City of Calgary *Parks and Pathways Bylaw* to restrain freedom of expression. However, the practical effects of the of the interim injunction obtained by the City of Calgary Bylaw Officers requiring the removal of all shelters and tents, impounding tents and issuing summonses, and dismantling the safe injection site are to prevent the freedom of expression of ADWS and the Occupy Calgary movement. By removing tents and dismantling the injection site, the City is directly and indirectly controlling the message of Occupy Calgary.

Here, a court would likely find that the section 2(b) freedom of expression of ADWS and the Occupy Calgary movement has been violated by the City of Calgary. The onus then shifts to the City of Calgary to show that the City's interference with the freedom of expression of ADWS and the Occupy movement is justified.

If the Court determines that all or one of *Charter* sections 2(b), 7 or 15(1) are violated, the government can rely on *Charter* section one to argue that the infringement is demonstrably justified in a free and democratic society. First, under a *Charter* section 1 analysis, the court will likely conclude that the City of Calgary's *Parks and Pathways Bylaw* is prescribed by law. Section 7 of the *Municipal Government Act* ("MGA") allows the City to pass bylaws with respect to, among other things, the health and safety of people and the protection of people and property, activities in public spaces and nuisances and unsightly property. Further, section 8 of the *MGA* allows the City to regulate and prohibit activities, deal with any development or activity, industry, or business in different ways, and provide for a system of licences, permits or approvals. Further, the actions of the police officers are also authorized by the *MGA*, and as such, these actions are also prescribed by law.

Second, in defending an infringement of ***Charter* subsection 15(1)**, in the government will have to demonstrate that the infringement is reasonable and justifiable in a free and democratic society; the government must demonstrate that the objective of the law is sufficiently important to justify limiting a *Charter* right. In the case of the City *Parks and Pathways Bylaw*, the stated objective is to ensure the "protection of the park and to make sure

the park is safe, aesthetic, comfortable, and accessible for the enjoyment of all Calgarians.” Thus, the stated objective of the City of Calgary *Parks and Pathways Bylaw* is to protect the health and safety of people, as well as to protect the value and quality of the property and prevent nuisances. In the hypothetical case of ADWS and the City of Calgary, members of the public complained about their inability to use Olympic Plaza and expressed concerns about the model safe injection site attracting drug users to the park. In our case, it is likely that the stated objective of the Parks Bylaw will be found to be sufficiently important.

If the challenged law is determined to be sufficiently pressing and substantial to justify an infringement of a *Charter* right, the next stage of the inquiry asks if the means justify the objective. With respect to the infringement of subsection 15(1) equality rights, the court will ask if there is a rational connection between the prohibition for erecting temporary shelter and a model safe injection site without a permit. In *Abbotsford*, the Court found a rational connection between a similar prohibition and requirement of a permit, and a court in this case would likely find the same.

The third stage in the inquiry asks if the challenged law is the least drastic means for meeting the stated objective, as the government is required to draft laws that restrict the rights of individuals as little as possible to meet the objective. This is a contextual analysis and the court must decide if the government could have achieved their objective by less intrusive means.

The least drastic means test of the section 1 analysis asks if the City could have designed and drafted a *Parks and Pathways Bylaw* that infringes the rights of the vulnerable and homeless less than it does currently. At this juncture, the court will ask whether there are any other reasonable alternatives that the City could have considered when drafting a bylaw that has such a heavy impact on the homeless and vulnerable. As noted in *Slaight*, the City must have regard for the protection of the vulnerable. The permitting scheme the City drafted into the *Parks and Pathways Bylaw* is a means to regulate visitors in the Park at night. The City of Calgary should be able to oversee the park’s overnight use without intruding on the City’s homeless population by their outright removal and dismantling of their tents. A permitting scheme that requires money is a means often used to regulate conduct. However, there should

be consideration of alternative solutions that take into account the vulnerable populations of the homeless. The court must ask whether the City considered the effect of the bylaw on the homeless in particular, and if they could have designed different means by which to regulate the conduct other than one that has a significant cost component.

Finally, *Dagenais* provides that “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in questions and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.” The fourth and final stage of the inquiry asks whether the bylaw’s effects are proportionate to the bylaw’s objectives. If the bylaw that limits the *Charter* right is found to be the least drastic means, then the court will ask if the City achieved a reasonable balance between the harmful and advantageous effects when drafting the bylaw. Arguably, in our hypothetical scenario, the price the homeless and drug addicts have to pay is too high. The homeless are a vulnerable group. Without a permit, the homeless have their tents and safe injection site dismantled, which exposes them to a greater the risk of death, a profound limitation on personal autonomy, and an increased risk to their physical and psychological health and well-being. As a result, the government would fail to justify the infringement of the *Charter* subsection 15(1) rights of the homeless because the means of legislating, in this case via the *Parks Bylaw*, cannot be reasonably and demonstrably justified.

The court will next ask whether an infringement of ***Charter* section 7** can be justified under Section 1 of the *Charter*. From the analysis, if the City of Calgary *Parks and Pathways Bylaw* is found to be overbroad and grossly disproportionate to the legislative goal, the inquiry becomes one of whether the infringement is a reasonable limit that can be justified in a free and democratic society. It is very rare that an infringement of section 7 rights can be justified, because the analysis under section 7 already contains the justification of “in accordance with the principles of fundamental justice”, where the claimant must prove that the violation occurred in a manner that was not in accordance with the principles of fundamental justice. Once the court has determined the violation of life, liberty and security of the person was not in accordance with the principles of fundamental justice and section 7 was violated, the onus shifts to the government to demonstrate that it was a reasonable and justifiable violation.

The analysis of section 1 in relation to a violation of *Charter* section 7 will be very similar to that under *Charter* subsection 15(1) above, with some potential differences in emphasis. Namely, as noted, it is very rare that an infringement of section 7 rights can ever be justified, if it offends a principle of fundamental justice. Additionally, if the court finds that a law is overbroad under the section 7 fundamental justice analysis, this implies that there is some rational connection between the objective of the law and its effect (it merely concludes that the law is overbroad) and the *Charter* section 1 analysis would move on to the minimal impairment stage.

At this stage, a court would likely find that there exists a breach of section 7 of the *Charter*, and that this breach is not in accordance with the principles of fundamental justice, particularly because the law in question is overbroad. The government would be unlikely to justify the infringement during the section 1 analysis during the minimal impairment stage of the test. Following this analysis, the court would move to a discussion of available remedies.

With respect to an infringement of ***Charter* section 2(b)**, the court's inquiry into justification under section 1 for freedom of expression is contextual. Professor Koshan's *Ablawg* post, *Should they Stay or Should they Go?* provides a framework for a hypothetical section 1 analysis on an Occupy movement in a City of Calgary Park such as Olympic Plaza. Koshan brings into focus the Court's consideration of the location and audience in a section 1 analysis. The contextual approach by the Court means that a limit on expression in one location may be not function as a limitation in another location. The Court will also regard the make-up of the audience and their ability to choose. The vulnerability of the group the City is trying to protect, such as the presence of children and their exposure to certain types of expression is a relevant consideration, as is the nature of the activity. Limits to political expression are more difficult for the government to justify as they relate to the core values of the promotion of truth, democratic dialogue, and self-fulfillment. The Occupy movement in Olympic Plaza, which promotes shelter for the homeless and a safe injection site, has political expression. The onus is on City of Calgary to provide evidence of the harms of the occupation and whom the harms are affecting.

Once it has been established that the limit is prescribed by law as it is in the City of Calgary *Parks and Pathways Bylaw*, the Court will inquire whether the purpose of the limit is pressing and substantial. The City of Calgary *Parks and Pathways Bylaw* includes the important objective of ensuring the health and safety of all the people visiting the park. The City needs to protect the property and prevent nuisances. The City parks are valued and treasured assets for all Calgarians to enjoy. The City must also ensure that visitors have accessibility to the park and are comfortable while visiting. In *Abbotsford BCSC*, Justice Hinkson also found that the Bylaws in question were meeting a pressing and substantial need. Justice Hinkson determined that the activities of the members of DWS were the cause of the harms the Bylaw was intended to protect. However, Professor Koshan points out that the enforcement of a bylaw, such as the removal of tents from Olympic Plaza, is not a valid objective for the purposes of a section 1 analysis. Koshan reasons that if a bylaw is in violation of a *Charter* right or freedom, then the bylaw cannot be enforced without a *Charter* remedy. However, Koshan acknowledges that it is rare for the government not to pass this phase of a section 1 analysis since there is usually some validity to their perspective.

Next, the measures taken by the City Bylaw Officers must be rationally connected to the objective of *the Parks and Pathways Bylaw*. The measures taken must “not be arbitrary, unfair or based on irrational considerations.” The actions of the City Bylaw Officers resulted in the removal of all shelter and tents, impounding of tents and the issuance of summonses, and the dismantling of the safe injection site. The Bylaw requires a permit to camp overnight. In *Abbotsford BCSC*, Justice Hinkson found a rational connection between the objective and the measures taken. The City bears the burden of providing evidence that “enforcing the removal of tents will restore the enjoyment of the park by others, protect the occupiers from harm, and/or protect Olympic Plaza itself.” The applicants could argue that the design and physical make up of Olympic park is durable enough to withstand the tents and shelters. Thus the concern for the protection of property may not be a viable argument put forward by the City. The argument that the actions are to protect the protesters themselves is also not based in fact since the safe injection site and overhead shelter is intended to protect the welfare of the homeless, and the actions of dismantling the structures arguably go against that objective. The

strongest argument that may be submitted by the City in favour of a rational connection is to protect the enjoyment and health of the general public who would like to visit Olympic Plaza.

The minimal impairment or least drastic means is the stage of the proportionality test that the government most often fails. This limit requires the City to limit the right or freedom as little as reasonably possible. Additionally the City must demonstrate that the government considered the full range of alternatives and found them to be less effective or more restrictive than the methods used that are in dispute. In *Abbotsford BCSC*, Justice Hinkson weighed the methods used by the City of Abbotsford with approaches used in other jurisdictions. However, even if the City used less impairing methods than other cities, it does not mean that the means chosen by the City do not violate section 1. In that circumstance, Justice Hinkson found the benefits of the Bylaw in question were valid and a way to prevent damage to public lands, but he did not accept the argument that the negative impact on limiting rights and freedoms was minimal. Another issue that the Court should consider is whether the City's action resulted in a partial or complete ban on an activity, as complete bans are more difficult to justify under minimal impairment considerations. In *Adams BCCA*, the Court found the City could have exercised less restrictive alternatives than a complete prohibition on shelter. Professor Koshan frames the deleterious effect of the Bylaws on the limit of expression argument as the removal of tents and shelter going to the heart of the occupation movement. The prohibition on the tents and safe injection site thus limits the political aspect to the intentions of the ADWS and the homeless. In terms of freedom of expression, this is difficult for the City to justify.

The final stage of the proportionality test is one that seeks to find a reasonable balance between the negative effects on *Charter* rights and freedoms and the positive impact that the limitation provides for others. Koshan takes issue with protecting the many interests of the general public against a small group of people who are already vulnerable and marginalized.

After the *Charter* section one analysis, if the government is not successful in defending the violation of one or all of *Charter* sections 2(b), 7 or 15(1), the Court will award a remedy.

If the court concludes that the *Calgary Transit Bylaw* under hypothetical scenario #1 or the City of Calgary's *Parks and Pathways Bylaw* or the actions of the police officers under hypothetical #2 violated the *Charter* rights of the homeless persons under one or more of

Charter sections 7, 15(1) or 2(b), and the violation cannot be saved by *Charter* section 1, homeless persons may seek a remedy under *Charter* section 24(1) and/or section 52(1) of the *Constitution Act, 1982 (CA, 1982)*. Section 52(1) of the *CA, 1982* is the supremacy clause that gives the *Charter* “overriding effect.” Section 52(1) of the *Constitution Act, 1982* provides that:

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.

A remedy under section 52(1) of the *CA, 1982* applies to the bylaw itself. There is no discretion by the Court under section 52(1); the Court must declare the bylaw to be invalid if it is determined to be inconsistent with the *Charter*. The effect of this declaration would be to render any ticket or fine imposed under the bylaw also invalid. However the Court has developed variations on the theme of a simple declaration of invalidity. Declarations of invalidity could be possible as remedies for either hypothetical situation presented.

The Court could temporarily suspend the invalidity of the bylaw. This gives the Court the power to postpone the invalidity of the bylaw (or the offensive section of the bylaw) until it can be rewritten so that it does not violate the *Charter* rights of the homeless.

The Court could also sever the portion of the bylaw that is inconsistent with the *Charter*. It is a helpful remedy when only part of a piece of legislation is determined to be invalid. In the context of the *City of Calgary Parks and Pathways Bylaw*, the portion of the bylaw that requires those who want to camp overnight in a park to obtain a permit could be severed.

The Court could ‘read into’ the bylaw by adding any wording in to ensure the bylaw is in accord with the *Charter*. This could resolve the under-inclusive nature of the bylaw with respect to the homeless. Wording could be added to the bylaw to include the class of homeless people in order to alleviate the effect of the vulnerable nature of homelessness.

Additionally, the Court could allow for a constitutional exemption for the claimants from the application of the bylaws under section 52(1) of the *CA, 1982*. A constitutional exemption is applicable in circumstances where a bylaw is valid except for its application to a particular group or individual. This is relevant to vulnerable groups such as the homeless and people with addictions. When drafting bylaws, the City must consider the health and safety of all Calgarians and strike the right balance. The right to life, liberty, and security of persons in accordance with

the principles of fundamental justice is to be exercised for everyone, including the vulnerable groups of people that include the homeless, the impoverished, the disabled, Aboriginal persons, and those suffering from addictions.

The *Charter* has its own remedy under section 24(1), which states:

[a]nyone 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.

A remedy under the *Charter* is applicable to government acts as opposed to the bylaws. It is a remedy that is more personal for the litigants. In hypothetical scenario #2, it would be a remedy specifically for ADWS and the homeless. A remedy that is appropriate and just in the circumstances allows for some discretion by the Court. In hypothetical #2, The Calgary Bylaw Officers required removal of all shelters and tents that had been erected, including the wooden tent for the safe injection site. The City Bylaw Officers also impounded the tents. The court could require the City to return the tents to the homeless under section 24(1) of the *Charter*.

The report concludes with law reform recommendations.

I. Introduction

Municipal governments write and pass bylaws in order to govern the affairs of a city or town and its citizens. Bylaws exist for a variety reasons; although the overall function of bylaws is to ensure order and the health and safety of the municipality's citizens, bylaws also outline rules and standards of conduct in order for people in a localized area to live together peacefully. Low-income or homeless people are often unequally affected by the enforcement of city bylaws, particularly when they accumulate fines and face the possibility of jail time as a result of the enforcement of bylaws. Due to circumstances that are often beyond their control, low-income and homeless people are often put in situations where they have no choice but to break a bylaw.

Consider the following example, provided by the United Way of Calgary in 2008: a single mother is unable to purchase a C-Train ticket on her way to work or school. Although the ticket only costs \$2.50, if she is caught riding the train without valid fare, a peace officer may fine her \$250. She likely cannot afford to pay the fine—a problem that may be made worse by any

previous offences or an accumulation of fines—and as a result, she can be held in the Calgary Correctional Centre if she is unable to qualify for community service. The cost of incarceration at the Centre for one person is between \$410 and \$690 per day. The woman may pay off her fine at a rate of \$55 to \$75 a day. For the woman to pay off a ticket of \$250 it may cost the city up to \$1,400.² This cycle is neither cost-effective for municipalities, nor fair to the woman who is unable to afford transit. Additionally, the cycle disproportionately affects the most vulnerable and marginalized populations, namely, single women, single parents, the mentally ill, Aboriginal people, street youth, the working poor, and new immigrants. Many municipal bylaws forbid activities that are necessary for the survival of low-income and homeless Albertans. For example, it is an offence to sleep in a tent in a public park, as well as to ‘scavenge’ for recyclables to return for refund. As a result of these bylaws, people are criminalized for being poor.

The objective of this study is to examine a sampling of Calgary’s municipal bylaws, the unequal effect of bylaws on low-income and homeless Albertans, potential violations of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and to suggest legal reforms to reduce the negative effects of municipal bylaws on vulnerable populations. Many of the bylaws of Calgary are similar to those in Edmonton, Red Deer, Lethbridge, Medicine Hat, Fort McMurray, Taber, and Cardston. The applicable sections of bylaws from these municipalities are set out in Appendix B. Additionally, in order to demonstrate the disproportionate effect of bylaws on vulnerable populations and their potential *Charter* and human rights violations, this study will examine case law within Alberta and across Canada. Further, this study will include some theoretical analysis on the shaping of public policy and the exclusionary effect of bylaws on low-income and homeless Albertans. Finally, the study will look toward future goals of legal reforms and offer recommendations, some of which are already under review. An all-encompassing goal of this research is to propose a legal framework for challenging bylaws and their accompanying enforcement that will lead to a more just result for low-income and homeless Albertans.

² Poverty Reduction Coalition, *Crimes of Desperation: the Truth about Poverty-Related Crime* (United Way Calgary and Area, 2008) at 1, online: < <http://www.calgaryunitedway.org/images/uwca/our-work/communities/public-policy-research/Crimes%20of%20Desperation%20Final%20mar08.pdf> > [Crimes of Desperation].

II. The Subjects of this Study

The scope of this study is limited to the unequal effects of municipal bylaws on low-income and homeless Albertans. Currently, there exists a lack of definitional precision and consensus with respect to describing the poor, low-income, and marginalized populations of Alberta. Poverty is a complex issue with a multitude of descriptive and contributing factors. The multidimensional nature of poverty includes, among other things, a lack of education, unemployment, physical and mental health concerns, and a connectedness to community.³ An absolute, encompassing definition would describe this group as struggling to provide for the basic necessities of life.⁴ In relative terms, Canadians living in poverty would be defined as “being worse off than average”.⁵ Vibrant Communities Calgary describes poverty “...as a lack of resources and few opportunities to achieve a standard of living that allows full participation in the economic, social, cultural and political spheres of society”.⁶ Poverty leads to marginalization and further setbacks.

Similarly, there is a lack of consensus on how to measure poverty in Canada. In Canada there is no official poverty line. There are several different measures that reveal different aspects of poverty in Canada. The three most common methods are the Low-Income Measure (LIM), the Market Basket Measure (MBM), and Low-Income Cut-Off After Tax (LICO). A well-established method for measuring poverty is Statistics Canada’s Low-Income Cut-Offs (LICOs).⁷ Low-income Cut-offs will be the measurement referred to in this report. It should be noted that how you measure poverty will ultimately affect the shape of policy.⁸ Although the LICO measuring tool is not without criticism, it is the quantitative measuring tool that will be referred

³ United Way Calgary and Area, *Mapping Poverty in Calgary: Where do Poverty, Social Capital and Human Services Programs Exist in Calgary?* (2011) at 5, online: < www.calgaryunitedway.org/images/uwca/our-work/poverty/public-policy-research/mapping.pdf>.

⁴ Library of Parliament Canada, “Measuring Poverty: A Challenge for Canada” (17 October 2008) online: <<http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0865-e.pdf>> at 1 [Library of Parliament].

⁵ Library of Parliament at 1.

⁶ United Way of Calgary and Area, The City of Calgary, and Vibrant Communities Calgary, *What is Poverty* (2012) [UWCA, CC, VCC 1] at 4 (online: <http://www.calgaryunitedway.org/images/uwca/our-work/poverty/public-policy-research/finalwhat.pdf>).

⁷ Alexa Briggs and Celia R. Lee, *Poverty Costs: An Economic Case for Preventative Reduction Strategy in Alberta* (Vibrant Communities Calgary & Action to End Poverty in Alberta, 2012) at 4, online: <http://vibrantcanada.ca/files/poverty-costs_feb06-2012.pdf> [*Poverty Costs*].

⁸ Deanna L. Williamson and Linda Reutter, “Defining and Measuring Poverty: Implications for the Health of Canadians” (1999) 14(4) *Health Promot. Int.* 355 at 355-356.

to in this study. Statistics Canada describes low-income as an essential part of poverty. The LICO represents the point at which a family will assign a larger portion of income to the household necessities of food, shelter and clothing than the average family.⁹ This is a relative measuring device. Another way of understanding LICOs is as a “methodology which identifies those who are substantially worse off than the average.”¹⁰ The usefulness of this tool is to show trends in who is relatively the “worst off” economically in Canada at a given point in time.¹¹ There exists a demographic trend for single mothers to be one of the “worst-off” groups in Alberta. Thus, an example of a single mother illustrates the LICO threshold. A mother may be earning minimum wage, and the cost of food and shelter takes up 70% of her monthly income. The other monthly expenses, such as transportation and childcare, may reach beyond her monthly income.¹² LICOs will vary by the size of the family unit and the community population in which they are measured.¹³ In 2003, the LICO threshold for which Canadians were considered to be living in poverty was \$19,795 for one person; \$24,745 for two; \$30,744 for three; \$37,253 for four; \$41,642 for five; \$46,031 for six; and \$50,421 for seven and greater.¹⁴ The essence of the LICO measurement is to identify those who are struggling to survive and, by extension, to have meaningful participation in community and civic life.¹⁵ The most relevant question is how do we help people from the most vulnerable groups who live in poverty, or who are in danger of becoming poor? This report specifically examines the unequal effects of municipal bylaws on Alberta’s most vulnerable populations based on income.

Groups of Albertans struggling to provide for the necessities of life, or who tend to be worse off include homeless people, low-income workers, single parents, women, youth and

⁹ *Poverty Costs* at 5. See also Statistics Canada, “Low income cut-offs” (27 November 2015) online: www.statcan.gc.ca/pub/75f0002m/2012002/lico-sfr-eng.htm.

¹⁰ Ivan P. Fellegi, “On Poverty and Low Income” (25 July 2003), *Statistics Canada*, online: <www.statcan.gc.ca/pub/13f0027x/13f0027x1999001-eng.htm> [On Poverty].

¹¹ On Poverty.

¹² UWCA, CC, VCC 1 at 7.

¹³ Carol-Anne Hudson, *Poverty Costs 2.0: Investing in Albertans: A Blueprint for Reducing Poverty in Alberta Revised edition*, (Vibrant Communities Calgary & Action to End Poverty in Alberta, 2012) at 26, online: <d3n8a8pro7vnmx.cloudfront.net/actiontoendpovertyinalberta/pages/19/attachments/original/1421860062/569b482d06.compressed.pdf?1421860062> [Hudson, *Poverty Costs 2.0*].

¹⁴ United Way of Calgary, *Sustained Poverty Reduction: The Case for Community Action* (March 2005) at 4, online: <www.calgaryunitedway.org/images/uwca/our-work/poverty/public-policyresearch/Sustained%20Poverty%20Reduction%20The%20Case%20for%20Community%20Action%20final%20mar05.pdf> [United Way, *Sustained Poverty Reduction*].

¹⁵ United Way, *Sustained Poverty Reduction* at 4.

children, Aboriginal populations, people with disabilities, seniors, and new immigrants and refugees. It is clear that there are many Albertans living in poverty, and that people from these groups are overrepresented in those who are suffering adverse effects of poverty, no matter how we measure or define poverty. For example, a 2015 study by the Edmonton Social Planning Council (2015 Study) revealed that one in eight Edmontonians lives below the poverty line.¹⁶ In addition, the 2015 Study revealed that Alberta has the largest percentage of working poverty in Canada. The 2015 Study concluded that one in five children under 18 in Edmonton live in poverty, and that number increases to one in two if the family has a single parent. Further, the 2015 Study indicated that Aboriginal persons are twice as likely as non-Aboriginal persons to be living in poverty. Recent immigrants have comparatively lower incomes than other Canadians. Interestingly for our study, one of the recommendations of the 2015 Study was to implement a discounted fare transit pass for Edmontonians.

Likewise, a 2012 report authored by the United Way of Calgary and Area, Vibrant Communities Calgary and the City of Calgary indicated that one in ten Calgarians lives in poverty and nearly 400,000 Albertans live in poverty.¹⁷ The report indicates several key factors that contribute to poverty and its effects: mental health (60% of homeless persons live with mental illness); gender (69% of part time workers in Canada in 2003 were women; female seniors are at particular risk, as are lone-parent families); racialized minorities (40% of those living in poverty in 2006); sexual orientation (between 20% and 40% of homeless youth in Canada are lesbian, gay, bisexual or transgender); children in low-income families; recent immigrants, Aboriginal persons and persons with disabilities (all of whom had significantly lower median incomes than Calgary's median income in 2005).¹⁸

ACLRC (and others) have received many anecdotal reports that individuals from these demographic groups suffer adverse effects not experienced by others when they are faced with bylaw infraction tickets and their penalties. A group of researchers involved with the Justice

¹⁶ CBC News, "1 in 8 Edmontonians live below poverty line, report finds" 14 January 2015 online: <www.cbc.ca/news/canada/edmonton/1-in-8-edmontonians-live-below-poverty-line-report-finds-1.2900692>.

¹⁷ United Way of Calgary and Area, The City of Calgary, and Vibrant Communities Calgary, *Who is Affected by Poverty* (2012) at 3; online: <<https://www.calgary.ca/CSPS/CNS/Documents/Social-research-policy-and-resources/Who Does Poverty Affect.pdf?noredirect=1>> [UWCA, CC, VCC 2].

¹⁸ UWCA, CC, VCC 2 at 6-7.

Sector Constellation, Enough for All, Calgary’s Poverty Reduction Initiative, (including the Elizabeth Fry Society and Carolyn Green from the Criminal Justice Program at Athabasca University) is currently performing qualitative and quantitative research of stakeholders to confirm these anecdotal reports. The legal analysis performed in this report proceeds on the assumption (which seems well supported by all anecdotal evidence) that individuals in the groups set out above are adversely impacted by bylaw enforcement in Calgary and other Alberta centres.

III. Bylaws: Purpose, Enforcement and Effect

A. The *Municipal Government Act*, RSA 2000 c M-26

1. The *Municipal Government Act* – Authorization to Pass Bylaws and Powers Under Bylaws

All provinces are assigned exclusive constitutional powers and responsibilities over their municipal institutions under section 92(8) of the *Constitution Act*, 1867.¹⁹ This legal framework allows provincial governments to create municipalities and delegate powers for the purposes of local government administration, and municipalities may manage their own affairs within the scope of provincial powers. In Alberta, the *Municipal Government Act*²⁰ (“MGA”) allows individual municipalities to govern their own neighbourhoods. Section 3 of the MGA states that:

the purposes of a municipality are (a) to provide good government; (b) to provide services, facilities or other things that, in the opinion of the council, are necessary or desirable for all or a part of the municipality, and (c) to develop and maintain safe and viable communities.²¹

Specifically, section 7 of the *MGA* grants a city or town council the power to pass bylaws.²²

These powers allow council to develop bylaws that address the local concerns of the municipality. Generally, these concerns are similar for most municipalities, and, among other issues, relate to public spaces, health and safety, transportation, and protection of the environment.²³ Through bylaws, municipalities are able to control behaviours of the public, as

¹⁹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(8), reprinted in RSC 1985, Appendix II, No 5 [CA, 1867].

²⁰ *Municipal Government Act*, RSA 2000, c M-26 [MGA].

²¹ MGA, s 3.

²² MGA, s 7.

²³ The City of Calgary, “Bylaws” (2016), online: < <http://www.calgary.ca/CA/city-clerks/Pages/Legislative-services/Bylaws.aspx>>.

well as some private activity, via the use of permits, prohibitions, and licences.²⁴ Bylaws enacted by the city council are thereafter maintained by the city clerk's office.

2. Municipalities and the *Canadian Charter of Rights and Freedoms*

The overall concern for public health, safety and order within a municipality is for the benefit of members of the community as a whole. Municipalities have legitimate concerns for public health, safety and enjoyment of public spaces. However, municipalities must respect the rights and freedoms of all inhabitants within their sphere of influence, including minorities and vulnerable populations. The *Charter* applies to all levels of government (including municipalities). Thus, the wording and effect of the operation of bylaws passed by municipalities are subject to careful scrutiny as to whether the *Charter* rights of Canadians have been respected and protected. The manner in which the *Charter* works to protect our rights is set out below under IV. How the Charter Works.

3. Enforcement of Bylaws: Police and Peace Officers-*Provincial Offences Procedures Act*

The *Provincial Offences Procedures Act* ("POPA")²⁵ illustrates the procedures that are used when someone violates a municipal bylaw. Under section 2 of this legislation, the *POPA* "applies to every case in which a person commits or is suspected of having committed an offence under an enactment for which that person may be liable to imprisonment, fine, penalty or other punishment."²⁶ Bylaw enforcement officers, peace officers, and police officers may all issue bylaw violation tickets. The powers of peace officers to act are derived from the *Peace Officer Act* ("POA").²⁷

B. Bylaws²⁸

The following section of this report provides a summary of some of the bylaws that may affect people living in poverty. Our focus is on the purpose of the bylaw and the sections of the bylaws, including any penalties, which may particularly affect people living in poverty.

²⁴ *MGA*, s 8.

²⁵ *Provincial Offences Procedures Act*, RSA 2000, c P-34 [*POPA*].

²⁶ *POPA*, s 2.

²⁷ *Peace Officer Act*, SA 2006, c P-35 [*POA*].

²⁸ NOTE: See Appendices A and B for a full list of bylaws.

1. Public Behaviour Offences

The City of Calgary enacted the *Public Behaviour Bylaw*²⁹ in order to “regulate problematic social behaviours that may have a negative impact on the enjoyment of public spaces within the municipal boundary.”³⁰ For the purposes of this bylaw, problematic social behaviours include fighting in public³¹ and urinating or defecating in public spaces and private property that is not one’s own.³² The specified penalty for fighting in public is \$250,³³ while the fine for urinating or defecating in public is \$300.³⁴ For homeless individuals, living in public spaces presents a significant threat to health and safety. Dangerous living conditions, particularly in high traffic areas and during Calgary’s long and cold winters, can result in serious injury and even death for members of vulnerable social groups. As a result, homeless people are often faced with situations where their personal safety, or the safety of their belongings, are at risk from others, and they must be able to defend themselves and their spaces. For individuals who live in public spaces, fighting in public is often the only option to protect oneself when threatened, and attaching such a large fine to this behaviour only serves to discriminate against those with no other options. Further, for individuals living outside, public washrooms are not always readily accessible, and the large fine associated with urinating or defecating in public essentially has the result of criminalizing natural human behaviours for those with very limited options.

Another public behaviour bylaw, the *Panhandling Bylaw*³⁵ has the stated purpose of regulating activities associated with panhandling, which the City of Calgary has identified as detrimental to the safety of others, and the City believes that “public awareness and outreach programs to promote alternative income generating or support options are available for panhandlers.”³⁶ Although the bylaw makes no mention of what sorts of programs actually exist to provide panhandlers with other options, the specified penalty for contravening any section

²⁹ The City of Calgary, by-law No 54M2006, *Public Behaviour Bylaw* (13 November 2006), [*Public Behaviour*]

³⁰ *Public Behaviour* “And Whereas,” Preamble.

³¹ *Public Behaviour*, s 3.

³² *Public Behaviour*, s 4.

³³ *Public Behaviour*, s 3, “Schedule A.”

³⁴ *Public Behaviour*, s 4, “Schedule A.”

³⁵ The City of Calgary, by-law No 3M99, *Panhandling Bylaw* (8 March 1999), [*Panhandling Bylaw*]

³⁶ *Panhandling Bylaw*, “And Whereas,” Preamble.

of the bylaw is \$50,³⁷ while second and subsequent convictions within a 24 month period of the same provision result in a fine of \$100 per offence.³⁸ Some of the provisions within the bylaw prohibit panhandling within ten metres of banks and automated teller machines,³⁹ while others prohibit panhandling from individuals in vehicles.⁴⁰

Many homeless people and individuals living in poverty panhandle because they lack other options to generate an income. If an individual must resort to panhandling in order to provide him or herself with basic necessities or because of an addiction, it follows that that same individual is unlikely to be able to afford a fine if found contravening any portion of the panhandling bylaw. Fining individuals who, by virtue of their socioeconomic status, have difficulty making ends meet is of little benefit to both the individual or to the municipality.

A third public behaviour bylaw, the *Waste and Recycling Bylaw*⁴¹ is intended to “regulate and control the storage, collection and disposal of waste within the City of Calgary” pursuant to the city’s ability to pass bylaws that manage nuisances and services.⁴² Under section 4(1), “no person shall scavenge waste or recyclable material from a commercial bin, waste container, automated collection container, plastic garbage bag or community recycling depot.”⁴³ The specified penalty for scavenging in the community is \$125.⁴⁴ Further, individuals are prohibited from taking their vehicles to City disposal sites for the purposes of scavenging;⁴⁵ the specified penalty for this offence is also \$125.⁴⁶ These provisions are particularly severe for homeless individuals and people living in poverty, because for many, collecting recyclables to return for refund, or ‘binning,’ forms the bulk of their incomes and livelihoods. Since the introduction of the City Blue Recycling Bins Program, the municipal government has essentially

³⁷ *Panhandling Bylaw*, s 8.1.

³⁸ *Panhandling Bylaw*, s 8.3.

³⁹ *Panhandling Bylaw*, ss 3(a)-(b).

⁴⁰ *Panhandling Bylaw*, s 5.

⁴¹ The City of Calgary, by-law No 20M2001, *Waste and Recycling Bylaw* (19 March 2001), [*Recycling Bylaw*]

⁴² *Recycling Bylaw*, “And Whereas,” Preamble.

⁴³ *Recycling Bylaw*, s 4(1).

⁴⁴ *Recycling Bylaw*, s 4, “Schedule A.”

⁴⁵ *Recycling Bylaw*, s 39(c).

⁴⁶ *Recycling Bylaw*, s 39(c), “Schedule A.”

restricted the livelihoods of individuals who bin in order to make a living by criminalizing their only options to make an income.⁴⁷

2. Public Park Offences

Parks are public spaces controlled by the municipality and set aside for “rest, recreation, exercise, pleasure, amusement, and enjoyment.”⁴⁸ Parks include playgrounds, cemeteries, natural areas, sports fields, pathways, trails, and park roadways, but do not include golf courses.⁴⁹ The City of Calgary enacted the *Parks and Pathways By-law* in order to protect and preserve the quality of the city’s parks such that all Calgarians might enjoy them; this includes keeping parks safe, aesthetically pleasing, and comfortable, and prohibiting any activities that might damage parks and make them unsafe for the public.⁵⁰

The *Parks and Pathways By-law* provides regulations related to park use. However, a number of these regulations may negatively affect homeless people and people living in poverty. For example, s 4(1) states that “all parks shall be closed to the public between the hours of 11:00 o’clock in the evening and 5:00 o’clock the next morning,” with some exceptions.⁵¹ This regulation presents issues for people who do not have a safe place to sleep for the night and prefer to sleep in public parks, which tend to be less crowded than city streets and eliminate many of the risks associated with traffic, noise, and personal safety. This also presents issues for those who are unable to access temporary housing and homeless shelters in Calgary when they are at capacity. The specific penalty for contravening this regulation is \$100.⁵² For someone who is living in poverty, \$100 is a large amount of money. Additionally, under s 62(3), if a person contravenes any part of section 4 while the area is under construction or maintenance, the specific penalty is doubled to \$200.

⁴⁷ Cori Bender, *Informal Employment: Making a Living in Calgary* (Calgary Homeless Foundation, 2010) at 11, online:

<http://www.cooplesvaloristes.ca/v2/wpcontent/uploads/2015/04/panhandlingreportssubmittedtochfsept212010.pdf>.

⁴⁸ The City of Calgary, by-law No 20M2003, *Parks and Pathways By-law* (12 January 2004), [*Parks*] s 2(m).

⁴⁹ *Parks*, ss 2(m)(i-vii).

⁵⁰ *Parks*, Preamble.

⁵¹ *Parks*, s 4(1)(a)-(c).

⁵² *Parks*, s 4, “Schedule A.”

Section 9 states that “no person shall, unless allowed by a Permit: (a) camp in a park; or (c) erect a tent or other structure in a park.”⁵³ Section 2(d) defines camping as “to live or take up quarters in the park.”⁵⁴ Although it is possible to get a permit to camp in a park, as the bylaw suggests, given the barriers that the homeless and people living in poverty already face when it comes to accessing shelter, the Director is not likely to grant written permission to people who seek shelter in Calgary’s parks at night. Further, the bylaw does not define ‘structure.’ A broad definition might include any overhead form of protection from the elements, such as cardboard boxes, makeshift shelters, and tarps. The definition of ‘structure,’ if taken broadly, is particularly relevant in light of the specific penalty of \$100 for anyone found camping or erecting a tent or structure in a park.⁵⁵

Of further relevance is section 28, which states that: “no person shall urinate or defecate in a park except in a public washroom or portable facility provided for that purpose.”⁵⁶ This section presents issues for homeless people who choose to remain in parks after hours and potentially take up shelter; if public washrooms and portable facilities are closed when the park is closed to the public, they do not have access to washroom facilities and have no choice but to relieve themselves outside. The specific penalty for contravening this section is \$100.⁵⁷

3. Transit Offences

Pursuant to sections 5(1) and 9(a) and (b) of the *Calgary Transit Bylaw*,⁵⁸ people cannot ride Calgary transit or enter restricted fare areas, such as c-train platforms, without a valid ticket. As of January 2017, the cost of a transit ticket is \$3.25, while the cost of an adult monthly pass is \$101. Low-income adults who qualify are able to purchase a monthly pass for \$44.00, while the cost of a monthly pass for low-income seniors is \$15.⁵⁹ The City has indicated it will be providing tickets on sliding scale to low-income persons as of April 1, 2017.⁶⁰ Under the *Calgary*

⁵³ *Parks*, s 9(a)-(b).

⁵⁴ *Parks*, s 2(d).

⁵⁵ *Parks*, s 9, “Schedule A.”

⁵⁶ *Parks*, s 28.

⁵⁷ *Parks*, s 28, “Schedule A.”

⁵⁸ The City of Calgary, by-law No 4M81, *Transit By-law* (16 February 1981), [TB] s 5(1)(a)-(b), s 9(a)-(b).

⁵⁹ The City of Calgary, “User fees and rates” (2017), online: < <http://www.calgary.ca/CA/fs/Pages/Plans-Budgets-and-Financial-Reports/User-Fees-and-Rates.aspx> > [Transit Rates 2017].

⁶⁰ Transit Rates 2017.

Transit Bylaw, the minimum penalty for riding Calgary transit or entering into a restricted fare area without payment is \$150, while the specified penalty for this offence is \$250.⁶¹ For the homeless and people who live in poverty, it can be difficult to come up with \$3.25 to ride transit, and for the working poor, this presents a daily difficulty if they rely on transit to travel to and from work.

Unfortunately, multiple offences in one year increase the fine amount exponentially. If a person is found to contravene the same section of this bylaw two times in one twelve month period, the minimum penalty⁶² and the specified penalty⁶³ are double with respect to the second offence. For someone who is caught riding Calgary transit without a valid fare payment twice in one year, this brings the total minimum penalty to \$450, while the specified penalty for both offences would be \$750. Further, if a person is found to contravene the same section of this bylaw three or more times in a twelve-month period, the minimum⁶⁴ and specified penalties⁶⁵ triple with respect to the third and subsequent offences. If someone is caught riding Calgary transit without valid fare three times in one year, the minimum penalty would be \$900, while the specified penalty would be \$1,500. For people who are consistently criminalized for being poor and who have little hope of paying these substantial sums, the accumulation of hundreds of dollars in fines owed could result in detention in the remand centre.

Various bylaw infractions can add up very quickly for individuals without permanent or even temporary addresses, and a large accumulation of fines can result in negative credit ratings and problems with getting jobs and driver's licences. For example, Gerry Williams, a homeless man in Ontario, accumulated fines totalling \$65,000 from various provincial offences, including trespassing, panhandling, and public intoxication. Mr. Williams was homeless for nine years while he struggled with addiction, and did not know the extent of the fines that he faced until he managed to find housing, as many individuals who live outside have no way of paying the fines that they receive and simply throw their tickets away. Further, as they are homeless, individuals do not possess an address to which notices of overdue tickets and fines can be sent,

⁶¹ *Transit*, ss 5(1)(a), 9(a), "Schedule A."

⁶² *Transit*, s 16.2(5)(a)

⁶³ *Transit*, s 16.2(4)(a)

⁶⁴ *Transit*, s 16.2(5)(b)

⁶⁵ *Transit*, s 16.2(4)(b)

so they have little knowledge of the extent of their fines. However, law students at the Osgoode Hall legal clinic defended Mr. Williams against the unpaid tickets, which resulted in only one charge for aggressive panhandling remaining, for which Mr. Williams must complete community service and two year probation. Although the provincial fines were dropped, Mr. Williams still faces tickets for federal offences which total about \$5,000, and which must be appealed separately.⁶⁶

Mr. Williams' case is not unique, and illustrates some of the fundamental issues with continuously fining individuals who are simply unable to pay. Individuals in Mr. Williams' situation, who struggle with homelessness, addiction, and often mental illness as well, tend not to have the knowledge or resources to handle the often complex legal issues that stem from the accumulation of massive fines over several years. Fortunately, Mr. Williams was able to secure housing, which ultimately led to his seeking support from the Osgoode legal clinic, but many individuals in his position are often unable to do so, and continue to deal with the many struggles associated with living in public spaces, including health related issues and risk of injury and death. As clinic student director Daniel Ciarabellini notes, the larger issue in cases like Mr. Williams' is the criminalization of homeless people by fining these individuals for breaking bylaws in instances where they are faced with no other options.⁶⁷

4. Streets and Traffic Offences

The *Street Bylaw*⁶⁸ governs public behaviour with respect to Calgary's streets and thoroughfares. Under this bylaw, a person cannot stop pedestrians on sidewalks for the purpose of soliciting or selling any kind of merchandise;⁶⁹ nor can any person "place or leave on display or exhibit merchandise of any nature for sale on any portion of a street."⁷⁰ The same restriction applies to roadways. A person cannot "sell or offer for sale any goods;⁷¹ or offer or

⁶⁶ CBC News, "Osgoode law student helps drop \$65K in fines for former homeless man" (4 October 2016) online: <<http://www.cbc.ca/news/canada/toronto/programs/metromorning/law-student-homeless-tickets-fines-appeal-1.3788734>> [Osgoode Law Students].

⁶⁷ Osgoode Law Students.

⁶⁸ The City of Calgary, by-law No 20M88, *Street Bylaw* (17 October 1988), [*Street*].

⁶⁹ *Street*, s 3

⁷⁰ *Street*, s 4(1)

⁷¹ *Street*, s 4(2)(a)

perform any service, including cleaning vehicle windshields or washing vehicles.”⁷² The penalties for unauthorized soliciting and selling of merchandise, offering goods and services on a roadway, exhibiting merchandise, and carrying on an unauthorized business range from \$100 to \$200.⁷³ Bylaw Enforcement Officers may also issue orders of remedy to people who have committed infractions under section 87.1(a) of this bylaw, and a failure to comply with an order carries a penalty of \$1,000.⁷⁴ These provisions have the effect of stripping away the livelihood of many individuals who are homeless and make their living by cleaning car windshields and selling handmade items, such as crafts and drawings on sidewalks.

The *Calgary Traffic Bylaw*,⁷⁵ as the name suggests, is concerned with regulations surrounding the use of public streets and throughways. Of concern in this bylaw is that which governs jaywalking. Under section 6(1), “a pedestrian shall not cross a street within one block in any direction of a traffic control signal or pedestrian corridor other than in a crosswalk.”⁷⁶ The specified penalty for this offence is \$25.⁷⁷ Further, jaywalking on an LRT right of way⁷⁸ carries a specified penalty of \$60.⁷⁹ In theory, these regulations are intended to ensure the safety of pedestrians and drivers. However, one of the most important problems with these types of regulations is the fact that homeless people may simply be unaware of the regulations, and if they do receive a bylaw violation ticket, they tend to simply throw them away because they are unable to pay the fines.

Many of Calgary’s bylaws have the effect of criminalizing low-income and homeless individuals for being poor, and in some instances, force individuals to break bylaws where they have no other choice, such as remaining in public parks overnight, or searching through neighbourhood recycling bins in order to earn an income. The following sections will examine some of the legal options that are available for challenging the discriminatory effects of bylaws

⁷² *Street*, s 4(2)(b)

⁷³ *Street*, ss 3,5,4, and 4.1, “Schedule C.”

⁷⁴ *Street*, s 87.2, “Schedule C.”

⁷⁵ The City of Calgary, by-law No 26M96, *Calgary Traffic Bylaw* (10 June 1996), [*Traffic*].

⁷⁶ *Traffic*, s 6(1).

⁷⁷ *Traffic*, s 6(1), “Schedule A”.

⁷⁸ *Traffic*, s 6(3).

⁷⁹ *Traffic*, s 6(3), “Schedule A”.

on low-income and homeless individuals, and provide a legal framework for determining whether any of the bylaw provisions are unconstitutional.

IV. How the *Charter* Works: Introduction to Framework

Since we will be examining how the *Canadian Charter of Rights and Freedoms*⁸⁰ might be used to challenge the effects of bylaws on people living in poverty, it is necessary to discuss how the *Charter* operates. This section of our report discusses how the *Charter* works to guarantee our rights and freedoms and outlines how a *Charter* case might proceed once a court makes a decision to hear the case.

A. Prerequisites to a *Charter* Action

Before a *Charter* case is commenced, there are three requirements that must be met before the courts will even consider a *Charter* argument: the case must be against the government (“government” is given a fairly large definition); the case must be justiciable (based on a legal question and not a political one); and, the individual or group bringing forward the case must have standing. If any of these steps is missing, the case cannot proceed.

1. Application to the Government Only (*Charter* s 32)

The first step in determining whether the *Charter* applies is to ask if, on the facts of the case, the potential violation of an individual’s rights is from a government action or law. For example, a challenged bylaw may violate the *Charter* whether in purpose or effect. To determine whether the *Charter* applies, that is, whether the government’s law or action is challenged, involves a two-pronged test. The first part of the test asks who will *benefit* from a *Charter* right and the second part of the test asks who is *bound* by the *Charter*.⁸¹ Who will benefit from a *Charter* right depends on the actual right that is asserted. For example, section 7 of the *Charter* applies to “everyone”. This means that someone bringing a *Charter* action need not be a Canadian citizen, but must be in Canada at the time that the alleged violation occurs. The second part of the applicability test encompasses government actions. The *Charter* is

⁸⁰ *Canadian Charter of Rights and Freedoms*, s 32, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*].

⁸¹ Peter Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: Carswell, 2013) at 37.2 [Hogg].

applicable to federal, provincial, or territorial governments and to anybody that is exercising a statutory authority, such as a municipality. Whether a government is directly exercising its powers to enact laws or through a statutory authority such as a municipality, this portion of the test is met for the purposes of commencing a *Charter* action. The exercise of the government's statutory authority applies to bylaws, because bylaws flow from the exercise of statutory authority by the municipality.⁸²

2. Justiciability (not a Political Question)

Justiciability asks the whether the Courts can review an issue. In order for an issue to be justiciable it must be a legal issue. The requirement of justiciability looks at the role of courts and their constitutional relationship to government. This report looks at the justiciability question within the context of a broader inquiry of *Charter* breaches and bylaws with specific case examples. It is not a political inquiry that examines the root causes of homelessness and society's obligations to provide adequate housing. This level of inquiry should be addressed by Parliament and the legislatures, who may pass appropriate legislation. The justiciability question is instead a legal inquiry that may be looked at by the courts.⁸³ However, this inquiry will push the boundaries of what the court will examine with respect to socio-economic interests and the *Charter*. As demonstrated in caselaw, certain municipal bylaws disproportionately affect vulnerable low-income groups and arguably infringe their *Charter* rights, which are by extension connected to socio-economic rights.

*Operation Dismantle v The Queen*⁸⁴ addressed when a matter should be reviewed by the courts. Under section 32 of the *Charter*, a government body has a general duty to stay within the parameters of the *Charter*. In this particular case, Justice Wilson found that the issue was reviewable by the courts, despite the fact that it was argued by the government that it was a "political question". Justice Wilson stated that: "the court has a constitutional duty under section 24 of the *Charter* to determine if any particular act of the government violates or

⁸² Hogg, at 37.2(c).

⁸³ Joshua Sealy-Harrington, "Can the Homeless Find Shelter in the Courts?" (2 April 2015), ABlawg.ca online: <<http://ablawg.ca/author/joshua-sealy-harrington/>>

⁸⁴ *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 1985 (CanLII) 74 (SCC) at 443 [*Operation Dismantle*].

threatens to violate any rights of a person.”⁸⁵ Justice Wilson’s approach rests on the doctrine of justiciability and her conclusion that the proper sphere of influence of the courts is as places for the resolution of different types of disputes, including those that are of a political nature.⁸⁶ While the issue was found to be justiciable, Justice Dickson found that the allegation of a *Charter* infringement in this particular case, was “too uncertain, speculative, and hypothetical to push forward a cause of action.”⁸⁷ The applicants must be able to demonstrate that they have some reasonable chance of showing that the government has caused a violation of a citizen’s rights or threaten to violate a citizen’s rights.⁸⁸ *Operation Dismantle* tells us that an appropriate question for the courts is to determine if the applicant’s rights under the *Charter* have been violated. Section 24(1) of the *Charter* explicitly states that the adjudication of *Charter* infringement questions is the responsibility of a “court of competent jurisdiction.” The court cannot decide to decline on the basis that the issue is non-justiciable or it raises a “political question.”⁸⁹

There is one legal decision that addresses justiciability in the context of an issue related to this paper. In *Tanudjaja v Canada (Attorney General)* (“*Tanudjaja CA*”), the Ontario Court of Appeal (“CA”) was asked to decide on the question of justiciability and the motion judge’s finding that the appellant’s claim was not justiciable.⁹⁰ The appellants in this case were four individuals who were homeless or in danger of becoming homeless and a human rights group who advocates for housing. The appellants submitted that the overall approach and policies of the government led to a reduction in access to affordable housing and increased homelessness. The appellants also argued that the social conditions created by federal and provincial government policies violated their section 7 and subsection 15(1) *Charter* rights, but did not challenge any particular legislation or its application.⁹¹ The CA upheld the motion judge’s decision that the appellant’s claim was not justiciable. Writing for the majority, Justice Pardu

⁸⁵ *Operation Dismantle* at 443.

⁸⁶ *Operation Dismantle* at 459.

⁸⁷ *Operation Dismantle* at 447.

⁸⁸ *Operation Dismantle* at 450.

⁸⁹ *Operation Dismantle* at 472.

⁹⁰ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (CanLII) [*Tanudjaja CA*], leave to appeal to SCC refused *Tanudjaja et al v Attorney General of Canada et al.*, 2015 CanLII 36780 ISCC (June 25, 2015).

⁹¹ *Tanudjaja CA*, at paras 9 and 10.

referred to the non-justiciability of political questions, such as policy considerations. Justice Pardu framed the appellants' claim of a *Charter* section 7 violation as an assertion to a "general freestanding right to adequate housing."⁹² In addition, the "diffuse and broad nature" of this type of claim would not be conducive to a section 1 analysis and the limits of a *Charter* challenge.⁹³ Additionally, there exists no standard by which a court can adequately assess whether a housing policy is adequate for the needs of these appellants. Justice Pardu concluded that the question was one of legislative accountability, and effectively closed the door to assessing the extent to which a government has positive obligations towards those who experience *Charter* violations once it is determined that the issue raised is non-justiciable.⁹⁴

In dissent, Justice Feldman stated that the appellants raised issues that were particularly important to the public and that *Charter* litigation is often based on novel arguments.⁹⁵ Further, while there were a number of procedural issues raised by the broad approach taken in the application, the remedies requested were actually authorized in law. Thus, it was an error to strike the application at the early pleadings stage.⁹⁶ The Supreme Court of Canada declined to grant the applicants' leave to appeal to the application.⁹⁷

Returning to the matter of municipal bylaws, the violation of a *Charter* right, or the threat of a violation is an appropriate question for the court and one in which the court is obligated under the *Charter* to consider.

3. Public Interest or Private Interest Standing

Although justiciability and standing are interrelated inquiries, they are different questions asked by the court. Standing asks who may bring a proceeding before the court, while the justiciability question asks what subject may be brought before the courts.⁹⁸ Private interest standing is generally a matter of right if a challenged law or action directly affects someone.

⁹² *Tanudjaja CA*, at para 30.

⁹³ *Tanudjaja CA*, at para 32.

⁹⁴ *Tanudjaja CA*, at para 37.

⁹⁵ *Tanudjaja CA*, at para 43.

⁹⁶ *Tanudjaja CA*, at paras 85-86.

⁹⁷ *Tanudjaja et al v Attorney General of Canada et al.*, 2015 CanLII 36780 ISCC (June 25, 2015).

⁹⁸ Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 10 [*Boundaries of Judicial Review*].

Standing may also be expanded to include a discretionary public interest standing.⁹⁹ A threshold question in the inquiry into the public interest standing is whether the issue is justiciable. As a result, the analysis operates on the assumption that the courts have already agreed to look at a similar subject matter. Standing and justiciability both draw lines for appropriate judicial intervention.¹⁰⁰ Justiciability is the first of the threshold questions asked by the court for public interest standing. The second threshold question involves the seriousness of the issue and asks how genuine the interest is in its determination. The third question is whether the current parties present a “reasonable and effective way” in which the issue may be brought before the court.¹⁰¹ As in *British Columbia/Yukon Assn. of Drug War Survivors v Abbotsford City*, the British Columbia Court of Appeal upheld the decision of the trial court that the Drug War Survivor’s Group could challenge actions and legislation by the city under public interest standing and obtain a remedy under section 24(1) of the *Charter*. This challenge constituted the most reasonable and effective way for multiple homeless people to challenge the constitutionality of the city’s bylaws and conduct.¹⁰²

Section 24(1) of the *Charter* also makes reference to standing, and provides for the enforcement of rights and freedoms guaranteed under the *Charter*:¹⁰³ Under this section:

[a]nyone 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.¹⁰⁴

B. The General Course of a *Charter* Case

Once it is determined that the pre-*Charter* case threshold has been met, under the *Charter*, the courts will first examine whether the legislation or government action violates a protected right or freedom. At this stage, the onus is on the claimant, or the person bringing the *Charter* application before the court, to demonstrate that a violation has occurred. In

⁹⁹ *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 1974 CanLII 6 (SCC) [*Thorson*].

¹⁰⁰ *Boundaries of Judicial Review* at 10-11.

¹⁰¹ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII).

¹⁰² *British Columbia/Yukon Assn. of Drug War Survivors v Abbotsford (City)*, 2015 BCCA 142 (CanLII).

¹⁰³ *Charter*, s 24(1).

¹⁰⁴ *Charter*, s 24(1).

determining whether a violation has occurred, a court will first analyze the scope of the right or freedom and the purpose of the impugned legislation.

1. What is the Scope of the Right or Freedom?

In *R v Big M Drug Mart*,¹⁰⁵ the Supreme Court considered whether the *Lord's Day Act*, which made it an offence to carry on business on Sundays, violated section 2(a) of the *Charter*, which protects individuals' freedom of conscience and religion.¹⁰⁶ In considering this question, the court deviated from previous decisions and stated that in determining the constitutionality of a provision, both the purpose and effect of the law can invalidate legislation if either is found to be unconstitutional, particularly because the purpose of a piece of legislation is intimately connected with the intended effect that it aims to achieve.¹⁰⁷ Additionally, the court analyzed the scope of freedom of religion rather broadly. Freedom is a fundamental characteristic of our society and allows individuals to entertain and engage with whatever religious beliefs they choose, provided that they act of their own volition. The concept of freedom of religion is an important part of the multicultural society that makes up our country. In this case, the concept of religious freedom was interpreted broadly as both "the absence of coercion and constraint, and the right to manifest beliefs and practices."¹⁰⁸

Another example of the Court's analysis of the scope of a rights or freedom can be found in *Carter v Canada (Attorney General) (Carter)*,¹⁰⁹ where the Supreme Court looked at section 7 of the *Charter* within the context of assisted suicide. *Charter* section 7 reads:

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 impugned provisions in this case were sections 14 and 241(b) of the *Criminal Code* ("the *Code*"),¹¹⁰ which prohibit individuals from consenting to death being inflicted upon them and aiding or abetting a person in committing suicide, respectively. The challenge to these

¹⁰⁵ [1985] 1 SCR 295 [*Big M Drug Mart*].

¹⁰⁶ *Charter*, s 2(a).

¹⁰⁷ *Big M Drug Mart*, at para 80.

¹⁰⁸ *Big M Drug Mart*, at para 95.

¹⁰⁹ *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] SCJ No 5 [*Carter*].

¹¹⁰ *Criminal Code of Canada*, RSC 1985, cC-46 [the *Code*].

provisions was brought by Gloria Taylor, a woman diagnosed with fatal amyotrophic lateral sclerosis (ALS), as well as several interested parties, including the British Columbia Civil Liberties Association.¹¹¹ Patients with ALS eventually lose the ability to use their limbs, walk, chew, and breathe, and face immeasurable pain and suffering as their condition deteriorates. The prohibition against assisted suicide essentially leaves fatally ill individuals like Ms. Taylor with the impossible choice of committing suicide prematurely before the pain becomes unbearable while they are able to function, or living out the remainder of their lives with unbearable suffering without the ability to end their lives at will. In either circumstance, the impugned provisions essentially deprive these individuals of the ability to exercise any meaningful control over their own lives.¹¹²

In determining whether sections 14 and 241(b) of the *Code* violated the right to life, liberty, and security guaranteed by section 7 of the *Charter*, the court applied a generous interpretation to section 7 by expanding the discussion about the right to life to include death. As the court states, absolute prohibition on assisted suicide “would create a ‘duty to live’, rather than a ‘right to life’, and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment.”¹¹³ Further, while a respect for life is an important part of section 7, the rights protected by this section also apply to individuals “during the passage to death,” which includes the choice of a person to end his or her life when that living that life becomes unbearable.¹¹⁴

Similarly, the court found that the liberty and security interests protected by section 7 were engaged with respect to concerns over the autonomy and dignity of an individual. Liberty involves the right of an individual to make decisions regarding his or medical care without government interference, while security involves an individual’s ability to live his or her life free from intolerable suffering.¹¹⁵

Although the *Charter* does not explain what the principles of fundamental justice in *Charter* section 7 entail, over 32 years of constitutional litigation, the Supreme Court has

¹¹¹ *Carter*, at para 11.

¹¹² *Carter*, at paras 11-20.

¹¹³ *Carter*, at para 63.

¹¹⁴ *Carter*, at para 63.

¹¹⁵ *Carter*, at paras 64-68.

defined these principles as arbitrariness, overbreadth, and the gross disproportionality of consequences.¹¹⁶

With other rights and freedoms under the *Charter*, legal cases have set out principles that establish the scope of the right(s) and freedom(s) in issue. The analysis would proceed in a similar fashion as outlined above for *Charter* s 7. Additionally, it is possible to bring multiple *Charter* challenges within the same case.

These are just two examples of cases in which the court sets out the scope of the right or freedom at issue. Next, the court proceeds to examine whether the *Charter* right or freedom is actually violated.

2. Does the Legislation at Issue Violate the *Charter* Right or Freedom?

The second stage of the analysis involves looking at whether the impugned legislation violates the right or freedom according to this generous and broad interpretation. For example, after setting out some of the requirements for freedom of religion, in *R v Big M Drug Mart*, the court found that the *Lord's Day Act* violated the *Charter* protected right of freedom of religion by forcing, in a manner amounting to coercion, Christian values on individuals via a law that non-Christians would be obligated to follow.¹¹⁷

Also, in *Carter v Canada (Attorney General) (Carter)*, after providing guidance on life, liberty and security of the person in the context of the *Criminal Code* provisions on assisted death, the court found that the *Criminal Code* provisions violated section 7 of the *Charter* in a way that is not in accordance with the principles of fundamental justice.

3. Can the Government Nevertheless Defend the *Charter* Violation under Section One?

If, on application of the relevant analysis, a court finds that the government action or legislation does not interfere with a protected right or freedom, there is no need for any further consideration in the matter. The case is finished once the applicant fails to establish that an infringement has occurred. However, if the court finds that the claimants have met their burden of proving that there is in fact an infringement, the analysis continues and the onus of proof shifts from the applicant to the government. In each *Charter* case, the government is

¹¹⁶ *Carter*, at para 72.

¹¹⁷ *Big M Drug Mart*, at para 97.

given the ability to ‘answer’ the claimant by attempting to justify the infringement of the protected right or freedom. This is done via section 1 of the *Charter*, which states that the *Charter* “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.”¹¹⁸

In analyzing whether the government’s actions are justified, courts often consider whether the limit or infringement is prescribed by law, and whether the impugned provision is too vague. With respect to the requirement that a limit is prescribed by law, the Supreme Court notes in *R v Therens*¹¹⁹ that this requirement ensures that the infringement is not situational or arbitrary, but “expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.”¹²⁰ At this stage of the analysis, a court will also look at whether the limit is clearly explained or whether it is so vague that it cannot meet the prescribed by law requirement under section 1 of the *Charter*. The Supreme Court, in *R v Nova Scotia Pharmaceutical Society*¹²¹ stated that a vague limit is unconstitutional if it cannot provide individuals with enough guidance to determine how they should behave, and if it cannot provide those who administer justice with enough “guidance for legal debate.”¹²² If the impugned provision is shown to be prescribed by law and provides individuals with enough guidance regarding the law itself, courts will analyze the second portion of section 1 of the *Charter* in terms of the facts of the case.

An analysis regarding whether the limit is demonstrably justified in a free and democratic society involves the application of various principles that the Supreme Court set forth in *R v Oakes*.¹²³ These principles are known today in Canadian jurisprudence as the “*Oakes test*”. At this stage of the legal analysis, the burden remains on the government to justify its conduct in limiting the right or freedom in question. The Supreme Court in *Carter* applied the *Oakes test* in determining whether the impugned provisions of the *Code* could justifiably infringe section 7 of the *Charter*. First, the government must be able to show that the impugned law or provision

¹¹⁸ *Charter*, s 1.

¹¹⁹ *R v Therens*, [1985] 1 SCR 613 [*Therens*].

¹²⁰ *Therens*, at para 60.

¹²¹ *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical*].

¹²² *Nova Scotia Pharmaceutical*, at para 71.

¹²³ [1986] 1 SCR 103 [*Oakes*].

has a pressing and substantial objective that is important enough to warrant limiting the right in question. Although it is generally difficult for the government to justify a section 7 infringement because of the seriousness of the principles and freedoms contained within s 7, in some cases, it may be able to demonstrate that the public good requires this limitation. In *Carter*, the appellant conceded that the impugned provisions of the *Code* have an objective that is pressing and substantial, namely the protection of human life.¹²⁴

The next stage of the analysis requires the court to consider whether the means by which the government operates to limit the rights or freedom in questions, in this case the impugned provisions, are proportional to the object that the provisions are aiming to achieve. Proportionality is demonstrated by asking several questions. The court in *Carter* reiterated this portion of the *Oakes* test, and states that “a law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.”¹²⁵

At the first stage, the court in *Carter* found that the means, namely the prohibition on assisted suicide expressed in sections 14 and 241(b) of the *Code*, are rationally connected to its objective, which is to protect those who are vulnerable from being convinced or induced to commit suicide when they are in a position of physical and mental weakness. In this case, there was a causal connection between legislation that prohibits assisted suicide, an act which creates risks for vulnerable individuals, and the legislative objective of shielding these individuals from that risk.¹²⁶

In *Carter*, the court gave more extensive consideration to the second stage of the analysis. As assessment of minimal impairment involves an inquiry into whether there are any other ways for the government to achieve its objective that do not impair an individual’s *Charter* right.¹²⁷ In this particular case, this translates into asking whether the government may protect vulnerable individuals in some way other than by infringing on the section 7 right to life, liberty and security. The court found that the prohibition on assisted death was not minimally

¹²⁴ *Carter*, at paras 94-96.

¹²⁵ *Carter*, at para 94.

¹²⁶ *Carter*, at paras 99-101.

¹²⁷ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 53.

impairing, and that the legislative objective could be otherwise achieved by adopting a stringent set of provisions to a legislative scheme that allows assisted suicide. These provisions would enable doctors to look at whether patients exercised the required degree of competence in making end of life decisions, whether the patients were properly informed and knowledgeable when making the decision, and whether patients were making these decisions of their own accord free from coercion and inducement.¹²⁸ This alternative method of legislating the issue of assisted suicide would achieve the same legislative objective as the impugned provisions without violating the *Charter* section 7 rights of individuals who seek assisted suicide. As a result of this analysis, the court in *Carter* found that the government could not justify the infringement of the *Charter* right, and as a result, the infringement, via the impugned provisions of the *Code*, is not saved by section 1.¹²⁹

At this stage, because the court concluded that the effects of the violation are not minimally impairing, there would be no need to consider the third step of the analysis from the Oakes test. Had the government been able to demonstrate that the challenged provisions were not minimally impairing, the court would have analyzed the proportionality between the negative effects that the provisions have on the *Charter* rights of individuals and the importance of the objective that the government seeks to protect.¹³⁰ In this situation, the applicants would likely argue that the harmful effects that the law has on the *Charter* rights of individuals outweigh any of the potential benefits of prohibiting assisted suicide. For example, if the court had found that the protection of vulnerable individuals in prohibiting assisted suicide minimally impaired *Charter* section 7 rights, at this stage, the applicants could argue that the benefits of protecting vulnerable individuals are small in comparison to the intolerable suffering of those who are terminally ill, in extreme pain, and unable to access assisted suicide.

4. What is the Appropriate Remedy for the *Charter* Violation?

Once the analysis is complete and the court finds that there was a violation of a *Charter* right that cannot be justified under section 1, the court will consider an appropriate remedy.

¹²⁸ *Carter*, at paras 103-106, 121.

¹²⁹ *Carter*, at paras 122-123.

¹³⁰ *Carter*, at para 122.

Section 24(1) of the *Charter* states that a “court of competent jurisdiction” can apply a remedy that it considers to be just,¹³¹ and under section 24(2), if evidence was collected in a manner that infringes a *Charter* right, “the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”¹³² Typically, cases that involve considerations regarding the exclusion of evidence are criminal cases where the issue at trial is whether the evidence was properly obtained, and a balancing of various factors in determining whether the evidence should be excluded at trial.¹³³

A court may also award a remedy under section 52(1) of the *Constitution Act, 1982*, which states that: “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”¹³⁴ A remedy under this provision can take several different forms. In assessing an appropriate remedy in *Carter*, the court considered whether a constitutional exemption would be an appropriate remedy in this case. In such a case, this would mean that the law remains in force and retains its validity except for with respect to the group of individuals whose *Charter* rights have been violated. In this case, the court chose not to issue a constitutional exemption because doing so would effectively take away the government’s ability to legislate, and the court was of the view that the government should be given an opportunity to rectify the legislative framework around assisted suicide.¹³⁵

Instead, the court chose to issue a declaration of invalidity, and stated that “to the extent that the impugned laws deny the section 7 rights of people like Ms. Taylor they are void by operation of section 52 of the *Constitution Act, 1982*.”¹³⁶ It is important to note that this does not invalidate the laws by themselves, only insofar as they apply to individuals who are terminally ill, experiencing intolerable suffering, and who seek assisted suicide by virtue of the facts of this case.¹³⁷ The court also chose to suspend the declaration of invalidity for 12

¹³¹ *Charter*, s 24(1).

¹³² *Charter*, s 24(2).

¹³³ For example, see *R v Fearon*, 2014 SCC 77, [2014] 3 SCR 621.

¹³⁴ *CA*, 1867, s 52(1).

¹³⁵ *Carter*, at paras 124-125.

¹³⁶ *Carter*, at para 126.

¹³⁷ *Carter*, at para 127.

months,¹³⁸ which is a common remedy when the court wants to provide Parliament with an opportunity to re-write the law without immediately striking it down.

The following sections apply the *Charter* process and principles to bylaws that affect low-income and homeless individuals.

V. Charter Implications of Bylaws

The intention of the report is to examine the bylaw provisions that may have adverse impacts on people living in poverty, to suggest *Charter* challenges to these bylaws, and if the provisions or the effects of imposing the bylaw fines or penalties are found to violate the *Charter*, to recommend amendments or alternatives to the bylaws that are in keeping with individual rights and freedoms prescribed in the *Charter*. We start with *Charter* section 7, as we believe that this section shows the most promise for individuals wishing to challenge the effects of bylaw enforcement on people living in poverty. Next, we address *Charter* subsection 15(1) and finally *Charter* section 2(a). To date, *Charter* arguments that put forth both section 7 and subsection 15(1) claims have been most successful. All *Charter* analyses also include *Charter* section 1 arguments and discussion about appropriate remedies should it be found that the *Charter* is violated.

V. Application of *Charter* Section 7 to Bylaws that Affect People in Poverty

Generally, section 7 challenges, such as those in *PHS*, *Bedford*, and *Adams*, discussed in more detail in the following sections, tend to be more successful than subsection 15(1) challenges. However, cases that involve both section 7 and subsection 15(1) challenges that, as Jennifer Koshan notes, “push decision makers on equality rights and on the intersections between section 7 and section 15”¹³⁹ have some potential for success. For example, in *Inglis v British Columbia*,¹⁴⁰ female inmates successfully challenged the constitutionality of the

¹³⁸ *Carter*, at para 128.

¹³⁹ Jennifer Koshan, “Teaching Bedford: Reflections in the Supreme Court’s Most Recent Charter Decision” (24 December 2013), ABlawg.ca, online: <<http://ablawg.ca/2013/12/24/teaching-bedford-reflections-on-the-supreme-courts-most-recent-charter-decision/>> [Koshan: Teaching Bedford].

¹⁴⁰ *Inglis v British Columbia (Minster of Public Safety)*, 2013 BCSC 2309, [2013] BCJ No 2708.

cancellation of mother and child programs by British Columbia Corrections, which resulted in the children of inmates' assignment to foster care and amounted to a violation of the women's *Charter* rights.¹⁴¹ Given the comparable lack of success of subsection 15(1) challenges, the greatest potential for a successful subsection 15(1) claim may lie in combining the action with a section 7 challenge, if the facts of the case work in favour of this.

A. *Charter* Section 7

Charter section 7 reads:

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.

1. The Development of Section 7 of the *Charter*

a. *The Insite Case*

Recent modern developments and relative successes of section 7 of the *Charter* have “ushered in a new era” for challenging harms flowing from the government's (in)actions.¹⁴² Jennifer Koshan remarks that: “while relying on well-established definitions of life, liberty, and security of the person, and the principles of fundamental justice, section 7 is currently being applied in new ways.”¹⁴³ The case that heralds in this new era of section 7 *Charter* challenges is *Attorney General of Canada v PHS Services Society (“PHS”)*.¹⁴⁴ In *PHS*, Insite is a supervised safe injection site in Vancouver that provides medical services to intravenous drug users, but it does not provide the drugs themselves. The Supreme Court of Canada stated that: “the drug users have diverse origins with similar underlying themes of vulnerability: physical and sexual abuse, mental illness, early exposure to drugs, and family histories of drug use. It should be emphasized these are not recreational drug users, they are addicts.”¹⁴⁵ Insite services aids in the prevention of the spread of infectious diseases as HIV/AIDS and Hepatitis C, and death by drug overdoses.¹⁴⁶

¹⁴¹ Koshan: Teaching Bedford.

¹⁴² Jennifer Koshan, “Redressing the Harms of government (In)Action: A Section 7 Versus 15 Charter Showdown,” (2013) 22:1 Constitutional Forum [Koshan: Redressing the Harms].

¹⁴³ Koshan: Redressing the Harms, at 13.

¹⁴⁴ *Canada (Attorney General) v PHS Community Services Society (Insite)*, [2011] 3 SCR 134, 2011 SCC 44 (CanLII) [*PHS*].

¹⁴⁵ *PHS*, at para 7.

¹⁴⁶ *PHS*, at para 1.

Typically, injection methods cause the most harm, as opposed to the drugs themselves.¹⁴⁷ Under the *Controlled Drugs and Substances Act (CDSA)*, Insite is able to operate by an exemption from the Minister, but in 2008, the government failed to extend this exemption.¹⁴⁸ As Professor Koshan notes, Insite argued that: “either sections 4 and 5 of the *CDSA* violate section 7 rights and the principles of fundamental justice, or the Minister’s refusal to extend the exemption was a violation of section 7.”¹⁴⁹ Ultimately, Insite clients’ section 7 rights were infringed via the staff’s inability to provide services for fear of charges under the *CDSA*.¹⁵⁰ However, the government argued that the harms that flowed from the refusal to extend the exemption for Insite were a matter of personal choice by the claimants. Professor Koshan also noted that the court refused to accept the government’s argument, and held that drug users are addicts, and the addiction stems from illness—not personal choice.¹⁵¹

The Supreme Court of Canada (SCC) found that it was the Minister’s refusal to grant Insite an exemption under the *CDSA* specifically that infringed the claimants’ section 7 rights. As a result, the *Charter* breach occurred not with the legislation, but with the actions of the Minister.¹⁵² The SCC concluded that the Minister’s refusal to allow Insite an exemption under the *CDSA* was both an arbitrary and grossly disproportionate infringement of the group’s section 7 rights.¹⁵³ Although the test for arbitrariness is not yet settled law, Jennifer Koshan summarized that the SCC found that evidence demonstrated that criminal prohibitions under the *CDSA* did not reduce drug use; rather, the safe injection site decreased the drug users’ risk of harm.¹⁵⁴ Koshan noted that the removal of the Ministerial exemption was found to be “so extreme as to be disproportionate to any legitimate government interest,”¹⁵⁵ and the arbitrary and grossly disproportionate response was found not to be in accordance with the principles of fundamental justice.

¹⁴⁷ Koshan: Redressing the Harms, at 12.

¹⁴⁸ *PHS*, at para 2. *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*].

¹⁴⁹ Koshan: Redressing the Harms, at 12.

¹⁵⁰ Koshan: Redressing the Harms, at 12.

¹⁵¹ Koshan: Redressing the Harms, at 13.

¹⁵² *PHS* at para 114.

¹⁵³ Koshan: Redressing the Harms, at 13.

¹⁵⁴ Koshan: Redressing the Harms, at 13.

¹⁵⁵ Koshan: Redressing the Harms, at 14. See [*PHS*] at para 133 and *Malmo-Levine* at para 143.

With respect to section 1 of the *Charter*, the government could not justify the infringement of section 7 rights. As a result, the Court granted a remedy under section 24(1) of the *Charter*. The remedy allowed Insite a constitutional exemption from the *CDSA*. However, the court placed a limit on any future exemptions for Insite or any other organizations.¹⁵⁶ Professor Koshan concluded that this case is an excellent example of the interpretation of section 7 rights in a strong, or “robust,”¹⁵⁷ manner.¹⁵⁸ From a positive rights angle (e.g., imposing a duty on the government to act to ensure rights are provided), the Minister could be required to extend the exemption to Insite out of concern for the harms associated with refusing to extend the exemption. In the alternative, from a negative rights angle (e.g., shielding the claimant from the actions of the government), the exemption functions as an order to refrain from prosecuting the claimants under the *CDSA*. This is an important distinction, as the decision of the court in this case does not create a positive obligation on the part of the government to create safe injections sites for individuals. As a result, Professor Koshan notes that the claimant’s success in *PHS* has been limited to that particular group and situation and the Court has not extended the right to health services to other vulnerable groups.¹⁵⁹

b. Victoria (City) v Adams

Vulnerable groups have experienced other successes under section 7 *Charter* challenges.¹⁶⁰ Prior to *PHS*, the courts in *Victoria (City) v Adams*¹⁶¹ (“*Adams*, BCSC”) looked into city bylaws that prohibited homeless people from erecting temporary overhead shelter at night in the context of whether the bylaw violates their rights to life, liberty and security of the person under section 7 of the *Charter*.¹⁶² Both the Supreme Court of British Columbia and the British Columbia Court of Appeal came to the conclusion that the prohibition of erecting temporary shelter was a violation of the homeless people’s section 7 rights.¹⁶³ In the *Adams*

¹⁵⁶ Koshan: Redressing the Harms, at 14. See [*PHS*] at para 151.

¹⁵⁷ Jennifer Koshan, “Section 7: Superhero, Mere Mortal or Villain?” (Summer 2016), 41:2 Law Matters at 9 [Koshan: Section 7 Superhero].

¹⁵⁸ Koshan: Redressing the Harms, at 14.

¹⁵⁹ Koshan: Redressing the Harms, at 15.

¹⁶⁰ Koshan: Redressing the Harms, at 15.

¹⁶¹ *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* (BCSC)], aff’d 2009 BCCA 563 [*Adams* (BCCA)].

¹⁶² *Adams* (BCCA) at para 1.

¹⁶³ Koshan: Redressing the Harms, at 15.

BCSC decision, Justice Ross did not dispense with the possibility that section 7 may in different circumstances include positive rights.¹⁶⁴ Jennifer Koshan notes that the *Adams* decision was based on several important findings of fact, including findings related to inadequate shelter for the homeless, the vulnerable demographics of this group of people, and the fact that temporary overhead shelter is necessary to protect the homeless from certain health risks.¹⁶⁵ The Court found that the right to provide oneself with adequate shelter engaged the right to life, and the right to security of the person was engaged by the right to protect one's physical and psychological integrity. Further, creating shelter was important for one's dignity and independence, a fact that engaged homeless people's right to liberty.¹⁶⁶

In *Adams BCCA*, the Court determined that the city interfered with the principles of fundamental justice when it imposed an absolute ban on the erection of temporary shelters, as this prohibition was overbroad. A narrower measure could have accomplished the same purpose. Similar to *PHS*, the courts in the *Adams* decisions dealt with the concept of choice, and it is important to note that again, the court did not frame the issue in terms of a positive obligation to provide homeless people with adequate housing. The court rejected the city's claim that homeless people choose to be homeless, and instead framed the issue as such where the bylaw impaired the ability of a vulnerable group of individuals to address their need for adequate shelter.¹⁶⁷

c. The Bedford Case

Another important case in the recent development of the right to life, liberty and security of person under section 7 of the *Charter* is *Canada (Attorney General) v Bedford* ("*Bedford*").¹⁶⁸ *Bedford* involved a *Charter* challenge brought by current and former sex trade workers under section 7. The sex workers sought a declaration that certain provisions of the *Criminal Code*,¹⁶⁹ which criminalize certain activities relating to prostitution, infringed their section 7 rights under the *Charter*.¹⁷⁰ Jennifer Koshan notes that *Bedford* helps to dispel the myth of 'choice' and

¹⁶⁴ *Adams* (BCSC) at para 118.

¹⁶⁵ Koshan: Redressing the Harms, at 15.

¹⁶⁶ Koshan: Redressing the Harms, at 15 and 16. See *Adams* BCSC at paras 145 and 149.

¹⁶⁷ Koshan: Redressing the Harms, at 17.

¹⁶⁸ *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 (CanLII) [*Bedford*].

¹⁶⁹ *Criminal Code*, RSC 1985, c C-46.

¹⁷⁰ *Bedford* at 1103.

‘causation’ in a section 7 *Charter* analysis, helps to clarify interests, and furthers the movement of the courts toward a more positive reception to the rights of vulnerable individuals under section 7 of the *Charter*.¹⁷¹

The court in *Bedford* dismissed the contention of the Attorney General of Canada that section 7 was not engaged due to an insufficient causal connection between the laws and the associated risks faced by the sex workers. Additionally, the Court dismissed the Attorney General’s argument that it is a matter of choice to engage in prostitution and that it is this choice that is the cause of the harms, not the provisions under the *Criminal Code*.¹⁷² The Attorney General’s argument in *Bedford* is similar to that put forth by the respondents in *PHS* against Insite.¹⁷³

The court in *Bedford* clarified the case law by indicating that the appropriate test for causation is the “sufficient causal connection” test.¹⁷⁴ According to the case law, the test does not require the law or government action in question to be the main cause of the prejudice suffered by the claimant. This is a contextual approach that requires a real link that can be demonstrated, rather than a speculative link.¹⁷⁵ In applying this test, the court clarified the concepts of choice and causation in several ways, namely that prostitution is not a meaningful choice for this marginalized group; that prostitution is not in itself illegal; the government’s role in making a prostitute more vulnerable to violence does not have to be the main source; and, the floodgates argument¹⁷⁶ should be considered under section 1 rather than under the principles of fundamental justice argument.¹⁷⁷ Although *Bedford* builds on the decision in *PHS*, Jennifer Koshan is critical of the court’s hesitancy not to delve further into the role of choice in this case. Professor Koshan instead prefers the Ontario Court of Appeal’s (ONCA) analysis of choice in *Bedford*. Prior to reaching the Supreme Court level, ONCA rejected the idea that those who choose to engage in prostitution do not enjoy the same constitutional protection as

¹⁷¹ Koshan, Teaching *Bedford* at 2

¹⁷² Koshan, Teaching *Bedford*, at 2. See *Bedford* at para 73.

¹⁷³ Koshan, Teaching *Bedford*, at 2.

¹⁷⁴ Koshan, Teaching *Bedford*, at 2. See *Bedford* at paras 75 and 76.

¹⁷⁵ *Bedford* at para 76.

¹⁷⁶ Floodgates argument is the concern that the result in the case will open the doors to a flood of claims that will clog up the courts.

¹⁷⁷ Koshan, Teaching *Bedford*, at 2.

others.¹⁷⁸ In the government's perception of vulnerable groups, an underlying theme with respect to choice is that these groups are somehow less deserving of protection because they have chosen a high-risk lifestyle.

Bedford also expanded the interests and the principles of fundamental justice under section 7 of the *Charter*.¹⁷⁹ Professor Koshan notes that at the ONCA level, *Bedford* determined that 'liberty' protects "the right to make personal choices that go to the core of personal autonomy".¹⁸⁰ The ONCA defined the 'security of the person' as a right that is non-exhaustive and includes "preservation of one's physical safety and well-being".¹⁸¹ Further, if the effect of a law or government action increases an individual's risk of harm, that type of causal connection is sufficient to engage a *Charter* interest.¹⁸² *Bedford* also expanded on the principles of fundamental justice. Professor Koshan goes on to state that the ONCA in *Bedford* "reiterated the uncertainty in the case law on arbitrariness noted in *PHS*, and held that it was bound by the governing test from *Rodriguez*."¹⁸³ In *Bedford*, the ONCA referred to the test for arbitrariness in *Rodriguez*, which states that: "a provision is arbitrary only where it bears no relation to, or is inconsistent with, the objective behind the legislation."¹⁸⁴ Each of the principles of fundamental justice, arbitrariness, overbreadth, and gross disproportionality must be applied separately in an analysis.¹⁸⁵ Professor Koshan concludes that the decisions in *PHS*, *Adams*, and *Bedford* illustrate the Court's willingness to apply application of section 7 in novel ways to protect vulnerable groups when there is strong evidence of harm flowing from government actions.¹⁸⁶

d. Carter revisited

In deciding whether the prohibition of physician assisted death under the *Code* interfered with the claimants' section 7 *Charter* rights, the court was asked to weigh the competing values of the sanctity of life and protecting the vulnerable with personal choice and autonomy. As

¹⁷⁸ Koshan, Teaching *Bedford*, at 2. See *Bedford v Canada (AG)*, 2012 ONCA 186 at para 123 [*Bedford ONCA*].

¹⁷⁹ Koshan, Teaching *Bedford* at 3.

¹⁸⁰ Koshan: Redressing the Harms, at 18. See *Bedford ONCA* at paras 93-94.

¹⁸¹ Koshan: Redressing the Harms, at 18. See *Bedford ONCA* at paras 97-99.

¹⁸² Koshan: Redressing the Harms, at 19.

¹⁸³ Koshan: Redressing the Harms, at 19. See *Rodriguez v British Columbia (Attorney General)*, 1993 Carswell BC 228 *Rodriguez*.

¹⁸⁴ *Bedford ONCA*, at para 241.

¹⁸⁵ Koshan: Redressing the Harms, at 19.

¹⁸⁶ Koshan: Redressing the Harms, at 20.

mentioned in the a preceding section, *Carter* concerned the prohibition against physician-assisted dying under sections 14 and 241 of the *Code*, and the deprivation of patient's right to life, liberty and security of the person under section 7 of the *Charter*.¹⁸⁷

The Court held that the total ban on physician-assisted dying violated patients' right to life, liberty and security of person and it was not in accordance with the principles of fundamental justice.¹⁸⁸ In this case, the court grappled with attempting to ensure that vulnerable groups are not coerced into ending their lives at a time of weakness, and that vulnerable individuals are able to make a personal choice before the point at which their lives become unbearable due to pain. Jennifer Koshan points out that the interpretation of section 7 in *Carter* and *Bedford* alters the legal landscape and government policy in fundamental ways with respect to vulnerable and marginalized populations. The vulnerable groups of sex workers in *Bedford* and terminally ill patients in *Carter* have received more recognition by the courts for personal choice and autonomy under the *Criminal Code*. Conversely, in *Carter*, disability groups are concerned that this decision does little to promote the interests of the vulnerable.¹⁸⁹ Professor Koshan brings into focus a trend by the government in crafting policy in response to the Court's rulings in *PHS*, *Bedford*, and *Carter*, and points out that when developing policy, the government tends to narrow the scope of the Court's rulings. After *Carter*, for example, the government added 'reasonable foreseeability of death' as a condition that individuals must meet to be eligible for physician-assisted death.¹⁹⁰ While courts continuously develop section 7 of the *Charter*, the government attempts to struggle against the courts' interpretations by asserting its dominance in the area of public policy.¹⁹¹

Carter offers an overview of the court's position on the concepts of the right to life, liberty and security of person in section 7 of the *Charter*. *Carter* is particularly relevant to the development of the life interest under section 7. According to established case law, "the right to life is engaged where the law or state action imposes death or an increased risk of death on a

¹⁸⁷ *Carter*, at 5.

¹⁸⁸ *Carter*, at 5.

¹⁸⁹ Jennifer Koshan, "Section 7: Superhero, Mere Mortal or Villain?" (Summer 2016), 41:2 Law Matters at 9 [Koshan, Section 7: Superhero].

¹⁹⁰ Koshan, Section 7: Superhero, at 10.

¹⁹¹ Koshan, Section 7: Superhero, at 10.

person, either directly or indirectly.”¹⁹² The court’s recognition of the indirect impact of a law or state action leaves open the possibility of harms affecting vulnerable or marginalized groups, such as homeless and low-income individuals. The interest of life includes an individual’s passage to death and an individual’s choice to end their life should be recognized by the court in certain circumstances.¹⁹³ The court views choice and personal autonomy as underlying the right to liberty and security of the person.¹⁹⁴ The liberty interest protects “the right to make fundamental make personal choices free from state interference,”¹⁹⁵ while security of the person encompasses “a notion of personal autonomy involving ... control over one’s bodily integrity free from state interference”.¹⁹⁶ The right to security of the person is engaged when the government interferes with someone’s physical or psychological integrity.¹⁹⁷

The Court in *Carter* refers to *Blencoe* to determine when the liberty interest is engaged. The court finds that the liberty interest is engaged “where state compulsions or prohibitions affect important and fundamental life choices.”¹⁹⁸ In balancing public and personal interests, the government may infringe on an individual’s right to life, liberty or security of the person. However, the government must do so in accordance with the principles of fundamental justice.¹⁹⁹ The Court in *Carter* refers to *Bedford* to explain the principles of fundamental justice. The principles of fundamental justice forbid arbitrariness, overbreadth, and gross disproportionality.²⁰⁰ Arbitrariness arises when there is no rational connection between the purpose of the law and the limit it may impose on one of the section 7 interests.²⁰¹ Overbreadth occurs when a law “sweeps conduct into its ambit that is unrelated to the law’s objective.”²⁰² Gross disproportionality occurs when the “impact of the restriction on the

¹⁹² *Carter*, at para 62.

¹⁹³ *Carter*, at para 63.

¹⁹⁴ *Carter*, at para 64.

¹⁹⁵ *Carter*, at para 64. See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at para 54 [*Blencoe*].

¹⁹⁶ *Carter*, at para 64. See *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*], and *Rodriguez* at 587-588, per Sopinka J.

¹⁹⁷ *Carter*, at para 64. See *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, at para 58 (*New Brunswick*).

¹⁹⁸ *Carter* at para 68. See *Blencoe* at para 49.

¹⁹⁹ *Carter* at para 71.

²⁰⁰ *Carter* at para 81.

²⁰¹ *Carter* at para 83.

²⁰² *Carter* at para 86.

individual's life, liberty or security of the person is grossly disproportionate to the object of the measure."²⁰³ Through its discussion of these legal principles, the Supreme Court offers guidance to its current approach to a section 7 *Charter* analysis via the *Carter* decision.

e. Abbotsford (City) v Shantz

The recent British Columbia Supreme Court decision in *Abbotsford (City) v Shantz*,²⁰⁴ ("*Abbotsford*") reiterates the court's reluctance to recognize that the *Charter* creates positive obligations on the government to provide social and economic rights.²⁰⁵ In *Abbotsford*, the Drug War Survivors ("*DWS*") alleged that certain city bylaws are unconstitutional and infringe upon various rights of the homeless under the *Charter*, including section 7. The *DWS* made the assertion that the city bylaws in question contravened the principles of fundamental justice, in effect, because they displace the city's homeless population and exclude their presence from public spaces. As a result of this continuous displacement, homeless people are denied the ability to "obtain the basic necessities of life, including survival, shelter, rest and sleep, community and family, access to safer living spaces, and freedom from the risks and effects of exposure and sleep deprivation."²⁰⁶

The *DWS* took the position that there is a lack of accessible shelter for the city's homeless population.²⁰⁷ Homeless people face a number of barriers in accessing shelter and housing,²⁰⁸ and with the many risks that homeless people face, many prefer to seek shelter out-of-doors and set up camps in order to look after one another.²⁰⁹ However, the city made the claim that the homeless are sleeping out-of-doors in camps because they are choosing not to follow the rules set out for all members of the public.²¹⁰ In similar fashion to other cases, the court rejected the assertion that homelessness is a choice.²¹¹

The city also used blanket prohibitions against gathering in public spaces without a permit along with noxious displacement tactics to keep the homeless forming any visible presence in

²⁰³ *Carter* at para 89.

²⁰⁴ *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Abbotsford*].

²⁰⁵ *Abbotsford* at para 176 and 177. See [*Tanudjaja*].

²⁰⁶ *Abbotsford*, at para 25.

²⁰⁷ *Abbotsford*, at para 47.

²⁰⁸ *Abbotsford*, at para 74.

²⁰⁹ *Abbotsford*, at para 75.

²¹⁰ *Abbotsford*, at para 76 and 75.

²¹¹ *Abbotsford*, at para 81.

public parks.²¹² The DWS contended that the city failed to provide adequate housing for the homeless.²¹³ The court's position on the duty of the city to develop housing for the homeless was to reiterate that this falls within the scope of the legislature to decide rather than that of the court, emphasizing the perspective that courts do not create positive social obligations.²¹⁴ The court in *Abbotsford* refers to Justice Ross' decision in *Victoria (City) v Adams*,²¹⁵ which narrowed the scope of analysis of the housing issue, and allowed for this issue to fall within the ambit of the Court's powers to make a decision.²¹⁶ In *Adams* BCSC, Justice Ross framed the inquiry as whether a bylaw that prohibits homeless people from sleeping in public spaces and erecting overhead shelter without a permit infringed on people's section 7 rights when there is a lack of available shelter space.²¹⁷

In the *Adams* decisions at both the BC Supreme Court and the BC Court of Appeal,²¹⁸ this circumstance led to a violation of homeless persons' rights to life, liberty and security of the person under section 7 of the *Charter*.²¹⁹ The City of Abbotsford argued that they allowed camping in the parks with a permit, whereas the City of Victoria's bylaw in *Adams* was an absolute prohibition on overnight camping in City parks. DWS responded that the displacement tactics practiced by the City of Abbotsford acted as an absolute prohibition, in effect, for the homeless population.²²⁰ Additionally, DWS argued that homelessness is a lawful act made more dangerous by virtue of the city's bylaws. Further, the city is under a duty not only to refrain from drafting bylaws that endanger the health and safety of the all the citizens, but to also recognize in drafting bylaws that homeless people face special barriers to "accessing shelter, health and safety resources."²²¹ Justice Hinkson concluded in *Abbotsford* that "homelessness is a risky, but legal activity and enforcement of the impugned bylaws heightens the health and safety risks that the city's homeless face."²²²

²¹² *Abbotsford*, at paras 89 and 90.

²¹³ *Abbotsford*, at para 120.

²¹⁴ *Abbotsford*, at para 123.

²¹⁵ *Victoria (City) v Adams*, 2008 BCSC 1363 (CanLII) [*Adams* BCSC].

²¹⁶ *Abbotsford*, at para 123.

²¹⁷ *Abbotsford*, at para 123. See [*Adams* BCSC].

²¹⁸ *Victoria (City) v Adams*, 2009 BCCA 563 (CanLII) [*Adams* BCCA].

²¹⁹ *Abbotsford*, at para 132.

²²⁰ *Abbotsford*, at para 136.

²²¹ *Abbotsford*, at para 138.

²²² *Abbotsford*, at para 145.

In addressing the DWS' argument that the City of Abbotsford's homeless have a 'right to obtain the basic necessities of life' under section 7 and the principles of fundamental justice,²²³ Justice Hinkson specifically mentioned the definition of a "legal principle" referred to in *R v Malmo-Levine*,²²⁴ as one within the sphere of the judiciary and not public policy.²²⁵ As a result, Justice Hinkson rejected the idea that the Court has a role in mandating a governmental obligation to help people acquire the basic necessities of life. Justice Hinkson was not persuaded that: "the right to obtain the basic necessities of life is a foundational principle underlying the guarantee of section 7 of life, liberty and security of person."²²⁶ However Justice Hinkson did acknowledge the liberty and security of person interests as outlined discussed in *Carter*. Liberty involves "the right to make fundamental personal choices free from state interference," and security of the person involves personal autonomy and the right to non-interference by the government to one's own physical or psychological integrity.²²⁷ Justice Hinkson acknowledged that a homeless person's liberty interest is violated when the city bylaw interferes with that person's ability to shelter oneself when there is no other alternative.²²⁸

Ola Malik and Megan Van Huizen point to an important thread in how an issue is framed in *Adams* and *Abbotsford*, namely that the courts in *Adams* and *Abbotsford* recognized that:

[T]he homeless have a constitutionally protected liberty right under section 7 of the *Charter* to sleep overnight in parks under temporarily erected overhead shelters where a municipality does not have sufficient accessible shelter space to accommodate them.²²⁹

The court in *Abbotsford* framed the section 7 *Charter* question as one which asks if the bylaw is depriving someone of an interest rather than requiring the City to grant the provisions for adequate food, shelter or any other basic necessities of life.²³⁰ Malik and Van Huizen note that

²²³ *Abbotsford*, at para 170.

²²⁴ *R v Malmo-Levine*, 2003 SCC 74 (CanLII) at para 112-114 [*Malmo-Levine*].

²²⁵ *Abbotsford*, at para 172.

²²⁶ *Abbotsford*, at para 181.

²²⁷ *Abbotsford*, at para 182. See *Carter* at para 64.

²²⁸ *Abbotsford*, at para 188.

²²⁹ Ola Malik and Megan Van Huizen, "Is there Space for the Homeless in our City's Parks? A summary and Brief Commentary of *Abbotsford (City) v Shantz*," (17 November 2015), ABlawg.ca, online: <ablawg.ca/2015/11/17/is-there-space-for-the-homeless-in-our-citys-parks-a-summary-and-brief-commentary-of-abbotsford-city-v-shantz/> at 4 [Malik and Van Huizen: Is there Space].

²³⁰ Malik and Van Huizen: Is there Space, at 6. See *Abbotsford* at paras 181-183.

while the Courts continue to avoid placing positive obligations on the government to provide for an adequate living standard for everyone, there is a constant reminder in the legal and social spheres that it is an issue that must be addressed in some way, whether by the judiciary or the legislature.²³¹

2. The Potential of Section 7 of the *Charter*

The potential for the *Charter* to recognize economic and social interests is greatest under section 7 and the right to life, liberty, and security of the person not to be deprived except in accordance with the principles of fundamental justice. However, the Supreme Court of Canada and the lower courts are reluctant to interpret economic interests in a *Charter*. In *Gosselin*,²³² the court opened the door slightly for future discussions regarding a positive obligation on the part of the government to provide an adequate standard of living, although subsequent decisions have shown that the court is reluctant to cross this threshold. In *Gosselin*, the appellant, a welfare recipient, argued that the right to security of person in section 7 of the *Charter* imposed an obligation on the government to provide adequate welfare benefits to those in need of social assistance. Gosselin argued she was deprived of security of person by the currently inadequate level of social assistance that she was receiving.²³³ In the majority decision, the court found that:

[T]hus far, the jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.²³⁴

However, in the dissent, Justice Arbour stated that the court was willing to give section 7 a more expansive interpretation and impose positive duties on the government to make adequate social assistance provisions.²³⁵ Justice Arbour understood the economic rights

²³¹ Malik and Van Huizen: Is there Space, at 7. See *Abbotsford* at para 178.

²³² *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 (CanLII) [*Gosselin*].

²³³ Hogg at 47-17. See *Gosselin* at para 75.

²³⁴ *Gosselin* at 6 of 149.

²³⁵ Hogg at 47-17. See Arbour J. (dissent) in *Gosselin* at 11 of 149.

claimed by Gosselin under section 7 to be qualitatively different than economic rights related to corporate-commercial economic rights,²³⁶ and expressed a willingness to take a more purposive, contextual approach to the interpretation of section 7.²³⁷ The contextual approach allows for the *Charter* to not simply act as a shield against government action but also to place positive obligations on the government to negotiate competing demands arising from the liberty and rights of others. That is to say, the government is not only required to actively abstain from interfering with individual rights, but the government must also actively secure those rights for everyone.²³⁸ Justice Arbour characterized the right to sufficient social assistance as one which is inextricably linked to “one’s basic health and, at the limit, even one’s survival.”²³⁹

While the dissent in *Gosselin* may have engendered some hope in those wishing to find that the government has positive economic and social obligations, the recent decision in *Tanudjaja*²⁴⁰ demonstrates the Court’s ongoing reluctance to assert positive obligations on the government to provide adequate housing by finding that such obligations are not justiciable.²⁴¹ Malik and Van Huizen note that the courts in *Adams* and *Abbotsford*, while denying the imposition of positive duties on the government by the courts, bypass this line of reasoning by framing the question as one where the effect of a bylaw is to ‘deprive’ the homeless of *Charter* section 7 rights.²⁴² The courts continue to mention positive obligations on the government to provide for marginalized, vulnerable groups. For example, Justice Hinkson mentions Martha Jackman’s article with respect to the protection of welfare rights under the *Charter* in *Abbotsford*.²⁴³ Although it is generally understood to be outside the sphere of the powers of the judiciary, this sort of public policy issue is within the sphere of the powers of the legislatures,

²³⁶ See Arbour J. in *Gosselin* at 11 of 149.

²³⁷ See Arbour J. in *Gosselin* at 12 of 149.

²³⁸ See Arbour J. in *Gosselin* at 12-14.

²³⁹ See Arbour J. in *Gosselin* at 12 of 149.

²⁴⁰ *Tanudjaja v Canada (Attorney General)*, (Application), 2013 ONSC 5410 (CanLII), aff’d 2014 ONCA 852 (CanLII).

²⁴¹ Koshan: Section 7 Superhero, at 11.

²⁴² Malik and Van Huizen: Is there Space at 6.

²⁴³ *Abbotsford*, at para 178. See Martha Jackman, “The Protection of Welfare Rights Under the Charter” (1988) 20 *Ottawa Review* 257 [Martha Jackman Protection of Welfare].

and by repeatedly drawing attention to the issue, the courts may be signalling to the legislatures the need to address the problem of adequate living assistance for all Canadians.

Legal scholars like Martha Jackman have continuously advanced social rights under section 7 of the *Charter*, and these commentaries are an important source of dialogue within the legal and social community regarding the potential of *Charter* section 7 arguments. Martha Jackman takes the view that the *Charter* is capable of growth and should be broadly interpreted to protect the most vulnerable Canadians, particularly under section 7.²⁴⁴ The most vulnerable and marginalized populations in Canada, such as the homeless and those living in poverty, tend to have the least input into public policy.²⁴⁵ An understanding of Canadian cultural identity may enable the judiciary to broaden its interpretation of the meaning and scope of section 7. Canadian law has a significantly different conception of the right to life and liberty than American law, and Jackman suggests that Canadians place more trust in the state, and have greater expectations of our government to intervene in public policy to enhance social justice.²⁴⁶

Jackman also argues that the liberty interest has a positive as well as negative content. The practical reality of the experience of life and liberty within the state is that it must be grounded in the government's ensuring that there are adequate opportunities for disadvantaged and vulnerable groups.²⁴⁷ For those who lack the most basic needs such as food, water, and shelter, rights under the *Charter* are without any meaningful significance.²⁴⁸ If the government fails in its duty to provide the basic necessities to everyone, the result is that the government has also failed to fulfill its duty to ensure the guarantee of constitutional rights.²⁴⁹ While liberty interests are often defined by the relationship between the individual and the state, security of the person is more about the relationship of the individual within the community as a whole.²⁵⁰ At their core, communities should have regard for the welfare of

²⁴⁴ Martha Jackman Protection of Welfare, at 258.

²⁴⁵ Martha Jackman Protection of Welfare, at 258.

²⁴⁶ Martha Jackman Protection of Welfare, at 261.

²⁴⁷ Martha Jackman Protection of Welfare, at 265.

²⁴⁸ Martha Jackman Protection of Welfare, at 265.

²⁴⁹ Martha Jackman Protection of Welfare, at 266.

²⁵⁰ Martha Jackman Protection of Welfare, at 267.

individual members,²⁵¹ or as Jackman puts it, “the state, as agent for the community, has a duty to safeguard the security of its members.”²⁵²

An expansive interpretation of section 7 by the judiciary allows vulnerable and marginalized Canadians a space to challenge the protection of their rights and interests within the larger political process that they usually experience as inaccessible.²⁵³ Jackman defines section 7 of the *Charter* as “not only a rights protecting, but also a rights creating provision.”²⁵⁴ Rather than allowing the opportunity to pass it by, the judiciary has the potential to ensure that the government is fulfilling its responsibility to protect and provide for the interests and rights of individual Canadians in a meaningful way within the community.

An inclusive interpretation of section 7 of the *Charter* by the courts has regard for the effects of both government actions and inactions on vulnerable and marginalized groups.²⁵⁵ Jennifer Koshan observes that in the recent decisions of the court in *PHS, Bedford, and Carter*, the Supreme Court of Canada has taken into account how government laws and policy affect the most vulnerable populations, such as the people who suffer from addictions, sex workers, and those who are seriously ill. However, at the same time, the Court has been careful to put limits on how much these decisions actually promote the interests of the vulnerable and marginalized groups, while maintaining the powers of the government to legislate policy. For example, in *PHS*, the Supreme Court granted Vancouver’s Insite safe injection site an exemption under the *CDSA*. However, shortly thereafter, the federal government made it more difficult to allow future safe injection sites to operate in other cities.²⁵⁶ The courts are more willing to fulfill *Charter* obligations, while the government has been more hesitant to do so and often fails to fully consider and bring into fruition the spirit of the *Charter*.²⁵⁷ The main objective of the *Charter* is to “protect and enhance the rights of individual Canadians *vis-à-vis* the state.”²⁵⁸

²⁵¹ Martha Jackman *Protection of Welfare*, at 268-269.

²⁵² Martha Jackman *Protection of Welfare*, at 279.

²⁵³ Martha Jackman *Protection of Welfare*, at 282.

²⁵⁴ Martha Jackman *Protection of Welfare*, at 298.

²⁵⁵ Koshan: *Section 7 Superhero*, at 9.

²⁵⁶ Koshan: *Section 7 Superhero*, at 9-10.

²⁵⁷ Koshan: *Section 7 Superhero*, at 10.

²⁵⁸ Martha Jackman *Protection of Welfare*, at 299.

The court's attempt at imposing positive obligations on the government in forming public policy is supported by outside forces such as Canada's international obligations. The potential of section 7 may be more fully realized with the scope of international human rights under the *International Covenant on Economic, Social and Cultural Rights*,²⁵⁹ which includes the right to adequate housing and an adequate standard of living.²⁶⁰

For the purposes of this paper, the examples we have chosen mostly rely on the interpretation of *Charter* s 7 that uses it as a "rights protecting" provision. Underlying our analysis may be a philosophy that there should be an obligation on the government to provide economic and social well-being to all Canadians; however, we focus on the use of *Charter* s 7 as a shield to protect low-income and homeless Albertans from the adverse effects of bylaw penalties.

B. Application of *Charter* s 7 Principles to Hypothetical Situation #1, Involving a Person Living in Poverty

In order for us to demonstrate how *Charter* section 7 might be used to argue for a remedy for a person living in poverty who is subjected to fine for a bylaw infraction, we have set out a hypothetical situation, and applied the current interpretation of *Charter* s 7 to predict what the outcome of a legal decision might be.

Hypothetical scenario #1:

The first hypothetical scenario comes from a 2008 Report by the Poverty Reduction Coalition:

A single mother is riding the LRT in Calgary on her way to a job interview one morning without a transit ticket. She is looking for work and she cannot afford the ticket at the time. She is fined \$250 [note, this can be reduced by the judge to \$150] by a peace officer according to Calgary Transit Bylaw 4M81 (section 9(a) when someone boards a light rail transit without a valid pass). The woman has been looking for work for a long period of time and has accumulated tickets

²⁵⁹ *International Covenant on Economics, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 article 11 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

²⁶⁰ Koshan: Section 7 Superhero, at 11. See Martha Jackman & Bruce Porter, "Rights Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada*, (Toronto: Irwin law, 2014) 65 at 65.

*over time. She goes to court and does not qualify for alternative sentencing. She is incarcerated at the Calgary Remand Centre in order to “pay off” her fines. The cost to the criminal justice system (approximately \$400-\$700 per day) far exceeds the cost to pay her fines. If she can work her fine off at the rate of \$50 to \$75 per day it will cost the government up to \$1,400 to keep her in custody. She also has a young child at home without a network of support services to help care for her child while she is in the Remand Centre.*²⁶¹

The bylaw in question is *Calgary Transit Bylaw 4M81*. The stated purpose of the bylaw is:

[T]o regulate the conduct of users of the Calgary transit system to ensure: (1) the safety of users and employees of the transit, (2) users may be free of harassment, and (3) the transit system operations are carried out effectively and efficiently.²⁶²

Under section 9 of the bylaw, a person is guilty of an offence if they board the LRT without a valid ticket. Section 16.2(2) outlines a specified penalty for the offence, in this case \$250. Section 16.2(4) directs the penalty to increase dramatically with multiple fines accumulated within a twelve-month period. Section 17 states that if a person is found guilty of an offence under this bylaw they may be liable to pay up to \$10,000 or to imprisonment, or both.

In a *Charter* challenge before the court, the single mother would seek a declaration that *Calgary Transit Bylaw 4M81*, or the penalties that are imposed on her, infringe upon her section 7 *Charter* rights to life, liberty and security of the person, and cannot be saved by *Charter* section one. If the challenge is successful, it would result in a decision by the court that the Bylaw is unconstitutional.

1. *Charter* Section 7 Analysis of Calgary Transit Bylaw 4M81

[Note: other stages in the section 7 *Charter* analysis are applied under the hypothetical Olympic Park scenario below]

Section 7 of the *Charter* guarantees a person’s right to life liberty and security of person and the right not to be deprived of these except in accordance with the principles of

²⁶¹ Crimes of Desperation, at 1.

²⁶² *Transit*, Preamble.

fundamental justice. This is a two-part analysis²⁶³ that first requires an infringement, in purpose or effect, of one of the interests of life, liberty, or security of person. Imprisonment engages the liberty interest by restricting physical movement and the ability to make personal choices (*Blencoe v British Columbia (Human Rights Commission)*).²⁶⁴ The single mother was imprisoned for her inability to pay fines due to her low-income status and this had the effect of violating her liberty. However, a *Charter* section 7 analysis requires a second stage. To make a successful *Charter* section 7 argument, the single mother must also demonstrate that this interference is not in accordance with the principles of fundamental justice. This means that the bylaw cannot be arbitrary, overbroad, or grossly disproportionate in effect (see *Canada (Attorney General) v Bedford*)²⁶⁵ for a touchstone on an analysis of section 7 and section 1 of the *Charter*). The principles of fundamental justice express the basic values within our life, liberty, and security interests and those that are violated by laws that are arbitrary, overbroad, or grossly disproportionate.

A law is arbitrary when there is no real or rational connection between the purpose of the law and the means it employs to fulfill its purpose.²⁶⁶ The test for arbitrariness first looks at the law's objective and then inquires whether the law is actually connected to the purpose.²⁶⁷ The stated purpose of *City of Calgary Transit Bylaw 4M81* is to ensure the safety of all users, that the experience is free from interference and harassment, and that operations are effective and efficient. While the objects of the bylaw seem laudable, arguably, it is not very efficient or effective to impose an accumulation of large fines and the threat of imprisonment if someone is unable to pay the transit fare. While the threat of imprisonment and/or a fine may have the effect of meeting the law's overall objective, the argument would be that the imposition of large fines (particularly in the case of the single mother, who is unable to afford them) is not rationally connected to the goals of efficient, harassment-free transit. However, the test for arbitrariness is not yet settled case law. And, it is often difficult to establish that a law is

²⁶³ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 109 [*Chaoulli*].

²⁶⁴ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (CanLII) [*Blencoe*].

²⁶⁵ *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 (CanLII) [*Bedford*].

²⁶⁶ *Chaoulli*.

²⁶⁷ *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44 (CanLII) [*PHS*] at paras 129 and 130.

arbitrary, particularly if the goal or objective may be met if the law is roughly connected to its purpose.

An overbroad law overreaches by interfering with some behaviour that has no bearing on the object of the law.²⁶⁸ The law may cover some conduct, but it overreaches when it also covers conduct that goes beyond the scope of the objective of the law.²⁶⁹ The single mother's inability to pay a transit ticket, resulting in an accumulation of fines and possible imprisonment, is beyond the objective of the Transit Bylaw.

Further, a grossly disproportionate law has an exaggerated effect to the objective of the law. A law is grossly disproportionate when it is so extreme as to be disproportionate to any legitimate government interest.²⁷⁰ That is, it is so extreme that it offends society's basic values.²⁷¹ An argument for a breach of section 7 *Charter* rights is most likely to succeed on the basis that the effect of the *Transit Bylaw* is grossly disproportionate to the objectives of safety, freedom from harassment of other passengers, and the effective and efficient operation of transit. Gross disproportionality only looks at the negative effects on an individual against the object of the law. It does not look to the overall benefits to society of the transit system. The negative effects here are the harms that are caused by hefty fines and imprisonment to the single mother for the inability to pay transit fares, which goes far beyond the law's object of an efficient and effective transit system. Further, it runs counter to an effective and efficient system as it increases costs to the criminal justice system and to society, as well as to the individual. Thus, the single mother would argue that these provisions of the *Transit Bylaw* do not respect our values of fundamental justice.

2. *Charter* Section 1 Analysis on Calgary Transit Bylaw 4M81

After the single mother establishes that her *Charter* s 7 rights are violated, the government has the opportunity to justify the infringement under section 1 of the *Charter*. Keeping in mind the challenge of relying on *Charter* s 1 in cases involving violations of *Charter* s 7, the burden of justifying the infringement is now on the City of Calgary. The City would have

²⁶⁸ *Bedford*, at para 101.

²⁶⁹ *Bedford*, at para 101.

²⁷⁰ *PHS*, at para 133.

²⁷¹ *Bedford*, at para 103.

to prove that the overarching public interest justifies infringement of the principles of fundamental justice. *Charter* section one states:

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.²⁷²

The City must show that the infringement on the single mother's rights under *Charter* section 7 is proportional to the pressing and substantial goal of the bylaw in furthering the public interest.²⁷³ It is only in rare cases that this infringement may be justified. Section 1 of the *Charter* balances the rights of the individual with the government action known as the 'proportionality test'.²⁷⁴

In applying these factors to the situation in question, the government must first establish that the act in question is prescribed by law. This stage of the test is met by showing that the penalty of a fine and potential imprisonment originates in the *Calgary Transit Bylaw 4M81* at section 17 and Schedule A. Second, under the *Charter* section 1 analysis, the City of Calgary must show that the objective of the law, for which the large fines and possibility of imprisonment are the penalties, is pressing and substantial. The City must also show that it is not trying to shift objectives by lowering the visibility of certain marginalized groups that tend to be low-income or homeless. Usually, the government is able to demonstrate that the objective is pressing and substantial.

Next, the Court will inquire whether the City is achieving its legitimate goals in a proportionate way. The proportionality test will first ask if there is a rational connection between the objective and the law. The above analysis suggests that the bylaw and its punishment may be rationally connected to the objective of the law (safe and efficient operation of the transit system), as low-income Calgarians would likely be discouraged from travelling on the LRT without paying as required if they are given large fines and the possibility of imprisonment. However the City would likely not pass the second "minimal impairment" limit and the third "proportionate in effect" arguments. First, the City could consider other

²⁷² *Charter*, section 1.

²⁷³ *Bedford*, at para 125.

²⁷⁴ Hogg, at 38-18 and 38-43. See *Dagenais v CBC*, 1994 CarswellOnt 112 [*Dagenais*].

means to achieve their goals in order to avoid the *Charter* section 7 infringement, such as smaller fines and alternative measures to pay the fines. It is worth noting that the City does in fact offer the option of community service to pay fines, but not everyone qualifies for this measure. Finally, when determining whether there is proportionality between the deleterious (negative) and salutary (positive) effects of the law, it may be argued that the effect of fines and imprisonment for violations of the City bylaw will disproportionately affect low-income Calgarians, and the negative effects of a section 7 rights infringement outweighs any positive gains achieved by the City by issuing violation tickets to low-income Calgarians.

Once it has been found that the woman in question has had her *Charter* section 7 rights violated and that the government cannot justify the infringement under *Charter* s 1, the Court will order a remedy under *Constitution Act, 1982, s 52* or under *Charter* section 24(1). Potential remedies are discussed below under IX Remedies.

VI. *Charter* Section 15(1) and Bylaws: Could Social Condition be a Prohibited Ground?

Charter section 15 reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The following analysis provides a brief summary of a complex area of law. *Charter* subsection 15(1) has had a difficult and complicated history. Below we set out some of the key applicable principles that have evolved in the context of cases involving social condition, poverty or homelessness.

A. Justiciability

First, as with all *Charter* cases, there have been preliminary issues involving justiciability and standing. We discussed *Tanudjaja* briefly above under IV. A. 2. Justiciability. In *Tanudjaja*, the applicants were either homeless or were inadequately housed for their circumstances.²⁷⁵ The applicants alleged that the actions and inactions of the federal and provincial government led to homelessness and inadequate housing, which in turn violated their section 7 and subsection 15(1) *Charter* rights.²⁷⁶ At the federal level, the applicants submitted that the actions and inactions of the government included “cancelling funding for new social housing; withdrawing from inexpensive rental housing; phasing out affordable housing projects, and failure to have rent supplement programs.”²⁷⁷ Provincially, the alleged government inadequacies were similar. Specifically referring to subsection 15(1) of the *Charter*, the applicants contended that the federal and provincial governments failed to implement effective programs and strategies to reduce and eliminate homelessness and inadequate housing. They submitted this failure violated their equality rights and there was no justification for these violations under s 1 of the *Charter*.²⁷⁸

The motions judge found that the argument of the applicants did not pass the initial hurdle of justiciability and was prepared to dismiss the case. However, the motions judge went further and addressed subsection 15(1) of the *Charter* by stating that “the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others, meaning there can be no breach of subsection 15 of the *Charter*.”²⁷⁹ Justice Pardu for the Ontario Court of Appeal upheld the motion judge’s conclusion that the matter was not justiciable,²⁸⁰ and defined justiciability as a “normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring

²⁷⁵ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 1878 (CanLII), appeal dismissed *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (CanLII) [*Tanudjaja ONCA*] at para 3, leave to appeal to SCC refused *Tanudjaja et al v Attorney General of Canada et al.*, 2015 CanLII 36780 ISCC (June 25, 2015).

²⁷⁶ *Tanudjaja ONCA*, at para 9.

²⁷⁷ *Tanudjaja ONCA*, at para 11.

²⁷⁸ *Tanudjaja ONCA*, at para 15(d).

²⁷⁹ *Tanudjaja ONCA*, at para 17.

²⁸⁰ *Tanudjaja ONCA*, at para 19.

to other decision-making institutions of the polity.”²⁸¹ It is important to reiterate that while a justiciable question is within the court’s jurisdiction to decide, a political question is not a matter for the court.²⁸² Justice Pardu found that the matter before her was not justiciable because there was no particular law or action to be challenged. However, she did state that this is not to say that: “constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.”²⁸³ Justice Pardu based her decision of non-justiciability on several factors:

1. The doubtful proposition that s 7 confers a general freestanding right to adequate housing.
2. The nature of the claims are too broad and diffuse to allow for a s 1 *Charter* analysis.
3. The adequacy or sufficiency of housing is for the accountability of the legislatures.²⁸⁴

However, in dissent, Justice Feldman offered a more compelling argument for justiciability and found that there is a reasonable cause of action for *Charter* s 7 and s 15(1) violations. Justice Feldman reasoned that the appellants raised issues of public importance and that the case should not have been struck down at such an early stage without being heard.²⁸⁵ The motion to strike should not be taken lightly since the law is “not static and capable of change.”²⁸⁶ Instead, the motion to strike out a claim is for those that have no reasonable chance of success, not when a claim is novel.²⁸⁷ The subsection 15(1) *Charter* claim arose from “the federal and provincial government’s failure to address homelessness and inadequate housing by fostering conditions of inequality.”²⁸⁸ The applicant’s argument for a violation of their equality rights under the *Charter* by the government rests on their subjugation to:

...discriminatory prejudice and stereotype and historical disadvantage. As a group, the homeless are marginalized and more vulnerable to being overlooked in government policy for effective strategies to end

²⁸¹ *Tanudjaja ONCA*, at para 20. From *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 at 90-91.

²⁸² *Tanudjaja ONCA*, at para 21. From Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012).

²⁸³ *Tanudjaja ONCA*, at para 29.

²⁸⁴ *Tanudjaja ONCA*, at paras 30, 32, &33.

²⁸⁵ *Tanudjaja ONCA*, at para 43.

²⁸⁶ *Tanudjaja ONCA*, at para 47.

²⁸⁷ *Tanudjaja ONCA*, at para 49.

²⁸⁸ *Tanudjaja ONCA*, at para 50. See *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 1878 (CanLII) at para 34 [*Tanudjaja ONSC*].

homelessness and provide adequate housing. Further, the homeless are often composed of other marginalized groups, such as those with disabilities, women and single mothers, aboriginal persons, seniors, children and youth, and new immigrants.²⁸⁹

Justice Feldman revisited the decision in *Gosselin v Quebec (Attorney General)*,²⁹⁰ which left open the possibility that positive obligations may be imposed on governments to secure life, liberty, or security of person,²⁹¹ although she concluded that this is not one of those cases.²⁹² Justice Feldman also takes issue with the motion judge's decision to not allow the court to decide whether homelessness and living without adequate housing can be considered an analogous ground (decisions which have to be made under a *Charter* subsection 15(1) analysis). These issues were/are important and the application should have been allowed to proceed.²⁹³ Additionally, Justice Feldman reasoned that the decision to dismiss the issue at the application phase for non-justiciability was also premature.²⁹⁴ Justiciability of social and economic rights under the *Charter* continues to be an open and serious question and should be heard by the court.²⁹⁵

Joshua Sealy-Harrington²⁹⁶ concurs with the dissent in *Tanudjaja ONCA* on the issues of justiciability and about whether there was a reasonable cause of action before the motion judge on section 7 and subsection 15(1) of the *Charter*.²⁹⁷ Sealy-Harrington rejects the non-justiciability majority decision in *Tanudjaja ONCA*, which the court made on the grounds that homelessness and inadequate housing are too political and too vague.²⁹⁸ Sealy-Harrington refutes the court's conclusion that government's inability to address the issue of adequate housing is a political issue for the legislature, on the basis that the court's analysis is flawed. First, he argues that the majority mischaracterized the application. He believes that the

²⁸⁹ *Tanudjaja ONCA*, at para 50. See [*Tanudjaja ONSC*] at paras 36 and 37.

²⁹⁰ *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 (CanLII) [*Gosselin*].

²⁹¹ *Tanudjaja ONCA*, at para 64.

²⁹² *Tanudjaja ONCA*, at para 68.

²⁹³ *Tanudjaja ONCA*, at paras 73-74.

²⁹⁴ *Tanudjaja ONCA* at paras 75-76.

²⁹⁵ *Tanudjaja ONCA* at paras 79-81. See Dean Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 242-244.

²⁹⁶ Joshua Sealy-Harrington, "Can the Homeless Find Shelter in the Courts?" (2 April 2015), ABlawg.ca, online: <ablawg.ca/2015/04/02/can-the-homeless-find-shelter-in-the-courts/> [Sealy-Harrington, Can the Homeless].

²⁹⁷ Sealy-Harrington, Can the Homeless, at 1.

²⁹⁸ Sealy-Harrington, Can the Homeless, at 1.

applicants were within the realms of a legal inquiry when they asked the court to decide whether or not the governments have given enough consideration to adequate housing as a threshold demanded by the *Charter*. The applicants were asking the court to decide whether the government was pursuing ‘effective’ poverty-reduction programs, not a court-imposed legislative framework on *how* to govern poverty-reduction.²⁹⁹

Second, Sealy-Harrington argues that the Majority disregards intersecting political issues with legal issues that often come under the umbrella of the courts’ competency. Courts are asked to look at policy issues under section 1 of the *Charter*. Many legal issues have political dimensions and the author offers *Carter v Canada (Attorney General)*³⁰⁰ as a counterpoint to the *Tanudjaja ONCA* decision. In *Tanudjaja ONCA*, the applicants asked if the poverty-reduction approach by the federal and provincial governments is *Charter*-compliant under section 7 and subsection 15(1). Another example, *Reference Re Canada Assistance Plan*³⁰¹ distinguishes “purely political” questions from those that have a “sufficient legal component.” This pronouncement allows for the interpretation that only “purely political” questions are non-justiciable. As of yet, the threshold for “sufficiently legal” has not been determined by the court. Sealy-Harrington argues that the profound barriers that homeless people face in accessing justice meet the threshold of a sufficiently legal component. Substantive equality is the “animating norm” of subsection 15(1) of the *Charter*³⁰² and that norm will remain meaningless for a vast number of Canadians without greater attention to the experience of the poor.³⁰³ Rather than dismiss the applicants’ claims in *Tanudjaja ONCA* on the grounds of non-justiciability, the court had an opportunity to look at the meaning of economic and social rights for vulnerable Canadians under the *Charter*.³⁰⁴ Sealy-Harrington argues the majority’s argument of non-justiciability due to vagueness in *Tanudjaja ONCA* is also flawed. Homelessness and inadequate housing are issues that may result from constitutional violations caused by a web of inadequate government programs, particularly when there may be no other avenue of review.

²⁹⁹ Sealy-Harrington, *Can the Homeless*, at 2.

³⁰⁰ *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter SCC*].

³⁰¹ *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525 [*CAP*].

³⁰² *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2.

³⁰³ Martha Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law,” (1994) 2:1 *Rev Const Stud* 76 at 78.

³⁰⁴ Sealy-Harrington, *Can the Homeless*, at 2-3.

Although the arguments may be novel or difficult to remedy, this does not necessarily prevent the issue from being justiciable.³⁰⁵

The Dissent in *Tanudjaja ONCA* also addressed the test for a reasonable cause of action for s 7 and s 15 *Charter* violations. The legal test for striking down an application for the lack of a reasonable cause of action asks whether “it is plain and obvious,” if the action has no chance of success, or whether the action is “certain to fail.”³⁰⁶ The Dissent noted that motion to strike should be used with caution since part of the role of the courts is to advance the law. The courts should also be willing to listen to novel claims.³⁰⁷ Focusing on the subsection 15(1) equality claim, Sealy-Harrington agrees with the Dissent regarding the motion judge’s mistaken striking down of the applicant’s claim. There should be a review of the evidence into the government’s activity or inactivity, and possible causal links to homelessness and inadequate housing.³⁰⁸ The homeless deserve a review of the evidence into the causes of homelessness.

The issue of justiciability was also discussed in *Abbotsford*. While the lack of available housing and shelter for the homeless was raised by DWS, the Court did not look at the specific methods used by the City to respond to the need for housing as this is a political issue and not within the narrow scope of the Court’s jurisdiction.³⁰⁹ When a court looks at an issue it must be justiciable. That is, it must involve interpreting and applying the law. Social and economic issues such as the right to housing can easily be presented to the Court in a way that is political (and thus not justiciable). For example, we might ask whether the government should provide adequate housing and how should they do that. However, this is not for a court to decide. The Court looked to *Adams* for guidance regarding the types of legal issues that it may address with respect to sheltering the homeless. The Court in *Adams* established when there are “no practicable shelter alternatives, and homeless people are exposed to serious or life threatening harm, their right to life, liberty and security of person is engaged.”³¹⁰ This approach

³⁰⁵ Sealy-Harrington, *Can the Homeless*, at 3-4. See *Tanudjaja ONCA* at para 29.

³⁰⁶ Sealy-Harrington, *Can the Homeless*, at 5. See *Tanudjaja ONCA* at paras 45-46.

³⁰⁷ Sealy-Harrington, *Can the Homeless*, at 5. See *Tanudjaja ONCA* at para 47.

³⁰⁸ Sealy-Harrington, *Can the Homeless*, at 7.

³⁰⁹ *Abbotsford*, at para 123.

³¹⁰ *Abbotsford*, at para 124.

demonstrates how a court is able to avoid political questions yet still provide guidance as to whether one's *Charter* rights are violated.

B. Discrimination on an Analogous or Enumerated Ground

Once we overcome the hurdle of justiciability, an additional hurdle in establishing a subsection 15(1) equality claim is placing marginalized groups, such as the homeless and low-income people, in an enumerated or analogous ground for discrimination. The current two-part legal test for determining whether there is a violation of *Charter* subsection 15(1) is outlined in *R v Kapp*³¹¹ and affirmed in *Withler*.³¹² First, the courts ask if the law creates a distinction based on an enumerated or analogous ground, and second, the court asks whether the distinction creates a disadvantage by perpetuating prejudice, stereotyping, or historical disadvantage. The *Kapp* test is a contextual inquiry (e.g., the particular circumstances of the claimants must be examined when determining if there is discrimination).

In *Andrews v Law Society of BC*, the enumerated or analogous grounds approach was adopted as a means of interpreting discriminatory distinctions.³¹³ The enumerated or listed grounds of discrimination would include “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”³¹⁴ The enumerated grounds are based on personal characteristics that are difficult or impossible to change and historically have often been the target of prejudice and stereotyping.³¹⁵ The law, however, is open to change and progress, and the addition of analogous grounds allows for growth and progress.³¹⁶ New grounds of discrimination may be created by analogy to the enumerated grounds. Like the enumerated grounds, they are based on personal characteristics that are difficult or impossible to change, or if they are changeable it would be at great personal cost. These personal characteristics are outside of the control of the individual.³¹⁷ Thus far, courts have only accepted the following additional analogous grounds: citizenship or non-citizenship;³¹⁸ marital status;³¹⁹ sexual

³¹¹ *R v Kapp*, 2008 SCC 41 (CanLII) at para 17 [*Kapp*], at para 17.

³¹² *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 2011 SCC 12 (CanLII) [*Withler*].

³¹³ *Andrews v Law Society of British Columbia*, 1989 CanLII 2, 56 DLR (4th) 1 (SCC).

³¹⁴ *Charter*, s 15(1).

³¹⁵ *Hogg*, at 55-20.

³¹⁶ *Hogg*, at 55-22.

³¹⁷ *Hogg*, at 55-22.

³¹⁸ *Andrews*.

³¹⁹ *Miron v Trudel*. [1995] 2 SCR 418, 1995 CanLII 197 (SCC) [*Miron v Trudel*].

orientation;³²⁰ and off-reserve Indian status.³²¹ The underlying criteria for enumerated and analogous grounds are “stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or unchangeable only at unacceptable cost to personal identity.”³²² Individuals who are homeless and impoverished often have very little control over that way of being.

In order to advance homelessness and poverty as analogous grounds, the courts must free themselves from the obstacles that have been in place when it comes to applying definitions, and must recognize greater diversity within the groups that make *Charter* challenges. Sealy-Harrington is critical of the denial of homelessness as an analogous ground in *Tanudjaja ONSC*,³²³ particularly the discussion within Justice Lederer’s *obiter dicta* (discussion not relevant to the outcome of the case, which has been decided on other grounds).³²⁴ This critique of Justice Lederer’s analysis will allow for identifiable flaws in any potential subsequent rejections of the court of homelessness and low-income status as an analogous ground. Sealy-Harrington makes three observations on Justice Lederer’s flawed analysis. First, the “definability” requirement is rooted in a misunderstanding of the case law. Second, the court confuses indefinability with heterogeneity (diversity) in a group. Third, the error is in looking at contributing factors as necessary independent factors, rather than a multi-variable approach.³²⁵ A review of this analysis and an encouragement by the court to take a multi-variable approach will favour future support for homelessness and low-income as analogous grounds.

The jurisprudence does not support a definability requirement as interpreted by Justice Lederer.³²⁶ Sealy-Harrington distinguishes indefinability and heterogeneity when he states: “An indefinable group is one which lacks clear parameters for identifying its members. A

³²⁰ *Egan v Canada*, [1995] 2 SCR 513 1995 CanLII 98 (SCC) [*Egan*].

³²¹ *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbière*].

³²² *Corbière*, at para 13.

³²³ Sealy-Harrington, *Can the Homeless*, at 7. See Joshua Sealy-Harrington, “Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the *Charter*” (19 December 2013), ABlawg.ca, online: <ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/> [Sealy-Harrington, *Homelessness an Analogous Ground*]. *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410.

³²⁴ Sealy-Harrington, *Homelessness an Analogous Ground*, at 1.

³²⁵ Sealy-Harrington, *Can the Homeless*, at 7.

³²⁶ Sealy-Harrington, *Homelessness an Analogous Ground*, at 2-3.

heterogeneous group is one which has a diverse membership.”³²⁷ Justice Lederer seems to confuse the two concepts in his reasoning in *Tanudjaja ONSC*, since he rejects homelessness as an analogous ground because there is no common characteristic defining the group. Then he shifts to the heterogeneity of the homeless as being too inclusive as a group, and concludes that homelessness should be rejected as an analogous ground because it is heterogeneous. Sealy-Harrington counters that Justice Lederer misapplies the relevant factor of “discreet and insular minorities” with homelessness as “disparate and heterogeneous.”³²⁸

Additionally, multiple factors are important when considering analogous grounds, and heterogeneity is one of many factors, while definability is irrelevant. Sealy-Harrington argues that a multi-variable approach to analogous grounds reaches beyond the doctrinal approach of immutability and constructive immutability. The multi-variable approach should also include “difficulty and cost of change, vulnerability, historical disadvantage, and presence of the ground in human rights codes.”³²⁹

Thus, in addition to considering the perpetuation of historical disadvantage within a subsection 15(1) analysis, which is useful to understanding adverse effects cases, defining homelessness and poverty as analogous grounds would greatly advance the *Charter*’s 15(1) law in favour of eliminating bylaws that serve to perpetuate the disadvantages of homeless and low-income individuals. The key to including homeless and poverty within the analogous grounds lies in taking a multi-variable approach to the analysis.³³⁰

C. Prejudice Against and Stereotyping of Homeless and Persons of Low-Income

In *Kapp*, the court stated that the central purpose underlying subsection 15(1) of the *Charter* is to prevent discrimination. When governments act or make laws, they should be aware that distinctions based on enumerated or analogous grounds may perpetuate prejudice, stereotyping, and historical disadvantage.³³¹ In assessing whether the distinction creates a

³²⁷ Sealy-Harrington, *Homelessness an Analogous Ground*, at 3.

³²⁸ Sealy-Harrington, *Homelessness an Analogous Ground*, at 3-4.

³²⁹ Sealy-Harrington, *Homelessness an Analogous Ground*, at 5.

³³⁰ Sealy-Harrington, *Homelessness an Analogous Ground*, at 6.

³³¹ *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII) [*Kapp*] at para 25.

discriminatory disadvantage, the Court must make a broad contextual inquiry into the law and cast a wide net in search of potential beneficiaries of the law. After gathering all the relevant contextual factors, the question focuses on the perpetuation of prejudice, stereotyping, and historical disadvantage.³³² As stated in *Kapp*.³³³ the residual influence of *Law* is the identification of four contextual factors that are relevant to determining prejudice and stereotyping, which are the primary indicators of discrimination. The contextual factors to be considered include

(1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.³³⁴

First, the pre-existing disadvantage of the homeless, impoverished, Aboriginal persons and the disabled is a strong indicator of the differential treatment of the bylaw that contributes to discrimination. The court in *Kapp* narrows this factor to the contribution towards prejudice.³³⁵ The groups that are relevant in this analysis are already in a vulnerable position. These groups do not have the same financial resources as others and any bylaw will lead to differential treatment that further increases the unfairness of their circumstances.

Second, the court will inquire into the degree of correspondence between the differential treatment and the claimant group's reality. The court in *Kapp* states that this factor applies to stereotyping.³³⁶ The court in *Law* describes this inquiry as looking for "the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others."³³⁷ With respect to the grounds of impoverishment and homelessness, this group needs a place to rest at night. For a variety of reasons, they may not seek respite in a shelter and prefer to sleep out of doors.

³³² *Withler v Canada (Attorney General)* [2011] 1 SCR 396, 2011 SCC 12 (CanLII) [*Withler*] at para 2-3.

³³³ *Kapp*, at 23.

³³⁴ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675 (SCC) [*Law*] at paras 62-75.

³³⁵ *Kapp*, at para 23.

³³⁶ *Kapp*, at para 23.

³³⁷ *Law*, at para 88.

Third, the ameliorative purpose or effect of a bylaw is not a relevant consideration in this section, so the court would turn to a consideration of the final contextual factor, which is the nature and scope of the interest affected. The greater the severity and concentration of the law or government act on a particular group, the more likely the consequences will be discriminatory.³³⁸

The court in *Quebec (Attorney General) v A*³³⁹ elaborates and clarifies the meanings of prejudice and stereotyping in the context of the *Kapp* test. A government law or action may perpetuate prejudice by “promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian Society.”³⁴⁰ An adverse distinction becomes discriminatory by perpetuating prejudice when it sheds a negative light onto a person or persons who belong to one of the enumerated or analogous groups.³⁴¹ The perpetuation of prejudice does not have to have intention behind it; it is measured only in its adverse effects on these particular groups.³⁴² The perpetuation of prejudice by the government and the degree of harm associated with it goes to the heart of a person’s identity and leaves them with a profound sense of worthlessness in society. They are denied the benefits and privileges afforded to others.³⁴³

Stereotyping is another form of substantive inequality that is distinct from the perpetuation of prejudice. Stereotypes are defined as

...inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group.... Negative characteristics, such as a lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominately to members of a

³³⁸ *Law*, at para 74. See L’Heureux-Dubé J. in *Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (SCC) at paras 63-64.

³³⁹ *Quebec (Attorney General) v A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII) [*Quebec (Attorney General) v A*].

³⁴⁰ *Quebec (Attorney General) v A*, at para 192 refers to [*Law*] at para 51.

³⁴¹ *Quebec (Attorney General) v A*, at para 193.

³⁴² *Quebec (Attorney General) v A*, at para 193.

³⁴³ *Quebec (Attorney General) v A*, at para 195.

particular group. It is then the negative characteristic that becomes the focus of contempt.³⁴⁴

With the lack of shelter available in the park, the homeless are exposed to the elements, sleep deprivation and violence. Drug addicts are no longer able to access sterile supplies and are more likely to share needles and to contract HIV and Hepatitis C, and to develop infections and to overdose. The health and well-being of these groups is at stake. The contextual factors point to a distinction which creates a disadvantage by perpetuating prejudice and/or stereotyping. The claimant, in this scenario the ADWS, need only show that either a discriminatory distinction on one of the grounds is from the disadvantageous bylaw perpetuating prejudice or the disadvantage imposed from the bylaw is based on a stereotype.³⁴⁵

D. Importance of Adverse Effects Discrimination in the Context of Low-Income Persons

The disproportionately negative effects of bylaws on a city's more vulnerable population such as the homeless are illustrated in the case *Abbotsford (City) v Shantz*.³⁴⁶ As noted under the discussion of *Charter* section 7, *Abbotsford* is a case that challenged the constitutional validity of certain Abbotsford City bylaws. The bylaws concerned the use of public spaces and the prohibition of the erection of temporary shelter for the homeless. The challenge was brought by the Drug War Survivors ("DWS") who had public interest standing in the matter. According to the court in this case, standing was granted to DWS "on the basis that it had raised serious issues to be tried, that it had a genuine interest in the issues that it wished to raise in these proceedings, and that if it was not granted standing, there was no other reasonable and effective way to bring the issues that it has raised before the court."³⁴⁷

DWS challenged certain sections of the city's bylaws and their enforcement, alleging that they targeted the homeless population and infringed their *Charter* rights. DWS argued that the rights and freedoms of the homeless violated by the impugned bylaws include sections 2(c),

³⁴⁴ *Quebec (Attorney General) v A*, at paras 201 & 202.

³⁴⁵ *Quebec (Attorney General) v A*, at para 204.

³⁴⁶ *Abbotsford (City) v Shantz*, 2015 BCSC 1909 (*Abbotsford*).

³⁴⁷ *Abbotsford* at para 9 and 10. The standing decision was granted in *B.C./Yukon Drug War Survivors Association v Abbotsford (City)*, 2014 BCSC 1817 (CanLII) [B.C./Yukon DWS].

2 (d), 7 and 15(1) of the *Charter*. Specifically, DWS asserted that: “the impugned bylaws were arbitrary, overbroad, and grossly disproportionate in their effects on the homeless. The bylaws created an atmosphere of continual displacement from public spaces, preventing the homeless from acquiring the basic necessities of life.”³⁴⁸ The Court concluded in *Abbotsford* that homeless individuals should be allowed to erect temporary shelters and to camp overnight in city parks when there is not enough shelter space available.³⁴⁹

The events that precipitated this case began with City employees spreading chicken manure on “the Happy Tree Camp” created by the homeless on Gladys Avenue with the intention to force the homeless to dismantle and leave their camp. Shortly thereafter, Mr. Shantz and others created a tent camp in Jubilee Park without permission from the City. Many of the occupants of the tent camp moved into a wooden structure in the parking lot of Jubilee Park. The City obtained a Court Order for the occupants of the tent camp to vacate Jubilee Park. After the homeless people were continually forced to keep moving, with varying outcomes, some of them returned to erect tents along Gladys Avenue. By the time the case was presented in Court, the City managed to tolerate a small enclave of tents for the homeless people.³⁵⁰

In trying to pinpoint a definition of homelessness, Justice Hinkson adopted the accepted definition in *Victoria (City) v Adams*, which states that a homeless person is an individual³⁵¹ “...who has neither a fixed address nor a predictable safe residence to return to on a daily basis.”³⁵² Justice Hinkson noted that homeless people are heterogeneous in character, which increases their vulnerability. The homeless are composed of many types of people, including physically and mentally disabled persons, addicts, the poor, Aboriginal peoples, and a combination of these types.³⁵³ The Court noted that homeless people often have many battles to contend with on many fronts. DWS asserted that there was a lack of available shelter accessible to the homeless.³⁵⁴ Further, they argued that there are many barriers to accessible shelter and housing for the homeless. Some prefer to live in small groups together in

³⁴⁸ *Abbotsford*, at para 25.

³⁴⁹ *Abbotsford*, at para 279-280.

³⁵⁰ *Abbotsford*, at paras 26-32.

³⁵¹ 2009 BCCA 563 [*Adams BCCA*] at para 161.

³⁵² *Abbotsford* at para 41.

³⁵³ *Abbotsford* at para 42.

³⁵⁴ *Abbotsford*, at para 47.

encampments. However, it did not follow that a preference for encampments means that it is a choice to be homeless. The assumption that homelessness is a choice ignores the reality of how difficult it is for people to extract themselves from low-income and impoverished circumstances.³⁵⁵ DWS also argued that although the City had valid public health and safety concerns in homeless encampments, the impugned bylaws might have had the effect of masking the visibility issue of homelessness and disorder within the City.³⁵⁶

In *Abbotsford*, DWS challenged the constitutionality of the City bylaws and their enforcement by referring to their adverse effects on the City's homeless people. The Court noted that: "DWS seeks declarations that the City's homeless have a *Charter* right to exist and obtain the basic necessities of life, including survival shelter, rest and sleep, community and family, access to safe living spaces and freedom from the risks and effects of exposure, sleep deprivation and displacement."³⁵⁷ DWS also argued that: "the erection of temporary shelter is a way for the homeless to achieve some measure of safety and security from the elements and others."³⁵⁸

The City responded with a justification for regulating camping by permit. The City of Abbotsford distinguished its bylaws from those in the *Adams* case. In that case, there was a complete prohibition on overnight camping, but in this case, DWS contended the displacement tactics used by the City had the effect of an absolute prohibition on camping by the homeless.³⁵⁹ DWS submitted that the impugned bylaws and displacement tactics of Abbotsford City violated the sections 2(c), 2(d), 7, and 15 *Charter* rights of the city's homeless.³⁶⁰ While DWS would have liked the City to respect the *Charter* rights of the homeless they were not seeking positive duties to be imposed on the City in regards to the provision of housing. The DWS asked that the City's bylaws and enforcers respect the *Charter* rights of the homeless and acknowledge the need for overhead shelter for their protection and safety.³⁶¹ The "positive

³⁵⁵ *Abbotsford*, at paras 74, 75, 81.

³⁵⁶ *Abbotsford*, at para 93.

³⁵⁷ *Abbotsford*, at para 134.

³⁵⁸ *Abbotsford*, at para 135.

³⁵⁹ *Abbotsford*, at para 136.

³⁶⁰ *Abbotsford*, at para 146.

³⁶¹ *Abbotsford*, at para 148-149.

duties” refer to an obligation to provide housing, and this can easily slip into the realm of policy and politics, which, as we have noted, are outside of the court’s jurisdiction.

In *Abbotsford*, DWS submitted that the impugned bylaws and displacement tactics by the City discriminated against the homeless and perpetuate and exacerbate substantive inequality, thus violating their subsection 15(1) equality rights under the *Charter*. DWS continued to argue that the effect of the challenged bylaws was to impose a disproportionate and differential burden on the City’s homeless. There was a further imposition of a direct discriminatory impact on the homeless since they were targeted as a discrete minority on the basis of their personal characteristics. The bylaws and tactics discriminated against the homeless by preventing them from obtaining the basic necessities of life in the camps and streets of Abbotsford. Lastly, there was a compounding effect on the homeless who generally are composed of vulnerable groups, such as persons with disabilities, Aboriginal peoples, other racial minorities, and vulnerable economic and social beginnings.³⁶²

The court in *Abbotsford* applied the two part legal test from *R v Kapp*³⁶³ to determine whether the subsection 15(1) rights of the homeless were violated by the City in this case. This test asks whether (1) the law creates a distinction based on an enumerated or analogous ground, and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. The *Kapp* test also includes a contextual analysis, and DWS requested that the court determine the equality issue on a substantive basis, not merely on a formal equality basis. While formal equality concerns only the wording of the impugned bylaws and their enforcement on its face, substantive equality examines the effects of the suspected discriminatory law on people. Unfortunately, the court’s analytic approach to the substantive equality issue in this case did not address the adverse effects discrimination, and the court does not go beyond the mere recognition of substantive equality as not requiring like or similar treatment. Instead, the court’s analysis shifts to an examination of the distinction on enumerated and analogous grounds.³⁶⁴

³⁶² *Abbotsford*, at para 225.

³⁶³ *R v Kapp*, 2008 SCC 41 (CanLII) at para 17 [*Kapp*].

³⁶⁴ For more discussion on this decision and its approach to substantive equality, see Joshua Sealy-Harrington and Tara Russell, “Parks and Tribulation: Chartering the Territory of Homeless Camping Rights” (3 February 2016)

However, the court does reference adverse impact discrimination indirectly when discussing Madam Justice Abella's discussion in *Quebec v A*.³⁶⁵ Jonnette Watson-Hamilton and Jennifer Koshan offer a succinct definition for indirect or adverse effects discrimination, namely that "laws that are neutral on their face have a disproportionate and negative impact on members of a group identified by a prohibited ground of discrimination."³⁶⁶ Further, they note that: "the indirect nature of adverse effects discrimination is identified by a measure or provision that does not appear to reference any prohibited ground of discrimination."³⁶⁷ A broad contextual analysis is required to fully appreciate the unequal effects on people or the potential for those effects on those who suffer from social, political, or economic disadvantages.³⁶⁸ The narrow scope of discrimination in the *Kapp* test may have contributed to the court's difficulty in finding adverse effects discrimination in *Abbotsford*.³⁶⁹

Professors Watson-Hamilton and Koshan argue that in order for substantive equality to be realized, the court must recognize and remedy adverse effects discrimination.³⁷⁰ To date, adverse effects discrimination has not played a very prominent role in constitutional equality jurisprudence.³⁷¹ The leading case in adverse effects discrimination is *Eldridge v British Columbia (Attorney General)*.³⁷² The question before the courts in *Eldridge* was whether a disabled group was receiving "equal benefit of the law without discrimination" within s 15(1) of the *Charter*. Although the Medicare system in question was neutral on its face and applied equally to all, the court recognized deaf persons were not able to benefit from the same

ABlawg.ca, online: <ablawg.ca/2016/02/03/parks-and-tribulation-chartering-the-territory-of-homeless-camping-rights/ [Sealy-Harrington and Russell].

³⁶⁵ *Quebec (Attorney General) v A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII) at para 354 [*Quebec v A*].

³⁶⁶ Jonnette Watson-Hamilton and Jennifer Koshan, "Assisted Suicide and Adverse Effects Discrimination: Where Will the Supreme Court go in *Carter*?" (24 November 2016), ABlawg.ca, online: < ablawg.ca/2014/11/24/assisted-suicide-and-adverse-effects-discrimination-where-will-the-supreme-court-go-in-carter/>.

³⁶⁷ Jonnette Watson-Hamilton and Jennifer Koshan, "Adverse Impacts: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2014-2015) 19:191 Rev. Const. Stud. at 196 [Watson-Hamilton & Koshan, Adverse Effect]

³⁶⁸ Watson-Hamilton & Koshan, Adverse Effect, at 193, 197.

³⁶⁹ Watson-Hamilton & Koshan, Adverse Effect, at 212.

³⁷⁰ Watson-Hamilton & Koshan, Adverse Effect, at 191.

³⁷¹ Watson-Hamilton & Koshan, Adverse Effect, at 192. See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*] and *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*] for successful adverse effects discrimination claims.

³⁷² See *Eldridge*.

Medicare system as everyone else. As noted by Professors Watson-Hamilton and Koshan, “the court makes specific reference to their claim as one of ‘adverse effects’ discrimination.”³⁷³

The recognition of adverse effects discrimination in *Eldridge* is due in part to the way the argument for discrimination was framed. The applicants in *Eldridge* framed the adverse effects argument as a lack of equal access to a benefit, or a failure to provide a benefit, rather than the imposition of a burden.³⁷⁴ Justice La Forest reinforces the concept of adverse effects discrimination as resulting from either the imposition of unequal burdens or the denial of equal benefits. Further, the Professors note that the “government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.”³⁷⁵ In requiring the government to provide special measures to ensure equal treatment, Justice La Forest is also acknowledging that governments have a positive duty to ensure that there is equal access to a benefit in order to realize substantive equality.³⁷⁶

Carter and *Taypotat*³⁷⁷ are two recent cases where the applicants made a claim regarding subsection 15(1) and adverse effects discrimination. Although the Supreme Court in *Carter* chose not to conduct a subsection 15(1) equality analysis because the court had already found a section 7 violation,³⁷⁸ it is worthwhile to highlight Justice Smith’s review of adverse effects discrimination under the *Kapp* test in the British Columbia Supreme Court decision in *Carter (Carter BCSC)*.³⁷⁹ Justice Smith reiterated the Supreme Court’s prior focus on substantive equality and the courts acknowledgment of “adverse impact [and an] unintended effects discrimination analysis.”³⁸⁰ Under the second step of the *Kapp* test, the court should ask “whether the distinction perpetuates disadvantage or prejudice, or stereotypes people in a way that does not correspond to their actual characteristics or circumstances.”³⁸¹ The substantive

³⁷³ *Eldridge*, at para 60.

³⁷⁴ Watson-Hamilton & Koshan, Adverse Effect, at 205-206. See *Ontario Human Rights Commission & O’Malley v Simpson Sears Ltd*, [1985] 2 SCR 536, 7 CHRR D/3102 [*O’Malley*] and *Rodriguez v British Columbia*, [1993] 3 SCR 519, 3 WWR 553 [*Rodriguez*].

³⁷⁵ *Eldridge*, at para 77.

³⁷⁶ Watson-Hamilton & Koshan, Adverse Effect, at 206. See [*Vriend*] for another successful adverse effects discrimination case.

³⁷⁷ *Taypotat v Taypotat*, 2012 FC 1036 [*Taypotat FC*], rev’d 2013 FCA 192, 365 DLR (4th) 485 [*Taypotat FCA*];

³⁷⁸ *Carter*, at para 93.

³⁷⁹ *Carter v Canada (Attorney General)*, [2012] BCSC 886 [*Carter BCSC*]. See Watson-Hamilton & Koshan, Adverse Effect, at 219.

³⁸⁰ *Carter BCSC*, at para 1073.

³⁸¹ *Carter BCSC*, at para 1080. See Watson-Hamilton & Koshan, Adverse Effect at 221.

equality analysis requires a “contextual approach” considering the “actual impact of the law,” and one that is “grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.”³⁸² The contextual factors will vary from case to case, however they are “pre-existing disadvantage, correspondence with actual characteristics, impact on other groups, and the nature of the interest affected.”³⁸³

In *Abbotsford*, the contextual factors were never addressed in the substantive equality analysis. Justice Hinkson briefly acknowledged the historical mistreatment of Aboriginal people and persons with disabilities, yet he did delve deeper into a formal equality analysis. Although Chief Justice Hinkson acknowledged the impugned bylaws might have a greater impact on the homeless, he concluded that they are treated in the same way as everyone else.³⁸⁴

Unfortunately, in this case, the court missed what could have been an excellent opportunity to look at substantive equality through an adverse effects discrimination lens, and to apply this analysis to the bylaws in question and their effect on homeless people. An additional missed opportunity occurred in *Carter* at the Supreme Court when the court rendered a decision based on section 7 alone, without considering a subsection 15(1) infringement.³⁸⁵

Taypotat,³⁸⁶ like *Carter*, is an adverse effects case where there existed disparate impacts on members of groups who are listed in *Charter* s 15(1) under an enumerated or analogous ground.³⁸⁷ In this case, Louis Taypotat, a 76-year-old man, who was Chief of the Kahkewistahaw First Nation in Saskatchewan, challenged the Nation’s new Election Code, which stipulated that a Chief or Band Councillor must have at least a grade 12 education. Mr. Taypotat had a grade 10 education and had been Chief for more than 27 years in total.³⁸⁸ Although the evidentiary burden can be a difficult hurdle in adverse effects discrimination cases, the Federal Court of Appeal in *Taypotat* accepted statistical evidence of historical and social disadvantage.

³⁸² *Carter BCSC*, at para 1080 and 1081.

³⁸³ *Carter BCSC*, at para 1085.

³⁸⁴ *Abbotsford*, at para 235 and 236.

³⁸⁵ Watson-Hamilton & Koshan, *Adverse Effect*, at 226.

³⁸⁶ *Taypotat v Taypotat*, 2012 FC 1036 [*Taypotat FC*], rev’d 2013 FCA 192, 365 DLR (4th) 485 [*Taypotat FCA*]; *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548 [*Taypotat SCC*].

³⁸⁷ Watson-Hamilton & Koshan, *Adverse Effect*, at 229.

³⁸⁸ *Taypotat SCC*, at paras 2-4.

However, at the Supreme Court of Canada in *Taypotat*, the court chose not to accept the same statistical evidence.³⁸⁹ *Taypotat SCC* revisited the most recent approach to subsection 15(1) equality outlined in *Quebec v A*.³⁹⁰ The Supreme Court reiterated the flexible and contextual inquiry required for substantive equality. This type of inquiry should address systemic disadvantages that will limit opportunities available to certain groups of people, such as the homeless. A contextual inquiry looks for discriminatory distinctions and seeks to prevent conduct and laws that perpetuate disadvantages.³⁹¹ A clear case of discrimination is made out if it is demonstrated that the law at issue has a disproportionate effect with respect to an enumerated or analogous ground. The SCC came to the decision in *Taypotat* that although the challenged provision had some disparate (unequal) impact, there was not enough evidence to establish a *prima facie* (based on first impression) breach of equality rights.³⁹² Justice Abella acknowledged that while the provision may have a discriminatory impact, the court found no evidence linking the provision to a disparate impact on members of a group who belong to a recognized enumerated or analogous ground.³⁹³

Jennifer Koshan and Jonnette Watson-Hamilton critique the SCC decision in *Taypotat* based on the Court's misguided emphasis on arbitrariness.³⁹⁴ The Professors also take issue with Justice Abella's mistaken understanding of adverse effects discrimination. They note that while:

Justice Abella correctly identifies this case as one of adverse effects discrimination, [...] her statement that 'education requirements *may well be a proxy for, or mask, a discriminatory impact*' is misleading – adverse effects cases are ones where it is the discriminatory *intent* that is masked, which is why the focus must be on the effects or impact of the law on the individual or group concerned.³⁹⁵

³⁸⁹ Jennifer Koshan and Jonnette Watson Hamilton, "The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness," (29 May 2015), Ablawg.ca, online: <<http://ablawg.ca/2015/05/29/the-supreme-courts-latest-equality-rights-decision-an-emphasis-on-arbitrariness/>> at 5 [Koshan & Watson-Hamilton on Arbitrariness].

³⁹⁰ *Quebec v A*, [2013] 1 SCR 61 at paras 319-347 [*Quebec v A*].

³⁹¹ *Taypotat SCC*, at 549.

³⁹² *Taypotat SCC*, at para 34.

³⁹³ *Taypotat SCC*, at para 15.

³⁹⁴ Jennifer Koshan and Jonnette Watson-Hamilton, "The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness," (29 May 2015), Ablawg.ca, online: <<http://ablawg.ca/2015/05/29/the-supreme-courts-latest-equality-rights-decision-an-emphasis-on-arbitrariness/>> [Koshan & Watson-Hamilton on Arbitrariness].

³⁹⁵ Koshan & Watson-Hamilton on Arbitrariness, at 3, emphasis in original.

Professors Koshan and Watson-Hamilton summarize the problems that adverse effect discrimination cases currently face in court as more strenuous. The requirements are:

more burdensome evidentiary and causation requirements and assumptions about choice, the reliance on comparative analysis, acceptance of government arguments, based on the ‘neutrality’ of policy choices, the narrow focus on discrimination as prejudice and stereotyping, and the failure to ‘see’ adverse effects discrimination, often as a result of the size or relative vulnerability of the group or sub-group making the claim.³⁹⁶

In *Taypotat SCC*, the court dealt with three of these problems. The Court held that:

[F]irstly, although statistical evidence will not always be required, the lack of it in this instance was detrimental to this case. Secondly, the case indicates that there is an onerous causation requirement on the claimants to show a link between the impugned law and the disadvantage. Further, the impugned law played a dominant role in creating the disadvantage. Thirdly, is the court’s troubling reference to ‘arbitrary disadvantage.’ ‘Arbitrary disadvantage’ focuses on the *purpose* of the provision rather than the *effects* on the enumerated or analogous group. Arbitrariness is also a consideration under section 1 of the *Charter*, and the onus is on the government to disprove.³⁹⁷

However, Professors Watson-Hamilton and Koshan note that *Taypotat SCC* offers some hope that the obstacle of the court’s reliance on prejudice and stereotyping in step two of the legal test may be overcome by focusing on whether the provision “imposes burdens or denies a benefit in a manner that has the *effect* of reinforcing, perpetuating, or exacerbating their disadvantage.”³⁹⁸ Additionally, Justice Abella acknowledged that statistical evidence will not always be required to establish a link between the facially neutral provision and an infringement on an enumerated or analogous group’s right to equality. In some cases, the link will be ‘apparent and immediate.’³⁹⁹ Thus, *Taypotat SCC* signals some positive and negative trends in adverse discrimination cases. As noted by Watson-Hamilton and Koshan:

In relation to the adverse effects of municipal bylaws on low-income Albertans, adverse effects discrimination may be easier to show with the SCC’s current focus on the perpetuation of historical disadvantage rather than the

³⁹⁶ Koshan & Watson-Hamilton on Arbitrariness, at 7. See Hamilton & Watson, Adverse Effect for a full review.

³⁹⁷ Koshan & Watson-Hamilton on Arbitrariness, at 3.

³⁹⁸ Koshan & Watson-Hamilton on Arbitrariness, at 4. See *Taypotat SCC*, at para 20.

³⁹⁹ Koshan & Watson-Hamilton on Arbitrariness, at 4-5.

cumbersome reliance on having to show prejudice and stereotyping. On the downside for municipal bylaws and low-income Albertans, the Court may still be looking for a direct link between the provision and the disadvantage and that law playing the dominant role in creating the disadvantage.⁴⁰⁰

Unfortunately, the way that courts approach subsection 15(1) analyses is far from settled, particularly with respect to the finer details within each analysis. The area where there appears to be the most contention is the understanding by courts of the difference between the adverse effects of discriminatory provisions and the discriminatory nature of the provisions themselves. However, as Professors Watson-Hamilton and Koshan note, an analysis related to the perpetuation of historical disadvantage is perhaps the key to an effective subsection 15(1) bylaw challenge.

Below under VII Hypothetical Scenario #2, we provide a hypothetical example and apply the analysis under *Charter* subsection 15(1) to demonstrate how a bylaw challenge case might work.

VII. *Charter* Section 2(b) and Bylaws

There have recently been a number of cases involving persons who are homeless (or temporarily homeless) relying on *Charter* section 2(b), freedom of expression, to defend from a bylaw ticket or other charge. For example, the cases involving the Occupy Movement in 2011 often involved individuals who were protest camping in various city-owned locations.

Individuals used *Charter* section 2(b) to defend from court injunctions to stop their protest

⁴⁰⁰ Koshan & Watson-Hamilton on Arbitrariness, at 6. In a recent human rights case involving a preliminary application to dismiss, the British Columbia Human Rights Tribunal accepted evidence that street homeless people disproportionately consist of persons who are Aboriginal and disabled. The BCHRT also accepted that a standard or program that is neutral can still disproportionately impact individuals in a manner that may be discriminatory (*Pivot Legal Society v Downtown Business Improvement Association and another*, 2009 BCHRT229 (CanLII)). An Ambassadors program (Project Civil City) was implemented by the City of Vancouver to increase housing opportunities and eliminate homelessness; eliminate the open drug market on Vancouver streets; eliminate aggressive panhandling and increase the public satisfaction with the City's handling of public nuisance complaints. Several tactics employed by the Ambassadors alleged to be objectionable included: telling people sitting or lying on the sidewalk to move along; waking people who were sleeping on the street and telling them to move along; telling particular individuals that they were not allowed in a specific geographic areas and following or staring at individuals identified as being undesirable, among others. The BCHRT originally dismissed the complaint. However, on judicial review, the BCSC remitted the case back to the BCHRT, holding that the BCHRT had erred in finding that the facts did not amount to discrimination. See: *Pivot Legal Society v Downtown Business Improvement Association and Another (No. 6)*, 2012 BCHRT 23 (CanLII); case remitted back to BCHRT for rehearing (see *Vancouver Area Network of Drug Users v British Columbia Human Rights Tribunal*, 2015 BCSC 534 (CanLII)).

camps or the police officers' removal of their protest encampments under the authority of parks bylaws.

Section 2(b) of the *Charter* protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.”⁴⁰¹ In *Abbotsford*, the court recognized that freedoms are distinguished from rights. A freedom functions to “create and protect spaces” and allows a person to “pursue one’s own ends free from governmental interference, individually and in community with others.”⁴⁰² Under the *Charter*, freedom of expression protects all non-violent activity that conveys a meaning. The protection given to expression is content-neutral, provided the message is non-violent.⁴⁰³ However, although the protection is content-neutral, the time, method, and location of the expression does place some limitations on the freedom to express oneself.⁴⁰⁴

In public spaces, the freedom of expression may be limited if the “expression impedes the function of the place or fails to promote the values underlying freedom of expression.”⁴⁰⁵ The test, from *Montreal (City) v 2952-1366 Quebec Inc.*, for the application of *Charter* section 2(b) with respect to freedom to express oneself on public property (“*Montreal* test”) is:

Whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth-finding and (3) self-fulfillment. To answer this question, the following factors should be considered: (a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.⁴⁰⁶

In *Montreal*, the SCC considered whether a Montreal city bylaw concerning noise limited freedom of expression, and if so, whether the limit could be saved under section 1 of the

⁴⁰¹ *Charter*, s 2(b).

⁴⁰² *Abbotsford*, at para 150.

⁴⁰³ Jennifer Koshan, “Should They Stay or Should They Go? Occupy, The City and the *Charter*” (11 November 2011), ABlawg.ca, online: < ablawg.ca/2011/11/11/should-they-stay-or-should-they-go-occupy-the-city-and-the-charter/> at 2 [Koshan, Should They Stay or Should They Go]. *Irwin Toy Ltd v Quebec (Attorney General)*, (1989), 5 DLR (4th) 577 (SCC) at para 42 and 43 [*Irwin Toy*].

⁴⁰⁴ Hogg, at 43-20.2.54.

⁴⁰⁵ Koshan, Should They Stay or Should They Go, at 2. *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 CarswellQue 9633 at para 72 [*Montréal (City)*].

⁴⁰⁶ *Montréal (City)*, at para 74. Hogg, at 43-47.

Charter.⁴⁰⁷ In addition to the *Charter* argument, the court also considered a question of administrative law, namely whether the City had the power to regulate regarding nuisances, based on what actually constitutes a nuisance.⁴⁰⁸ The appeal stemmed from a noise complaint; a police officer walking by a dance club, which had set up speakers outside the club on the street that amplified the music from inside, issued a violation of articles 9(1) and 11 of the City's noise bylaw.⁴⁰⁹ The respondent argued that these provisions violated its section 2(b) *Charter* right to freedom of expression, and that "the City, in adopting these provisions, exceeded its delegated power in respect of nuisances because the provisions defined as a nuisance an activity that was not a nuisance."⁴¹⁰

At the Municipal Court, Judge Massignani found that that the impugned provisions did not restrict the respondents' freedom of expression, and that defining and regulating against nuisances was within the power of the City under its enacting legislation. However, Justice Boilard of the Superior Court reversed the lower court's decision, finding that "the impugned provisions infringed the respondent's freedom of expression; in his view, the bylaw impaired the underlying value of self-fulfillment, and this infringement could not be justified."⁴¹¹ The Court of Appeal upheld this decision.⁴¹² On appeal to the Supreme Court of Canada, the SCC found that with respect to the administrative law question, in considering a definition of the purpose of the impugned provision and the City's authority to regulate, article 9(1) of the bylaw was valid.⁴¹³ With respect to the *Charter* question, the court considered whether amplified sound was protected by section 2(b) such that it has expressive content, and whether the "method or location of this expression remove(s) that protection," as outlined above in the *Montreal* test above.⁴¹⁴ The court found that the amplified sound had expressive content. In considering whether an activity is expressive, the consideration is not for the particular theme or type of message of the activity, but whether, as the definition suggests, the content actually

⁴⁰⁷ *Montréal (City)*, at paras 1-2.

⁴⁰⁸ *Montréal (City)*, at paras 1-5.

⁴⁰⁹ *Montréal (City)*, at para 3.

⁴¹⁰ *Montréal (City)*, at para 4.

⁴¹¹ *Montréal (City)*, at para 5.

⁴¹² *Montréal (City)*, at para 5.

⁴¹³ *Montréal (City)*, at paras 7-8.

⁴¹⁴ *Montréal (City)*, at paras 5-6.

delivers a message of some kind. At this stage of the analysis, the fact that the sound has expressive content means that the expression is protected under section 2(b) of the *Charter*.⁴¹⁵

The Court then considered the method and location of the expressive content. While freedom of expression in some public places is protected, this protection generally does not extend to private property. In this case, the respondent owned the property on which the amplification equipment was located, but the amplified sounds travelled out onto the street, which is public and within government control. This led to the argument that for the purposes of the expression, the amplified sound is a government act, and must be protected under section 2(b).⁴¹⁶ The counterargument is that some spaces, such as places of public business and offices, are private in nature even though they are government owned and controlled, and the section 2(b) protection of expression does not extend to these spaces.⁴¹⁷

On the method and location stage of the test, the court agreed with the first argument and found that “the emission of noise onto a public street is protected by s. 2(b)” and that the method of expression allows the public area, in this case the city streets, to function normally without issue. Further, the expression does not “fail to promote the values that underlie the free expression guarantee.”⁴¹⁸ People are able to use the streets and roads as they normally might without interference, and “amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment” regardless, in this case, of content.⁴¹⁹ Finding that the expression is in fact protected under section 2(b) of the *Charter*, the court turned to the question of infringement, and found that the bylaw in question infringed upon the protected freedom in effect, because the effect of the bylaw was to restrict the expression.⁴²⁰ In this case, the bylaw restricts the expression by restricting the ability of passersby to hear the amplified sound, which encourages “passersby to engage in the leisure activity of attending one of the performances held at the club,” particularly because in engaging in leisure activities is a method of self-fulfillment.⁴²¹

⁴¹⁵ *Montréal (City)*, at paras 58-59.

⁴¹⁶ *Montréal (City)*, at paras 61-63.

⁴¹⁷ *Montréal (City)*, at para 64.

⁴¹⁸ *Montréal (City)*, at para 66.

⁴¹⁹ *Montréal (City)*, at paras 67-68.

⁴²⁰ *Montréal (City)*, at paras 82-85.

⁴²¹ *Montréal (City)*, at para 84.

Despite finding that the bylaw limited freedom of expression, the court found that the limitation was justified under section 1. The objective of the bylaw is to address the issue of noise pollution, and the court found that “the objective of the limitation [was] pressing and substantial” in a free and democratic society, particularly because “noise pollution is a serious problem in urban centres, and cities like Montreal are entitled to act reasonably and responsibly in seeking to curb it.”⁴²² The court found that the means, namely, limiting noise from amplified sound, was rationally connected to the City’s objective of providing citizens with a small degree of protection from noise in city streets.⁴²³ With respect to the minimal impairment portion of the test, the court found that the City used only the most reasonable means to handle the issue of noise.⁴²⁴ As a result, the measures that the City took to legislate regarding noise impaired the rights of the respondent in a minimal way because it was the only reasonable action to take under the circumstances.⁴²⁵ Finally, the court found that the prejudicial effects of infringing on freedom of expression were proportional with the benefits of the bylaw.⁴²⁶

Generally, the debate in most section 2(b) challenges occurs in the section 1 inquiry, as was the case in *Montreal (City)*, as courts generally find in most section 2(b) challenges that the disputed law does in fact limit freedom of expression. This is partially due to the unqualified language of section 2(b) and the broad interpretation the Courts give to this section when conducting analyses.⁴²⁷

The hypothetical scenario that immediately follows applies the legal principles under Charter section 2(b), and subsection 15(1) and section 7 to a situation involving low-income and homeless persons.

VIII. Hypothetical Scenario #2

The following hypothetical scenario is illustrative of the issues and analyses with which Canadian courts grapple during *Charter* challenges, particularly concerning low-income and

⁴²² *Montréal (City)*, at para 89.

⁴²³ *Montréal (City)*, at para 91.

⁴²⁴ *Montréal (City)*, at para 97.

⁴²⁵ *Montréal (City)*, at paras 91-97.

⁴²⁶ *Montréal (City)*, at paras 98-99.

⁴²⁷ Hogg, at 43-46.

homeless people (see Appendix A for a description of the key provisions of the relevant *Parks and Pathways Bylaw*). The following analysis will be based on this hypothetical scenario:

The Alberta Association of Drug War Survivors (“ADWS”) is seeking to establish a safe injection site in the City of Calgary. The ADWS has two active leaders, Luke Skywalker and Darth Vader, and members who are drug users or former drug users. Many of the members are homeless or do not have safe, adequate housing.

Addiction problems are often linked to homelessness. Shelters often place restrictions on hours of use and rules on sobriety and drug abstinence. Some individuals prefer sleeping ‘rough.’ For those homeless individuals who prefer to sleep in a shelter, often there is not enough available shelter space. ADWS’ research has revealed that Calgary’s Aboriginal homeless population is on the rise as they make up a disproportionate number of homeless people, and shelters have been unable to provide adequate services.

Homelessness can exacerbate other serious health issues. The homeless often have physical and mental health issues beginning early in life. Over time, homelessness increases the risks for infectious and communicable diseases and increases the risk of exposure to violence. In colder weather, the homeless suffer from frostbite and hypothermia. Sleep deprivation and inadequate sleep results in an increased risk of diabetes, cardiovascular disease, obesity, depression, and other physical and psychological injuries.

A study conducted by a researcher with the School of Public Health at the University of Alberta found that 40% of inner-city drug users are homeless, and approximately 50% of that group cannot access shelter space because of their addiction. Addicts who inject in public spaces usually lack access to sterile supplies, and addicts are more likely to contract HIV and hepatitis C and to develop infections and to overdose.

In response to the ADWS’ push for a safe injection site, the Calgary Police Service (“CPS”) voiced their concerns, namely those regarding contaminated drugs on site.

The ADWS believe that the need for a safe injection site is urgent. To spur on the initiative, DWS rallied Calgary’s homeless population to occupy Olympic Park. ADWS declined to obtain a permit as required by the Calgary Parks and Pathways Bylaw due to costs. The homeless set up tents to establish “Occupy Calgary” and began building a wooden structure to

serve as a future model safe injection site. In response to the activity in Olympic Park, members of the public complained to the City of Calgary and to CPS. Their concerns related to their inability to use the Park and the fact that the wooden structure and tents attract drug users.

The City of Calgary Bylaw officers gave notice to ADWS to cease the construction of the structure for the safe injection site and to vacate the tent encampment within 24 hours. When ADWS did not comply, the City Bylaw officers impounded the tents and issued summonses to several individuals, including Luke Skywalker and Darth Vader. The officers dismantled the safe injection wooden structure. As a result of these events, hundreds of homeless people were left without any shelter and many had to sleep without protection from the elements. There were several reported cases of frostbite and pneumonia as well as drug overdoses following the seizure.

The Municipal Government Act authorizes the City of Calgary to pass bylaws to address health, safety and the well-being of people, as well as the protection of property and the prevention of nuisances. An additional purpose of the Parks and Pathways Bylaw is to protect our valuable and treasured parks from harm and to be comfortable and accessible to all Calgarians and visitors.

A. Charter Subsection 15(1) and Hypothetical Scenario #2

When relying on subsection 15(1) of the *Charter* in this scenario, the affected individuals would be seeking a declaration from the Court that poverty and/or homelessness are analogous grounds and that individuals should be protected from discrimination by subsection 15(1) of the *Charter* based on these grounds. Also, they may rely on existing grounds such as disability or ethnicity and race, as Aboriginal people and persons with disabilities are adversely and disproportionately affected by the application of the City of Calgary *Parks and Pathways Bylaw*. If the court agrees with these arguments, and the government is not able to justify the legislation under section 1, the bylaw would be rendered unconstitutional (of no force or effect) under section 52 of the *Constitution Act*. In addition, if the actions of the bylaw officers are not defensible under *Charter* s 1, the court would look to section 24(1) of the *Charter* for a remedy. For example, the officers could be ordered to return the items that were seized. Any remedies

that might be available for a violation of Charter rights are discussed below under section **XI. Remedies.**

B. Application of the Steps in the *Charter* Analysis to Hypothetical Scenario #2

1. Threshold Issues

a. Standing

In *B.C./Yukon Drug War Survivors Association v Abbotsford (City)*, the DWS were granted public interest standing on the basis there was a serious issue to be tried, there was a genuine interest in those issues as some of the members were drug users or former drug users, and it was the most reasonable and effective way to bring the issues before court.⁴²⁸

Using the hypothetical facts in our scenario, the granting of public interest standing for the ADWS to bring the case forward would follow the same principles. The issue to be tried in this case, namely that of discrimination against a group of people, is sufficiently serious, and courts have looked at similar subject matter in the past. There is also a genuine interest on the part of ADWS to bring the case forward, as its members are current or former drug users, and bringing the case forward is the most reasonable and effective, and likely the only way, to bring issues of discrimination before the court.

b. Government Action: Does the Charter Apply?

Section 32(1)(b) of the *Charter* applies “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”⁴²⁹ The *Charter* applies to all legislation and delegated legislation of the provincial and federal government, and to actions of the government. The *Charter* acts as a limitation on governmental powers. If legislation or secondary legislation is inconsistent with the *Charter*, it will be deemed invalid. Secondary legislation, such as bylaws, enacted under statutory authority, such as the *Municipal Government Act*,⁴³⁰ is also subject to the *Charter*.⁴³¹

In applying this principle to the hypothetical example, the bylaw in question would be subject to *Charter* analysis. Actions by police, such as seizing the tents and dismantling the safe

⁴²⁸ *British Columbia/Yukon Assn. of Drug War Survivors v Abbotsford (City)*, 2015 BCCA 142 (CanLII).

⁴²⁹ *Charter*, s 32(1).

⁴³⁰ *MGA*, s 7.

⁴³¹ Hogg at 37-39, 37-13. See *Pridgen v University of Calgary*, 2012 ABCA 139 (CanLII) at para 79.

injection site, would be subject to *Charter* scrutiny, as police are considered part of government under section 32 of the *Charter*.

2. *Charter* Subsection 15(1) Analysis

Once the preliminary issues have been addressed, the court would launch the *Charter* analysis. This analysis involves first providing guidance on subsection 15(1) of the *Charter* and the factors that are required to show that discrimination occurred on the basis of an enumerated or analogous ground. Second, the court will analyze whether subsection 15(1) was violated under the facts of the case. If the court finds that the claimant has not proven that discrimination has occurred on the balance of probabilities, the case would end. If the court holds that subsection 15(1) rights are violated, the onus then shifts to the government to demonstrate that its bylaw and actions are reasonable and justifiable in a free and democratic society. If the government is successful, the case ends. If the government is not successful and the bylaw or actions are held to be unconstitutional, the court then provides remedies to the claimants.

The issue the court would address could be stated as whether the *Calgary Parks and Pathways Bylaw* infringes subsection 15(1) of the *Charter* on the grounds that it establishes a discriminatory distinction based on the proposed analogous grounds of low-income and homelessness. First, the court would investigate both the purpose and the effect of the *Parks and Pathways Bylaw* in order to find whether a discriminatory distinction exists.

Again, subsection 15(1) of the *Charter* states:

Everyone is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁴³²

The purpose of subsection 15(1) of the *Charter* is to ensure equality in the formulation and application of the law.⁴³³ A distinction or differential treatment created by an impugned law may result in discrimination and should be assessed within its context. The current two-part

⁴³² *Charter*, s 15(1).

⁴³³ *Andrews*, at para 16.

legal test for determining whether there is a violation of *Charter* subsection 15(1) is outlined in *R v Kapp*⁴³⁴ and affirmed in *Withler*.⁴³⁵ First, the courts ask if the law creates a distinction based on an enumerated or analogous ground, and second, the court asks whether the distinction creates a disadvantage by perpetuating prejudice, stereotyping, or historical disadvantage. The *Kapp* test is a contextual inquiry, and the discussion that follows applies the two-part test to the hypothetical fact scenario.

Step 1: Does the City of Calgary *Parks and Pathways Bylaw* impose differential treatment on the basis of a ground of discrimination enumerated and/or analogous to those listed in section 15?

The potential groups affected by the City of Calgary *Parks and Pathways Bylaws* by differential and discriminatory treatment on the basis of enumerated and analogous grounds include Aboriginal persons, persons with mental and physical disabilities, homeless persons, and impoverished persons. Aboriginal persons and those with disabilities would fall under the enumerated grounds in subsection 15(1). Some of the members of the ADWS in Calgary are Aboriginal homeless persons and those with mental and physical illnesses. The Courts have been more reluctant to expand the list of analogous grounds, and thus far, they have only expanded to citizenship, marital status, sexual orientation, and off-reserve status Indian. The analogous grounds are the same as those listed in subsection 15(1) in the sense that they are personal characteristics that are difficult, or impossible, to change. For example, poverty and homelessness are arguably very difficult circumstances to change, and those who experience these situations are prone to discrimination, as impoverished and homeless individuals are often excluded from mainstream society.

The reluctance of the courts to accept poverty and homelessness as analogous grounds stems from the difficulty in defining those groups and their heterogeneous character. The homeless and the impoverished are made up of many diverse groups of people. Sealy-Harrington presses for the recognition of homelessness as an analogous ground by the court in

⁴³⁴ *Kapp*, at para 17.

⁴³⁵ *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 2011 SCC 12 (CanLII).

Tanudjaja ONSC,⁴³⁶ and argues for a multi-variable approach to defining analogous grounds. The multi-variable approach expands the criteria for analogous grounds beyond an inability to change, to change that is very difficult and costly to achieve. Also included in the multi-variable approach is vulnerability of the group, their historical disadvantage, and presence in the human rights codes.⁴³⁷ As Justice Hinkson remarks in *Adams BCCA*, heterogeneity in homelessness and the poor amplifies their vulnerable state.⁴³⁸ The barriers that the homeless face are numerous and difficult, including lack of housing, addiction issues, and physical and mental disabilities. The protection of the vulnerable and the marginalized against discrimination should be a priority in the courts. Historical disadvantage of these groups is well-documented, such as the effect of colonialism on Aboriginal peoples. The *Alberta Human Rights Act* accepts “source of income that attracts social stigma” as a protected ground against discrimination.⁴³⁹ However, it is still an issue for the courts to expand analogous grounds to include homelessness and poverty.

Although we are looking for differential treatment on these grounds, true equality accommodates some differential treatment. In the City of Calgary *Parks and Pathways Bylaw* we inquire into which distinctions may be acceptable under subsection 15(1) and those that may be a violation of equality rights under the *Charter*. The following examination for potential distinctions in the *Parks and Pathways Bylaw* includes both the purpose and effects of the bylaw on the accepted and postulated grounds of discrimination discussed. *The Municipal Government Act* authorizes that the regulation of parks by the City of Calgary is to ensure the “safety, health and welfare of people and the protection of people and property.”⁴⁴⁰

The stated purpose of the *Parks and Pathways Bylaw* is to protect the value and quality of parks, and to ensure that they remain safe, aesthetic, comfortable and accessible for the enjoyment of all Calgarians.⁴⁴¹ In the bylaw, parks are closed at night to the public unless otherwise provided by permit. The permit must be obtained by the Director of Parks at a cost. A

⁴³⁶ Sealy-Harrington Homelessness an Analogous Ground.

⁴³⁷ Sealy-Harrington Homelessness an Analogous Ground, at 5.

⁴³⁸ *Adams BCCA*, at para 161.

⁴³⁹ *Alberta Human Rights Act*, RSA 2000, c A-25.5 s 44(1)(n).

⁴⁴⁰ *MGA*, s 7(a).

⁴⁴¹ City of Calgary, by-law 20M2003, Being A Bylaw Of The City of Calgary To Regulate The Use Of Parks And Pathways And To Regulate Activities In and on Parks and Pathways, preamble [*Parks and Pathways Bylaw*].

permit acts to regulate the use of a park by the City. Here, a distinction is drawn on the basis of available financial resources of Calgarians who want to use the Park at night for recreational purposes. Impoverished circumstances are the common denominator distinguishing the people who fall within the following enumerated and analogous grounds: Aboriginal homeless persons, homeless persons generally, and persons with disabilities and addictions. In order to obtain a permit to camp or to draw a crowd, people must contact the Director for permission. The groups of people previously discussed are often marginalized and powerless individuals within society and it may be difficult to understand and follow rules and procedures set out by the more mainstream society. Many homeless prefer sleeping rough or they may not be able to access shelters due to an addiction problem.

The effects of the bylaw on the homeless and impoverished groups results in exclusion from public spaces. The homeless and poor are not receiving the benefit of enjoyment of parks outlined in the bylaw preamble as intended for all Calgarians.⁴⁴² For those individuals who are homeless or have addiction issues, a lack of access to the parks will exacerbate other serious health issues. The ADWS would like to establish a future safe injection site for drug-users in Calgary and began construction on a wooden structure. Due to concerns for safety in public spaces, they were given notice by City Bylaw Officers to dismantle their model safe injection site. The homeless also set up tents in the Park as part of an Occupy Calgary movement. As a result of the bylaw and its enforcement by City Bylaw Officers, many homeless and impoverished people are left without shelter and use of the park at night.

In the City of Calgary *Parks and Pathways Bylaw*, discrimination based on distinction is not apparent on the face of the bylaw. A law that is neutral on its face is a component of formal equality.⁴⁴³ The bylaw does not expressly refer to or exclude any person who is homeless, impoverished, or of a specified race or disability. However, the bylaw is arguably discriminatory in its effect. This is referred to as substantive equality, as the discrimination manifests itself in its *effects* on these groups as opposed to within the law itself.⁴⁴⁴ Subsection 15(1) requires that

⁴⁴² *Parks and Pathways Bylaw*, preamble.

⁴⁴³ Hogg, at 55-47.

⁴⁴⁴ Hogg, at 55-47.

both formal equality and substantive equality exist.⁴⁴⁵ Discriminatory laws will manifest in disproportionate adverse effects on individuals who belong to one or more of these enumerated or analogous grounds. This type of discrimination is referred to as adverse effects discrimination.⁴⁴⁶ The homeless and impoverished individuals occupying the Park are unable to financially acquire a permit to seek shelter in the Park at night. It is more probable they would not know the rules and procedures in acquiring a permit even if they had the resources to acquire the permit. When the Court looks at the impact of the law and whether it is discriminatory, applicants are not required to establish intent by the government in drafting bylaws.⁴⁴⁷ If the City argues that the laws are not targeting the homeless or the impoverished and they are treating everyone the same, the fact that there is no intent to distinguish or discriminate is not relevant. The homeless and impoverished are not able to use the park in the same capacity as others and are adversely impacted. Although the City has a legitimate concern for the broader public interest, it should be addressed in other ways.

Step 2: Does the distinction create a disadvantage by perpetuating prejudice, stereotyping, or historical disadvantage?

Aboriginal people, the poor and homeless have a long history of being labelled as lazy, of lesser intelligence, and predisposed to criminality. In actuality there is a lack of correspondence between the negative characteristics and the groups of people that are assumed to have a preponderance of these traits. Unfortunately, these negative characteristics become imposed on these groups of people and are translated into policy and legislation. In the hypothetical scenario, these groups of people may not even be the intended target of the City bylaw. Substantive inequality and adverse effects discrimination do not require intention on the part of the City.

This report contends that the homeless, the impoverished, Aboriginal persons, persons with disabilities, and drug addicts are adversely impacted by the City of Calgary *Parks and Pathways Bylaw*. The effect of the bylaw on these disadvantaged groups results in the

⁴⁴⁵ Hogg, at 55-48. See *Andrews*.

⁴⁴⁶ Hogg, at 55-48.

⁴⁴⁷ Hogg, at 55-48. See *Andrews* at para 19.

perpetuation of prejudice and is based in the stereotypical beliefs of the City about the homeless and poor, Aboriginal persons and the disabled. Further, it violates the subsection 15(1) equality rights of these groups. The next phase of inquiry moves to the question of whether the City can justify the violation under section 1 of the *Charter*.

3. *Charter* section 1 Analysis

If the court determines that discrimination has occurred in this situation, the government then has the opportunity to defend its law or actions under section 1 of the *Charter*. This report contends that on the balance of probabilities, the members of ADWS's rights are violated under section 15(1) of the *Charter*. However, our rights under the *Charter* are not absolute.⁴⁴⁸ Section 1 of the *Charter* takes into consideration the greater public interest and is the means by which the government may be justified in infringing an individual's rights and freedoms under the *Charter*. *Charter* section 1 states:

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.⁴⁴⁹

In order for the government to limit rights and freedoms of individuals, the impugned action must be prescribed by law and the government prejudice, stereotyping, and historical disadvantage must be "reasonable and justifiable in a free and democratic society." The onus shifts to the City to show that the Bylaw is a "reasonable limit", and "can be demonstrably justified in a free and democratic society".⁴⁵⁰ The court then applies an analysis as prescribed under the case of *R v Oakes*,⁴⁵¹ and further developed under *Dagenais*.⁴⁵² The steps are set out immediately below.

a. Is the City Parks and Pathways Bylaw prescribed by law?

Limitations to rights and freedoms under section 1 of the *Charter* must be prescribed by law. Requiring the limitation to be prescribed by law is meant to prevent arbitrary and discriminatory action by the government, and to allow people to sufficiently understand what

⁴⁴⁸ Hogg at 38-2.

⁴⁴⁹ *Charter*, section 1.

⁴⁵⁰ Hogg, at 38-7 to 38-8.

⁴⁵¹ *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

⁴⁵² *Dagenais v CBC*, 1994 CarswellOnt 112 [*Dagenais*].

the law is prohibiting.⁴⁵³ In order for limitations to be prescribed or authorized by law, they must be accessible and sufficiently precise,⁴⁵⁴ and accessibility has been held to apply to municipal bylaws.⁴⁵⁵ The law must be sufficiently precise enough “to enable people to regulate their conduct by it, and to provide guidance to those who apply it.”⁴⁵⁶ The City of Calgary’s *Parks and Pathways* Bylaw is authorized by law. The City of Calgary has the authority to enact bylaws under the *Municipal Government Act*. Section 7 of the *Municipal Government Act* (“MGA”) allows the City to pass bylaws with respect to, among other things, the health and safety of people and the protection of people and property,⁴⁵⁷ activities in public spaces,⁴⁵⁸ and nuisances and unsightly property.⁴⁵⁹ Further, section 8 of the *MGA* allows the City to regulate and prohibit activities,⁴⁶⁰ deal with any development or activity, industry, or business in different ways,⁴⁶¹ and provide for a system of licences, permits or approvals.⁴⁶² Further, the actions of the police officers are also authorized by the *MGA*, and as such, these actions are also prescribed by law.

b. Is the infringement reasonable and justifiable in a free and democratic society?

The leading case on determining whether an infringement is reasonable and justifiable in a free and democratic society is *Oakes*. As noted by Stevens and McKay-Panos:

the *Oakes* test has developed through caselaw since it was established and underlying values have been identified to guide the Court in a *Charter* section 1 analysis. The values underlying a section 1 analysis include the consideration of the following: social justice and equality, enhanced participation of individuals and groups in society, and Canada’s international human rights obligations.”⁴⁶³

⁴⁵³ Hogg, at 38-12.

⁴⁵⁴ Hogg, at 38-13.

⁴⁵⁵ Hogg, at 38-13.

⁴⁵⁶ Hogg, at 38-12.

⁴⁵⁷ *MGA*, s 7(a).

⁴⁵⁸ *MGA*, s 7(b).

⁴⁵⁹ *MGA*, s 7(c).

⁴⁶⁰ *MGA*, s 8(a).

⁴⁶¹ *MGA*, s 8(b).

⁴⁶² *MGA*, s 8(c).

⁴⁶³ Kristyn Stevens & Linda McKay-Panos, *No Place to Sleep: The Right to Housing in Canada, Second edition* (2013) Alberta Civil Liberties Research Centre at 116 [No Place to Sleep]. See *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056-1057 [*Slaight Communications*].

Further, “in *Irwin Toy Ltd. v Quebec (Attorney General)*, the Supreme Court showed that in interpreting and applying section 1, the government is obliged to protect the rights of vulnerable groups.”⁴⁶⁴

The *Oakes* test has been modified by subsequent case law, including *Dagenais*.

Currently, the second stage of the analysis generally includes 4 criteria:

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
2. Rational Connection: The law must be rationally connected to the objective.
3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.⁴⁶⁵

i. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right

The task of identifying and assessing the objective of a challenged law may be difficult and opaque. If the objective of the challenged law is stated too widely, the assessment of the pressing and substantial nature of the challenged law may shift into the proportionality phase of the justification stage.⁴⁶⁶ There is an element of discretion by the Courts at this stage of the inquiry.⁴⁶⁷ Hogg notes that: “assuming this objective is general and important enough to be desirable to the public, the inquiry moves to the proportionality phase of section 1 analysis.”⁴⁶⁸

In the case of the *City Parks and Pathways Bylaw*, the stated objective is to ensure the “protection of the park and to make sure the park is safe, aesthetic, comfortable, and accessible for the enjoyment of all Calgarians.”⁴⁶⁹ Thus, the stated objective of the City of Calgary *Parks and Pathways Bylaw* is to protect the health and safety of people, as well as to protect the value and quality of the property and prevent nuisances.

⁴⁶⁴ No Place to Sleep, at 116. See *Irwin Toy Ltd v Quebec (Attorney General)*, (1989), 5 DLR (4th) 577 (SCC) at 999 [*Irwin Toy*].

⁴⁶⁵ Hogg, at 38-18.

⁴⁶⁶ Hogg, at 38-19.

⁴⁶⁷ Hogg, at 38-22.

⁴⁶⁸ Hogg, at 38-19.

⁴⁶⁹ *Parks and Pathways Bylaw*, preamble.

In *Abbotsford*, the issue that the challenged bylaw did not meet a pressing and substantial issue was not raised by either party. Justice Hinkson found that camping on lands caused the very harms that the bylaw was intended to prevent.⁴⁷⁰ In the hypothetical case of ADWS and the City of Calgary, members of the public complained about their inability to use Olympic Plaza and expressed concerns about the model safe injection site attracting drug users to the park. For further discussion of this issue, see Ola Malik and Megan Van Huizen's discussion regarding the issue of whether communal spaces belong to everyone, including the homeless.⁴⁷¹ In our case, it is likely that the stated objective of the Parks Bylaw will be found to be sufficiently important.

ii. Rational Connection: The law must be rationally connected to the objective

If the challenged law is determined to be sufficiently pressing and substantial to justify an infringement of a *Charter* right, the next stage of the inquiry asks if the means justify the objective. At this stage, the court asks how well the bylaw has been drafted to suit the stated objective.⁴⁷² Hogg notes that the bylaw's measures, such as prohibition on camping without a permit, must not be "arbitrary, unfair, or based on irrational considerations."⁴⁷³ With respect to the infringement of section 15(1) equality rights, the court will ask if there is a rational connection between the prohibition for erecting temporary shelter and a model safe injection site without a permit. In *Abbotsford*, the Court found a rational connection between a similar prohibition and requirement of a permit,⁴⁷⁴ and a court in this case would likely find the same.

iii. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective

The third stage in the inquiry asks if the challenged law is the least drastic means for meeting the stated objective, as the government is required to draft laws that restrict the rights of individuals as little as possible to meet the objective.⁴⁷⁵ This is a contextual analysis and the

⁴⁷⁰ *Abbotsford*, at para 240.

⁴⁷¹ Malik and Van Huizen, *Is there Space*.

⁴⁷² Hogg, at 38-32.

⁴⁷³ Hogg, at 38-32. See [*Oakes*] at para 103, 139.

⁴⁷⁴ *Abbotsford*, at para 241.

⁴⁷⁵ Hogg, at 38-36.

court must decide if the government could have achieved their objective by less intrusive means.

The least drastic means test of the section 1 analysis asks if the City could have designed and drafted a *Parks and Pathways Bylaw* that infringes the rights of the vulnerable and homeless less than it does currently. As noted by Hogg, it is based on the expectation and requirement that laws should “impair any right as little as possible.”⁴⁷⁶ At this juncture, the court will ask whether there are any other reasonable alternatives that the City could have considered when drafting a bylaw that has such a heavy impact on the homeless and vulnerable. As noted in *Slaight*, the City must have regard for the protection of the vulnerable.⁴⁷⁷ The permitting scheme the City drafted into the *Parks and Pathways Bylaw* is a means to regulate visitors in the Park at night. The City of Calgary should be able to oversee the park’s overnight use without intruding on the City’s homeless population by their outright removal and dismantling of their tents. A permitting scheme that requires money is a means often used to regulate conduct. However, there should be consideration of alternative solutions that take into account the vulnerable populations of the homeless.⁴⁷⁸ The court must ask whether the City considered the effect of the bylaw on the homeless in particular, and if they could have designed different means by which to regulate the conduct other than one that has a significant cost component.

iv. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies

The Supreme Court in *Dagenais* states that “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in questions and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.”⁴⁷⁹ The fourth and final stage of the inquiry is the requirement of proportionate effect. This stage of the analysis asks whether the bylaw’s effects are proportionate to the bylaw’s objectives.⁴⁸⁰ Hogg notes that the

⁴⁷⁶ Hogg, at 38-36. From [*Oakes*] at para 74.

⁴⁷⁷ *Slaight*, at 1056-1057.

⁴⁷⁸ *Irwin Toy*, at 999.

⁴⁷⁹ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 889.

⁴⁸⁰ Hogg, at 38-43.

“proportionate effect requires a balance between the objective obtained by the challenged law against the infringement of a *Charter* right or freedom under the Charter.”⁴⁸¹

If the bylaw that limits the *Charter* right is found to be the least drastic means, then the court will ask if the City achieved a reasonable balance between the harmful and advantageous effects when drafting the bylaw. Hogg states that essentially what the proportionate effect test is seeking is whether “the *Charter* infringement is too high a price to pay for the benefit of the law.”⁴⁸² Arguably, in our hypothetical scenario, the price the homeless and drug addicts have to pay is too high. The homeless are a vulnerable group. Without a permit, the homeless have their tents and safe injection site dismantled, which exposes them to a greater the risk of death, a profound limitation on personal autonomy, and an increased risk to their physical and psychological health and well-being. As a result, the government would fail to justify the infringement of the *Charter* subsection 15(1) rights of the homeless because the means of legislating, in this case via the Parks Bylaw, cannot be reasonably and demonstrably justified.

Keeping in mind that our *Charter* rights are not absolute, and that the government has the opportunity to limit the rights of individuals in cases where they are able to justify the limit, in this case, based on the above analysis, the court would find that the government has failed to appropriately justify violating the subsection 15(1) rights of the homeless individuals. Had the court found that this was not the case, the analysis would end and the case would conclude at this stage. However, given that a breach has occurred without justification, the court would then apply any necessary remedies appropriate to the case at bar. Any remedies that would be available for a breach of *Charter* rights will be discussed below under **IX Remedies**.

C. *Charter* Section 7 Life, Liberty and Security of the Person and Hypothetical Scenario #2

The following is an examination of the City of Calgary’s *Parks and Pathways* Bylaw, and an analysis of the limits the Bylaw places on the section 7 *Charter* rights of homeless and low-income people. *Charter* section 7 guarantees that: “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

⁴⁸¹ Hogg, at 38-43.

⁴⁸² Hogg, at 38-43.

principles of fundamental justice.”⁴⁸³ Martha Jackman states that “section 7 of the *Charter* contains both a positive and negative guarantee: a positive right to life liberty, and security of the person, and a negative right not to be deprived of them except in accordance with principles of fundamental justice.”⁴⁸⁴ Section 7 is a single right with a two-step analysis. First, the Court will ask if a government action has interfered with the right to life, liberty, or security of person. Second, if the answer to the first step is yes, the Court will ask if the interference is done in accordance with the principles of fundamental justice.⁴⁸⁵

Under a section 7 analysis for a breach of a *Charter* right it is the person or persons whose rights are being infringed upon who bear the burden of establishing that the bylaw or bylaws deprive them of life, liberty, and security of person in a manner that is either not rationally connected to the object of the law or grossly disproportionate to the object of the bylaws.⁴⁸⁶

1. Step One: Life Liberty and Security of the Person

At this stage, the Court inquires whether the Bylaw engages the section 7 rights of the claimants, DWS. The DWS are claiming that the removal of all the tents and temporary shelters jeopardized the health and safety of the vulnerable groups. With respect to the proposal for the model safe injection site, the DWS are claiming that the actions of the City Bylaw officers in ordering the halt of construction on the structure and further dismantling it amounts to a violation of the DWS’ section 7 rights under the *Charter*. The question is whether DWS and the associated vulnerable groups are exempt from the City of Calgary *Parks and Pathways* Bylaw and the actions of the City Bylaw officers.

a. Life

With respect to the right to life in section 7 of the *Charter*, and the purpose and effects of the City Bylaw on DWS, this interest is engaged. The many barriers that the homeless face put their lives in jeopardy and increase the risk of death. The demographics of homeless people consist of many vulnerable groups, including drug addicts and the disabled. Sleeping outside is

⁴⁸³ *Charter*, s 7.

⁴⁸⁴ Martha Jackman, “The Protection of Welfare Rights Under the Charter,” (1988) 20 Ottawa L. Rev. 257 at 322 [The Protection of Welfare Rights Under the Charter]. HeinOnline: http://heinonline.org/HOL/Page?handle=hein.journals/ottlr20&div=23&g_sent=1&collection=journals.

⁴⁸⁵ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791. At para 109 [Chaoulli].

⁴⁸⁶ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 110 (CanLII), [Bedford] at 127.

likely to cause serious harm to a homeless person's physical and mental health. It is often suggested that the homeless choose to sleep outside. However, often there is not enough adequate shelter space available, or drug addicts who may not be able to access shelter due to restrictive rules. Homelessness increases the risk of exposure to communicable diseases, violence, frostbite, and hypothermia, and leads to sleep deprivation over long periods of time. Sleep deprivation may increase the risk of diabetes, cardiovascular disease, obesity and depression. Additionally, many homeless people suffer from drug addictions. Padmé Amidela, a researcher at the School of Public Health at the University of Alberta, found that 40% of inner-city drug users were homeless. Homeless addicts are less likely to have access to sterile supplies and more likely to share needles. This leads to an increased likelihood of contracting HIV and Hepatitis C, to develop infections, and to overdose.

In *Chaoulii v Quebec*,⁴⁸⁷ the SCC held that when excessive wait times in the public health system increases the chance of death, this leads to a violation of the life interest protected under section 7 of the *Charter*.⁴⁸⁸ The model safe injection site proposed by DWS is intended to help save the lives and increase the health of homeless drug addicts. In *PHS*, the SCC granted health professionals from Insite an exemption from the application of the *CDSA*. If the health staff at Insite could not provide a life-saving environment for drug addicts, they were at risk of death and contracting communicable diseases.⁴⁸⁹ The government action by Calgary Bylaw Officers in notifying the DWS to cease construction of the model safe injection site and the dismantling of the structure by the officers left the lives of many homeless drug addicts in peril. Following the dismantling of the safe injection site there were several reported overdoses from fentanyl.

Alongside the dismantling of the safe injection site, the City Bylaw Officers were ordered to remove the tent encampment. Further to this, on March 21, 2016, Calgary Bylaw Officers impounded tents and issued summonses to several homeless individuals within Olympic Park plaza. The actions of the City Bylaw Officers left many homeless people without any shelter from the elements during a period of harsh Calgary weather. Following these actions, there

⁴⁸⁷ *Chaoulii v Quebec*, 2005 SCC 35.

⁴⁸⁸ Hogg, at 47-7.

⁴⁸⁹ *PHS*, at para 91.

were several reported cases of frostbite and pneumonia at local Calgary hospitals. In *Carter*, the SCC was asked to balance competing values, which includes the need to protect the vulnerable.⁴⁹⁰ The actions of the City Bylaw Officers led to increased risk of death for vulnerable and marginalized populations. The *Carter* decision allows for an opening by the courts in future decisions to acknowledge that government actions may indirectly affect vulnerable groups. Following this reasoning, the actions of the City Bylaw Officers at Olympic Park Plaza increased the risk of death as a result of lack of adequate housing and access safe injection methods.

b. Liberty

With respect to the liberty interest in section 7 of the *Charter*, and the purpose and effects of the City Bylaw on DWS, this interest is engaged when there is the possibility of imprisonment. However, liberty interests are engaged beyond mere physical restraint.⁴⁹¹ The main principle underlying liberty is to protect “the right to make fundamental choices free from state interference.”⁴⁹² However, the SCC in *Blencoe* caution that freedom in making personal choices is not without constraints.⁴⁹³ The interests of the public must also be considered in balancing the consideration of personal freedoms. In *Morgentaler*, the SCC brings to light the idea of human dignity finding expression throughout the *Charter*, and the right to choose is the common thread that runs throughout the different rights and freedoms contained within the *Charter*. The government must attempt to respect the right to choose to the greatest extent possible,⁴⁹⁴ as this is an integral aspect of human dignity. In turn, the right to choose is integral to the right to liberty. Liberty “grants the individual a degree of autonomy in making decisions of fundamental importance.”⁴⁹⁵

The elements of choice, causation, and harms that flow from the Bylaws within vulnerable and marginalized groups applies to government laws and actions rather than the ‘choice’ to be homeless or an addict.⁴⁹⁶ Where to live and seek adequate shelter applies to human dignity and the right to choose. The lack of adequate shelter space contributes to the decisions that

⁴⁹⁰ *Carter*, at para 2.

⁴⁹¹ *R v Malmo-Levine: R v Caine*, [2003] 3 SCR 571, 2003 SCC 74 (CanLII) [*Malmo-Levine*] at paras 84, 85.

⁴⁹² *Carter*, at para 64. See *Blencoe*, at para 54.

⁴⁹³ *Blencoe*, at para 54.

⁴⁹⁴ *Morgentaler*, at para 288.

⁴⁹⁵ *Morgentaler*, at para 289.

⁴⁹⁶ Koshan, Teaching Bedford, at 2.

homeless people will have to make in seeking out shelter. Inn from the Cold and the Calgary Drop-In Centre report they are often over-capacity and homeless individuals and families have to sleep on mats on the floor. Calgary's Aboriginal homeless population is increasing. The Drop-In centre acknowledges that they cannot provide adequate shelter to meet the needs of homeless Aboriginal people. The homeless have a right to choose to sleep in tents when shelters are full. In *Adams* (BCSC), Justice Ross acknowledged that many homeless people have no choice but to sleep outside. The City of Victoria's Bylaws prevented the homeless from erecting temporary overhead shelter at all times. The Bylaw had a greater impact on the homeless and put their health at significant risk.⁴⁹⁷ The permit scheme in City of Calgary's Bylaw at section 4(1) and section 9 does not allow anyone to camp or erect a tent at night unless allowed by permit, and permit schemes are generally cost prohibitive for the homeless.

c. Security of the Person

With respect to the security of the person in section 7 of the *Charter*, and the purpose and effects of the City Bylaw on DWS, this interest is engaged when a law or a government action creates a risk to someone's physical and psychological health.⁴⁹⁸ The right to security of person and liberty are overlapping rights. The City of Calgary's Bylaws heighten the risk of the homeless person's by not allowing them to set up tents and camp.⁴⁹⁹ *Bedford* establishes that by limiting the homeless person's right to camp and erect temporary shelter the City Bylaw is actually imposing dangerous conditions on an already risky activity. Homeless people often suffer from pre-existing physical and mental health problems. Sleeping outside, particularly without any overhead shelter causes serious physical and mental health problems. Further, the dismantling of the safe injection site prevents homeless addicts from accessing sterile supplies. They are more likely to share needles and to contract HIV and Hepatitis C, to develop infections, and to overdose. Drug use, an inherently risky behaviour, becomes more risky without a safe injection site.

⁴⁹⁷ *Adams*, BCSC, at para 5.

⁴⁹⁸ *PHS*, at para 93. *R v Morgentaler*, [1988] 1 SCR 30 at para 25. For psychological stress see *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (CanLII) at para 55.

⁴⁹⁹ *Bedford*, at para 59.

The City of Calgary's Bylaws deprive homeless people of their right to life, liberty and security of the person under section 7 of the *Charter*, and violate the right to life by the lack of provision for adequate shelter and by not allowing access to a safe injection site. The homeless are positioned for greater risk of death by the City's actions and legislation. The City of Calgary's Bylaws violate the right to liberty by restricting the right to choose where to live and ways to provide for adequate shelter. Additionally, the cost factor to obtain a permit is prohibitive for homeless people, thereby excluding them from any real meaningful choice. The City of Calgary's Bylaws violate the right to security of person by lack of adequate housing, a lack of a safe injection site, and thereby diminishing the physical and psychological health of the homeless. At the next stage of the inquiry, the Court will ask whether these deprivations are in accordance with the principles of fundamental justice.

2. Fundamental Justice

At this stage, the Court inquires whether this limit is in accordance with fundamental justice. The burden is on the claimants to establish that any limit on life, liberty, and/or security of the person is not in accordance with the principles of fundamental justice. The principles of fundamental justice have the following three underlying criteria: (1) they must be legal principles; (2) there is consensus that it is fundamental to the operation of fairness in the legal system; and, (3) it can be identified with sufficient precision to operate as a touchstone against which to measure any deprivations of life, liberty or security of the person.⁵⁰⁰ Fundamental justice covers both substantive and procedural justice.⁵⁰¹ Procedural aspects that are relevant in this hypothetical example are the City Bylaw Officers' interim injunction from the Alberta Court of Queen's Bench on March 19, 2016, requiring removal of all shelters and tents that had been erected, including the model safe injection site. The homeless, or DWS on their behalf, will have to go to court to challenge the injunction. One has the right to know the case against oneself and the right to answer that case, but it is difficult for homeless people to navigate the legal system. From a procedural perspective, the court will have to inquire whether the

⁵⁰⁰ *Abbotsford*, at para 171. See *Canadian Foundation for Children, Youth and the Law*, 2004 SCC 4 (CanLII) at para 8.

⁵⁰¹ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 181 (SCC). See Hogg, at 47-21.

procedures adopted by the City are fair to the homeless or whether they deprive them of life, liberty and security of person.

The courts are also entitled to inquire into the substantive portion of deprivation of life, liberty, and security of person.⁵⁰² The law has developed “organically as courts were faced with novel *Charter* claims.”⁵⁰³ Specifically the Court asks whether the Bylaw and the actions of the City Bylaw officers are arbitrary, overbroad, and/or grossly disproportionate. In *Bedford*, Chief Justice McLachlin encapsulates the lessons from case law with respect to violations under section 7 of the *Charter* as

“laws that run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal.”⁵⁰⁴

The next point of inquiry moves to whether an interference of life, liberty or security of person is in accordance with the principles of fundamental justice.

a. Arbitrariness

The test for arbitrariness in *PHS* involves two steps. First, identify the law’s objectives, and second, identify the relationship between the government’s interest and the law in question, or an action by the government.⁵⁰⁵ A court will ask whether the law or action is rationally connected to the purpose the law or act is said to serve.⁵⁰⁶ The stated purpose of the City of Calgary’s *Parks and Pathways* Bylaw is to protect the value and quality of Calgary’s parks and pathways, while ensuring they remain safe, aesthetic, comfortable and accessible for the enjoyment of all.⁵⁰⁷ The Court will inquire into whether the activities of the DWS and vulnerable groups within the Park correspond to the objectives of the Bylaw. It should be noted that the test for arbitrariness is not entirely settled.⁵⁰⁸ In *Chaoulli*, the approach taken by the court to arbitrariness ended in a divide among the judges. Three justices asked whether a limit was

⁵⁰² Hogg, at 47-20.

⁵⁰³ *Bedford*, at para 97.

⁵⁰⁴ *Bedford*, at para 105.

⁵⁰⁵ *PHS*, at paras 129-130.

⁵⁰⁶ *Chaoulli*, at para 134.

⁵⁰⁷ City of Calgary, bylaw 20M2003, *Parks and Pathways*, preamble [*Parks and Pathways Bylaw*].

⁵⁰⁸ *PHS*, at para 132.

necessary to further a government objective,⁵⁰⁹ while the other three justices asked whether ‘the limit on the right had any connection to the government’s objective.’⁵¹⁰

The court in *Bedford* describes arbitrariness as a “situation where there is no connection between the effect and the object of the law.”⁵¹¹ In *Adams*, the correct test for arbitrariness is found in the following statement in *Rodriguez*: “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.”⁵¹² The City of Calgary’s Parks and Pathways Bylaw is meant to ensure the health and safety of all Calgarians visiting the parks, and to preserve the Parks’ value and quality and to ensure that they are safe and accessible for all visitors. It is likely that the Court will find there is a rational connection to the purpose of the Bylaw and the effect of the Bylaw on Calgarians. Although in *Adams* BCCA, the court found that the Bylaws may be arbitrary in some applications, they were not arbitrary in the same sense as those in *Chaoulli*. This situation, like the hypothetical scenario, may lead to a violation of a principle of fundamental justice in terms of overbreadth, but not arbitrariness.⁵¹³

b. Overbreadth

Overbreadth is another means by which a law or government action may interfere with the conduct of people that has no connection to the law’s objective.⁵¹⁴ It is related to arbitrariness in the sense that overbreadth may lead to laws being arbitrary in some applications. The standard for overbreadth is not as stringent as that for arbitrariness. In *Bedford*, the court describes overbreadth as a situation where “the law goes too far and interferes with some conduct that bears no connection to its objective.”⁵¹⁵ In *Bedford*, the court recognizes that a law that is overbroad is rational in some sense, but may overreach in some situations. The Court provides the example where a law may be broad enough to capture conduct that bears no relation to its purpose, which is to make enforcement more practical.

⁵⁰⁹ *Chaoulli*, at paras 131, 132.

⁵¹⁰ *Chaoulli*, at para 232.

⁵¹¹ *Bedford*, at para 98.

⁵¹² *Adams*, BCCA, at para 117; Referring to *Rodriguez*, at 594-595.

⁵¹³ *Adams*, BCCA, at para 123.

⁵¹⁴ *Bedford*, at para 101.

⁵¹⁵ *Bedford*, at para 101.

The justification and reasonableness of “enforcement practicality” is an issue that is often determined under section 1 of the *Charter*.⁵¹⁶ In order for the homeless to seek overhead shelter in City parks, they must comply with a permit scheme as outlined in section 9 of the City *Parks and Pathways Bylaw*. The City of Calgary should be able to oversee the park’s overnight use without intruding on the City’s homeless population by their outright removal and dismantling of their tents and safe injection site. The City could have drafted other options into the scheme, taking into account the homeless person’s inability to pay for any permit or even the knowledge of the process of obtaining a permit. The Court in *Abbotsford* also concluded that the Bylaws in question deny the homeless any access to public parks without permits and prevent them from erecting temporary overhead shelter without permits, and as a result, are overbroad.⁵¹⁷

c. Grossly Disproportionate

According to the majority, the test for gross disproportionality that was applied in *PHS* was such where “the government actions or laws are so extreme as to be disproportionate to any legitimate government interest.”⁵¹⁸ In *Bedford*, a grossly disproportionate law is one which violates our basic values.⁵¹⁹ In our hypothetical scenario, the effect of the City of Calgary *Parks and Pathways Bylaw* permit scheme on the homeless is grossly disproportionate to the City’s objective of protecting the park and safety of the users.

3. Analysis under *Charter* s 1

At this stage, once an infringement has been found, the court will ask whether an infringement of Section 7 can be justified under Section 1 of the *Charter*. From the analysis, if the City of Calgary *Parks and Pathways Bylaw* is found to be overbroad and grossly disproportionate to the legislative goal, the inquiry becomes one of whether the infringement is a reasonable limit that can be justified in a free and democratic society. It is very rare that an infringement of section 7 rights can be justified, because the analysis under section 7 already

⁵¹⁶ *Bedford*, at para 113.

⁵¹⁷ *Abbotsford*, at 203.

⁵¹⁸ *PHS*, at para 133. From *Malmo-Levine*, at para 143.

⁵¹⁹ *Bedford*, at para 103.

contains the justification of “in accordance with the principles of fundamental justice,” where the claimant must prove that the violation occurred in a manner that was not in accordance with the principles of fundamental justice. Once the court has determined the violation of life, liberty and security of the person was not in accordance with the principles of fundamental justice and section 7 was violated, the onus shifts to the government to demonstrate that it was a reasonable and justifiable violation.

The analysis of section 1 at this point will be very similar to that under *Charter* s 15(1) above, with some potential differences in emphasis. Namely, as noted, it is very rare that an infringement of section 7 rights can ever be justified, if it offends a principle of fundamental justice. Additionally, if the court finds that a law is overbroad under the section 7 fundamental justice analysis, this implies that there is some rational connection between the objective of the law and its effect (it merely concludes that the law is overbroad) and the *Charter* section 1 analysis would move on to the minimal impairment stage.

At this stage, a court would likely find that there exists a breach of section 7 of the *Charter*, and that this breach is not in accordance with the principles of fundamental justice, particularly because the law in question is overbroad. The government would be unlikely to justify the infringement during the section 1 analysis during the minimal impairment stage of the test (see iii. Least Drastic Means above). Following this analysis, the court would move to a discussion of available remedies. Any available remedies are discussion in section **IX. Remedies** below.

D. Section 2(b) Freedom of Expression: Hypothetical Scenario #2

1. Does the Bylaw Violate DSW Members’ and others’ Freedom of Expression?

In Olympic Park at the City of Calgary, DWS began a movement called Occupy Calgary. The intention of the Occupy movement is to push for a safe injection site. Alberta has the highest rate of drug overdose deaths in the country from fentanyl, an opioid that is typically injected. On March 1, 2016, DWS decided to rally Calgary’s homeless population, including those who want a safe injection site, to occupy Olympic Plaza. Occupy Calgary set up tents, and the homeless population was invited to move in and live there. Regular public meetings were held

to discuss the plight of the homeless population, the need for adequate spaces for the homeless, and the need for a safe injection site in Calgary.

As a reaction to complaints by the public, the City of Calgary Bylaw Officers notified the DSW leadership that construction of the model safe injection site must cease immediately, and later posted notices that the tent encampment must be removed within 24 hours. Two days later when the encampment hadn't moved, Calgary Bylaw Officers obtained an interim injunction requiring removal of all shelters and tents that had been erected. Many tents were impounded and summonses were issued. The officers dismantled the almost completed safe injection site.

Olympic Plaza has many public use features to be enjoyed by all Calgarians and the public more generally. It was built in 1988 for the Olympic Winter games. It has an outdoor ice skating surface, a reflecting pond, a sculpture of the Famous Five, a stage, waterfalls, public washrooms, and an independently owned concession stand. Olympic Plaza hosts many special events and festivals year round and is often used by Calgarians as a place to enjoy a lunch break or family picnic.

In movements like Occupy Calgary, groups of people acting in solidarity for a singular purpose of conveying a message are an expressive activity that falls under the protection of section 2(b) of the *Charter*.⁵²⁰ In order to establish whether there is a violation of the freedom of expression by DWS and the Occupy Calgary movement, the court will ask the following questions:⁵²¹

a. Does the activity in question convey a meaning in a non-violent way?

The protest for a safe injection site and the setting up of tents does not convey a violent message. The message is one of protest for the rights of the homeless to have adequate shelter and the protection of people with addictions and the right to a safe injection site.

⁵²⁰ Koshan, *Should They Stay or Should They Go*, at 2.

⁵²¹ *Canadian Constitutional Law*, NCA Prep (Osgoode Hall, 2012) at 4 of Section 2(b) Freedom of Expression.

b. Is the method and location of the expression consistent with the purposes underlying s. 2(b)?

Olympic Plaza is a public space where one should anticipate freedom of expression. However there are some limits imposed on freedom of expression in public spaces. Arguably the Occupy movement in Olympic Plaza may impede the use of the park by other visitors. Some members of the public complained about their inability to use Olympic Plaza and expressed concerns about the wooden tent's future attraction to injection drug users. In applying *Montreal* test for freedom of expression in public spaces, the Court will inquire whether the expression is promoting of values that include the promotion of truth, democratic dialogue, and individual self-fulfillment.⁵²² The DWS and Occupy movement are interested in promoting the truth, demonstrating democratic dialogue and individual fulfillment. By openly occupying Olympic Plaza, the DWS and homeless are bringing about public awareness of their situation.⁵²³ The prior use of Olympic Plaza was generally intended for sporting activities. However freedom of expression is broadly construed by the courts and any public impediment to the use of Olympic Plaza for others would likely be assessed for justification under section 1 of the *Charter*.⁵²⁴

c. Is the purpose of the impugned government action to control expression by reference to its content?

There is nothing to indicate an intention on the part of the government in the City of Calgary *Parks and Pathways Bylaw* to restrain freedom of expression.

d. Does the impugned government action have the effect of suppressing expression related to truth, democracy or self-realization?

The practical effects of the of the interim injunction obtained by the City of Calgary Bylaw Officers requiring the removal of all shelters and tents, impounding tents and issuing summonses, and dismantling the safe injection site are to prevent the freedom of expression of DWS and the Occupy Calgary Movement. By removing tents and dismantling the injection site, the City is directly and indirectly controlling the message of Occupy Calgary.⁵²⁵

⁵²² Koshan, *Should They Stay or Should They Go*, at 2.

⁵²³ *Montreal*, at para 68.

⁵²⁴ Koshan, *Should They Stay or Should They Go*, at 2.

⁵²⁵ Koshan, *Should They Stay or Should They Go*, at 3. See *R v Keegstra*, 1990 CarswellAlta 192 SCC [*Keegstra*].

Here, a court would likely find that the section 2(b) freedom of expression of DWS and the Occupy Calgary Movement has been violated by the City of Calgary. The onus then shifts to the City of Calgary to show that the City's interference with the freedom of expression of DWS and the Occupy movement is justified.

2. Can an infringement of Section 2(b) Freedom of Expression be justified under Section 1 of the *Charter*? (*R v Oakes*)

At this stage, the Court will inquire whether an infringement of section 2(b) freedom of expression under the Charter can be “demonstrably justified in a free and democratic society.”⁵²⁶ In the article “Should they Stay or Should They Go?,” Jennifer Koshan highlights the inquiry into justification under section 1 for freedom of expression as contextual. Professor Koshan's article provides a framework for a hypothetical section 1 analysis on an Occupy movement in a City of Calgary Park such as Olympic Plaza. Koshan brings into focus the Court's consideration of the location and audience in a section 1 analysis.⁵²⁷ The contextual approach by the Court means that a limit on expression in one location may be not function as a limitation in another location. The Court will also regard the make-up of the audience and their ability to choose. The vulnerability of the group the City is trying to protect, such as the presence of children and their exposure to certain types of expression is a relevant consideration,⁵²⁸ as is the nature of the activity. Limits to political expression are more difficult for the government to justify as they relate to the core values of the promotion of truth, democratic dialogue, and self-fulfillment.⁵²⁹ The Occupy movement in Olympic Plaza, which promotes shelter for the homeless and a safe injection site, has political expression. The onus is on City of Calgary to provide evidence to the harms of the occupation and who the harms are affecting.⁵³⁰

Once it has been established that the limit is prescribed by law as it is in the City of Calgary *Parks and Pathways Bylaw*, the Court will inquire whether the purpose of the limit is

⁵²⁶ *Charter*, s 1.

⁵²⁷ Koshan, *Should They Stay or Should They Go*, at 4.

⁵²⁸ *Greater Vancouver Transportation Authority v Canadian Federation of Students-British Columbia Component*, [2009] 2 SCR 295, 2009 SCC 31 (CanLII) at para 78 [*Greater Vancouver Transportation*].

⁵²⁹ Koshan, *Should They Stay or Should They Go*, at 4. See *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 91 [*Thomson Newspapers*].

⁵³⁰ Koshan, *Should They Stay or Should They Go*, at 4. See *Thomson Newspapers*, at para 90.

pressing and substantial. If the objective is found to be pressing and substantial, the Court will conduct a proportionality test. Overall, the proportionality test looks at the means of limiting the freedom of expression used by the City and whether they are reasonable and proportional to the purpose of the Bylaw. The different sections of the proportionality test ask: (i) is the limit on the freedom rationally connected to the purpose, (ii) does the limit minimally impair the freedom, and (iii) is the law proportionate to the effect and weighs the actual benefits and harms. The City of Calgary must pass all the outlined steps before a limit of the expression of freedom can be justified.⁵³¹

a. Pressing and Substantial Objective

The City of Calgary *Parks and Pathways Bylaw* includes the important objective of ensuring the health and safety of all the people visiting the park. The City needs to protect the property and prevent nuisances. The City parks are a valued and treasured asset for all Calgaryans to enjoy. The City must also ensure that visitors have accessibility to the park and are comfortable while visiting. In *Abbotsford BCSC*, Justice Hinkson also found that the Bylaws in question were meeting a pressing and substantial need. Justice Hinkson determined that the activities of the members of DWS were the cause of the harms the Bylaw was intended to protect.⁵³² However, Professor Koshan points out that the enforcement of a bylaw, such as the removal of tents from Olympic Plaza, is not a valid objective for the purposes of a section 1 analysis. Koshan reasons that if a bylaw is in violation of a *Charter* right or freedom, then the bylaw cannot be enforced without a *Charter* remedy. However, Koshan acknowledges that it is rare for the government not to pass this phase of a section 1 analysis since there is usually some validity to their perspective.⁵³³

b. Is the Limit Rationally Connected to the Purpose?

The measures taken by the City Bylaw Officers must be rationally connected to the objective of *the Parks and Pathways Bylaw*. The measures taken must “not be arbitrary, unfair

⁵³¹ Koshan, *Should They Stay or Should They Go*, at 4. See *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at para 70 [*Oakes*].

⁵³² *Abbotsford (City) v Shantz*, 2015 BCSC 1909 (CanLII) at para 240 [*Abbotsford*, BCSC].

⁵³³ Koshan, *Should They Stay or Should They Go*, at 5.

or based on irrational considerations.”⁵³⁴ The actions of the City Bylaw Officers resulted in the removal of all shelter and tents, impounding of tents and the issuance of summonses, and the dismantling of the safe injection site. The Bylaw requires a permit to camp overnight. In *Abbotsford BCSC*, Justice Hinkson found a rational connection between the objective and the measures taken.⁵³⁵ The City bears the burden of providing evidence that “enforcing the removal of tents will restore the enjoyment of the park by others, protect the occupiers from harm, and/or protect Olympic Plaza itself”⁵³⁶ The applicants could argue that the design and physical make up of Olympic park is durable enough to withstand the tents and shelters. Thus the concern for the protection of property may not be a viable argument put forward by the City. The argument that the actions are to protect the protesters themselves is also not based in fact since the safe injection site and overhead shelter is intended to protect the welfare of the homeless, and the actions of dismantling the structures arguably go against that objective. The strongest argument that may be submitted by the City in favour of a rational connection is to protect the enjoyment and health of the general public who would like to visit Olympic Plaza.⁵³⁷

c. Does the Limit Minimally Impair the Right?

The minimal impairment or least drastic means is the stage of the proportionality test that the government most often fails.⁵³⁸ This limit requires the City to limit the right or freedom as little as reasonably possible. Additionally the City must demonstrate that the government considered the full range of alternatives and found them to be less effective or more restrictive than the methods used that are in dispute. In *Abbotsford BCSC*, Justice Hinkson weighed the methods used by the City of Abbotsford with approaches used in other jurisdictions. However, even if the City used less impairing methods than other cities, it does not mean that the means chosen by the City do not violate section 1. In that circumstance, Justice Hinkson found the benefits of the Bylaw in question were valid and a way to prevent damage to public lands, but he did not accept the argument that the negative impact on limiting rights and freedoms was

⁵³⁴ *Oakes*, at para 70.

⁵³⁵ *Abbotsford BCSC*, at para 241.

⁵³⁶ Koshan, *Should They Stay or Should They Go*, at 5.

⁵³⁷ Koshan, *Should They Stay or Should They Go*, at 5.

⁵³⁸ Koshan, *Should They Stay or Should They Go*, at 5.

minimal.⁵³⁹ Another issue that the Court should consider is whether the City's action resulted in a partial or complete ban on an activity, as complete bans are more difficult to justify under minimal impairment considerations.⁵⁴⁰ In *Adams BCCA*, the Court found the City could have exercised less restrictive alternatives than a complete prohibition on shelter.⁵⁴¹ Professor Koshan frames the deleterious effect of the Bylaws on the limit of expression argument as the removal of tents and shelter going to the heart of the occupation movement. The prohibition on the tents and safe injection site thus limits the political aspect to the intentions of the DWS and the homeless. In terms of freedom of expression, this is difficult for the City to justify.⁵⁴²

d. Is the Law Proportionate in Effect?

The final stage of the proportionality test is one that seeks to find a reasonable balance between the negative effects on Charter rights and freedoms and the positive impact that the limitation provides for others. Koshan takes issue with protecting the many interests of the general public against a small group of people who are already vulnerable and marginalized.⁵⁴³

IX. Remedies

If the court concludes that the *Calgary Transit Bylaw* in hypothetical scenario #1, the City of Calgary's *Parks and Pathways Bylaw* or the actions of the police officers in hypothetical scenario #2, violated the *Charter* rights of homeless persons under one or more of *Charter* sections 7, 15(1) or 2(b), and the violation cannot be saved by *Charter* section 1, homeless persons may seek a remedy under *Charter* section 24(1) and section 52(1) of the *Constitution Act, 1982 (CA, 1982)*.⁵⁴⁴ Section 52(1) of the *CA, 1982*, is the supremacy clause that gives the *Charter* "overriding effect."⁵⁴⁵ Section 52(1) of the *Constitution Act, 1982* provides that

⁵³⁹ *Abbotsford BCSC*, at para 243-245.

⁵⁴⁰ Koshan, *Should They Stay or Should They Go*, at 5.

⁵⁴¹ *Victoria (City) v Adams*, 2009 BCCA 563 (CanLII) at para 116.

⁵⁴² Koshan, *Should They Stay or Should They Go*, at 6.

⁵⁴³ Koshan, *Should They Stay or Should They Go*, at 6.

⁵⁴⁴ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52 [CA, 1982]. [*Charter*] section 24(1).

⁵⁴⁵ Hogg, at 40-42.

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.⁵⁴⁶

A remedy under section 52(1) of the CA, 1982 applies to the Bylaw itself. There is no discretion by the Court under section 52(1), so instead, the Court must declare the Bylaw to be invalid if it is determined to be inconsistent with the *Charter*. However, the Court has developed variations on the theme of a simple declaration of invalidity.⁵⁴⁷

The Court could temporarily suspend the invalidity of the Bylaw. This gives the Court the power to postpone the invalidity of the Bylaw until it can be rewritten so that it does not violate the *Charter* rights of the homeless.⁵⁴⁸ It is an exceptional response to leave in place legislation deemed unconstitutional. *Schachter v Canada* offers some guidance on suspending temporary invalidation of a piece of legislation.⁵⁴⁹ The three circumstances that may warrant a suspension of invalidity by the Court include a potential danger to the public, threat to the rule of law, or result in deprivation of benefits to others.⁵⁵⁰ The reasoning has been simplified to simply refer to putting the remedy in place as the Court and Legislature conversing with one another. In this circumstance, the Court would prefer that the legislature, in this case the City, craft a new Bylaw.⁵⁵¹

The Court could also sever the portion of the Bylaw that is inconsistent with the *Charter*. It is a helpful remedy when only part of a piece of legislation is determined to be invalid.⁵⁵² In the context of the City of Calgary *Parks and Pathways Bylaw*, the portion of the Bylaw that requires those who want to camp overnight in a park to obtain a permit could be severed.

The Court could 'read into' the Bylaw by adding any wording in to ensure the Bylaw is in accord with the *Charter*.⁵⁵³ This could resolve the under-inclusive nature of the Bylaw with

⁵⁴⁶ CA, 1982, s 52(1).

⁵⁴⁷ Hogg, at 40-43.

⁵⁴⁸ Hogg, at 40-3.

⁵⁴⁹ Hogg, at 40-8 and 40-9. See *Schachter v Canada*, (1992) CarswellNat 1006 (SCC).

⁵⁵⁰ Hogg, at 40-9.

⁵⁵¹ Hogg, at 40-9.

⁵⁵² Hogg, at 40-12.

⁵⁵³ Hogg, at 40-4.

respect to the homeless. Wording could be added to the Bylaw to include the class of homeless people in order to alleviate the effect of the vulnerable nature of homelessness.⁵⁵⁴

Additionally, the Court could allow for a constitutional exemption for the claimants from the application of the Bylaw under section 52(1) of the *CA, 1982*.⁵⁵⁵ A constitutional exemption is applicable in circumstances where the Bylaw is valid except for its application to a particular group or individual. This is relevant to vulnerable groups such as the homeless and people with addictions.⁵⁵⁶ Similar to the situation in *Insite*, the infringement is ongoing with serious and grave consequences to the health and safety of the DWS claimants. When drafting Bylaws, the City must consider the health and safety of all Calgarians and strike the right balance. The right to life, liberty, and security of persons not to be deprived except in accordance with the principles of fundamental justice is to be exercised for everyone, including the vulnerable groups of people that include the homeless, the impoverished, the disabled, Aboriginal persons, and those suffering from addictions⁵⁵⁷

The *Charter* has its own remedy under section 24(1),⁵⁵⁸ which states:

anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.⁵⁵⁹

A remedy under the *Charter* is applicable to government acts as opposed to the bylaws. It is a remedy that is more personal for the litigants. In this circumstance, it would be a remedy specifically for DWS and the homeless. A remedy that is appropriate and just in the circumstances allows for some discretion by the Court.⁵⁶⁰ On March 19, 2016, the Calgary Bylaw Officers required removal of all shelters and tents that had been erected, including the wooden tent for the safe injection site. On March 21, 2016, the City Bylaw Officers impounded the tents.

⁵⁵⁴ Hogg, at 40-16.

⁵⁵⁵ Hogg, at 40-20.

⁵⁵⁶ Hogg, at 40-20.

⁵⁵⁷ *Canada (Attorney General) v PHS Community Services Society (Insite)*, [2011] 3 SCR 134, 2011 SCC 44 (CanLII) [*Insite*] at 140.

⁵⁵⁸ *Charter*, s 24(1).

⁵⁵⁹ Hogg, at 40-3. *Charter*, s 24(1).

⁵⁶⁰ Hogg, at 40-3.

The court could require the City to return the tents to the homeless under section 24(1) of the *Charter*.

X. Conclusion

A significant portion of Alberta's bylaws affect vulnerable individuals in disproportionate ways, and violate the protected rights and freedoms contained within the *Charter*, including the right to life, liberty and security of person, the right to equality free from discrimination based on several grounds, and the freedom to express oneself. Legally, the only way to combat the substantially unfair effects of some government actions is by bringing forward *Charter* challenges and arguing for equal treatment in the manner described in this report. While some sections of the *Charter* have seen greater utilization and success before the courts throughout Canada, the potential for expanded scopes of argument and greater consensus in analysis for multiple sections of the *Charter* by the courts remains promising.

In conducting research on the unequal impacts of bylaws on homeless individuals and people living in poverty, and advancing potential challenges under the *Charter* that might be available to combat some government actions and legislation, it is our hope that the criminalization of people for being poor might see a steady decline moving forward. This issue is particularly important in light of the consideration that low-income and homeless individuals, such as in our introductory example of the single mother who rides Calgary transit without valid fare payment, often have no choice but to break the law by virtue of their socioeconomic status. However, these arguments comprise only a small part of a multifaceted approach that is necessary to truly reduce the criminalization of poor individuals. The Canadian justice system continues to be plagued with barriers to justice that affect the poor in many ways, including accessibility to lawyers and other legal resources that have traditionally been reserved for those with the socio-economic means to access it. Public policy reform, which is beyond the scope of the courts to address, is crucial in ensuring that the justice system is truly accessible to vulnerable and marginalized individuals.

XI. Law Reform Recommendations

This report contains only recommendations for law reform. Where we have encountered practical or policy reform suggestions, we have included these in Appendix C. The

second report to be performed with sociological research and stakeholder feedback will contain more extensive practical reform suggestions.

A. Legislative Reforms (Bill 9)

On April 13, 2016, Alberta Justice Minister Kathleen Ganley tabled Bill 9, *An Act to Modernize Enforcement of Provincial Offences*,⁵⁶¹ in the provincial legislature. The purpose of the legislation is to lift the disproportionate burden placed on low-income and vulnerable individuals who are unable to pay fines by introducing a new system for enforcing payment for provincial offences.⁵⁶² As Ms. Ganley noted during Legislative Assembly, the current system of incarcerating individuals who cannot afford to pay fines is both ineffective and financially inefficient. Prior to the introduction of this legislation, people who broke bylaws and failed to pay tickets or go to court in time to ask for an extension or fine reduction were issued warrants for arrest. Once a person has a warrant out for his or her arrest, he or she can be arrested and forced to serve time in jail if they enter into conflict with police or the law again.⁵⁶³ Incarceration for minor offences can have tragic consequences, as the story of Barry Stewart illustrates. Mr. Stewart, who was serving a few days in the Edmonton Remand Centre for unpaid fines, was killed by a mentally ill cellmate.⁵⁶⁴

The new legislation amends the existing *POPA*⁵⁶⁵ and the *Traffic Safety Act*⁵⁶⁶ such that warrants are no longer issued for outstanding fines stemming from bylaw infractions, and so justice system resources, such as police and courts, no longer need to address issues of minor infractions. Rather than issue warrants, outstanding fines “would be enforced using other civil measures, including restriction of motor vehicle registry services, filing writs against property, and garnisheeing wages, bank accounts, income tax refunds and GST rebates.”⁵⁶⁷ Ultimately,

⁵⁶¹ Bill 9: *An Act to Modernize Enforcement of Provincial Offences*, SA 2016, c 11.

⁵⁶² Government of Alberta, “Government introduces amendments to simplify and streamline how minor offences are enforced” (13 April 2016) online: <<https://www.alberta.ca/release.cfm?xID=41558AF04C543-FED0-4D7E-4D83642E32785EB8>> [Government Introduces Amendments].

⁵⁶³ Alberta, Legislative Assembly, *Hansard*, 29th Leg, 2nd Sess (19 April 2016), Hon Kathleen Ganley, at 640-649 [Hansard, Ganley].

⁵⁶⁴ *Hansard*, Ganley, at 640. See CBC News, “Edmonton Inmate Stomped to Death Owed \$287 LRT Fine” (25 May 2015) online: <http://www.cbc.ca/news/canada/edmonton/edmonton-inmate-stomped-to-death-owed-287-lrt-fine-1.3086516>.

⁵⁶⁵ *Provincial Offences Procedures Act*, RSA 2000, cP-34.

⁵⁶⁶ *Traffic Safety Act*, RSA 2000, cT-6.

⁵⁶⁷ Government Introduces Amendments.

the purpose of the new legislation is to end the cycle of poverty and incarceration that function to keep marginalized individuals in positions of vulnerability, and to keep individuals who do not present a threat to public safety out of jail. Additionally, following the lead of other Canadian provinces which have implemented similar procedures, such as Manitoba, Saskatchewan, and Nova Scotia, the new legislation “would streamline the ticket processing steps for police to allow them to file tickets electronically with the courts rather than in paper form.”⁵⁶⁸ Bill 9 received Royal Assent on May 27, 2016.

Although the new legislation is intended to directly address the problem of criminalizing poverty, the fundamental issue—namely that homeless people and those who live in poverty cannot afford to pay fines—is not resolved by introducing legislative amendments. As homeless advocate Nigel Kirk states, homeless people do not pay the fines because they do not have money, and the alternative measures such as garnisheeing wages and preventing people from registering vehicles that they might need to get to work has the same effect as ticketing and incarcerating them, rather than lightening their burdens. Mr. Kirk states that it would make more sense for homeless people to have access to transit tickets and safe places to sleep.⁵⁶⁹

B. Other Legislative Reforms

With respect to the legal system, a number of policy initiatives could also reduce the unequal impact of the city bylaws on poor and vulnerable individuals. Currently, Alberta Justice offers a number of alternative measures programs for people who have committed minor offences. The programs are designed to prevent “the individual from obtaining a criminal record, [prevent] the continuation of criminal behaviour, [promote] community involvement, [and foster] community awareness through participation.”⁵⁷⁰ One such program is the Fine Option Program, whereby offenders can receive hourly minimum wage credit toward working off the fines. The program is administered by the Alberta Justice Attendance Centre, and offenders are placed in various organizations and on work crews throughout the city to

⁵⁶⁸ Government Introduces Amendments.

⁵⁶⁹ Brodie Thomas, “Homeless Advocate Critical of Alberta’s Bill 9” *Metro News* (26 May 2016) online: <http://www.metronews.ca/news/calgary/2016/05/26/homeless-advocate-critical-of-alberta-bill-9.html>.

⁵⁷⁰ Alberta Justice and Solicitor General, “Adult Programs” Government of Alberta (2016) online: https://www.solgps.alberta.ca/programs_and_services/correctional_services/community_corrections/Pages/adult_programs.aspx#fine.

complete work terms.⁵⁷¹ These programs are valuable alternatives for individuals who struggle with unpaid fines, and Alberta Justice has a key role to play in ensuring that vulnerable individuals are aware of these programs and able to access them. This objective could be achieved by training peace officers to provide vulnerable individuals with information about alternative measures in as many different circumstances as possible.

Additionally, municipal prosecutors could work with vulnerable individuals to reduce fines and point them toward alternative measures whenever possible. Calgary City prosecutors are currently exercising their discretion to withdraw tickets in circumstances where individuals cannot pay. In addition, where they determine a conviction is warranted, they ask for a conviction, with no time to pay, followed by time in court as the requisite prison time served. Protocols have been developed where agencies such as CUPS, the Alex Community Health Centre, the John Howard Society, Students Legal Assistance, and Calgary Legal Guidance can provide the Prosecutor's office with details of hardships suffered by clients so that some of these initiatives may be followed.⁵⁷² While these may appear to be practical solutions, the actions of the prosecutors are guided by their *Charter* obligations.⁵⁷³

Finally, the City of Calgary has a role to play in drafting bylaws to ensure that their impact is not unequal. This includes drafting legislation with an eye toward protecting vulnerable individuals and frequently consulting with stakeholders, such as homeless advocates and municipal prosecutors and homeless people themselves, to ensure that legislation does not have a disproportionate impact.

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⁵⁷¹ Calgary Legal Guidance, "Fine Option Program" (2017) online: < <http://clg.ab.ca/programs-services/dial-a-law/fine-option-program/>>.

⁵⁷² Discussion with Ola Malik, City Prosecutor, on February 6, 2017.

⁵⁷³ Honourable Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009) 34(2) *Queen's Law Journal* 813.

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Appendix A Bylaws in Calgary and Edmonton

The following pages contain a chart in which several applicable bylaws from Calgary and Edmonton are described and compared. This was prepared in April 2016. Appendix B contains a list of applicable bylaws in other Alberta municipalities.

Offences	By-law provisions Calgary	By-law Provisions Edmonton	Purpose & Policy
<u>1. Transit Violations</u>	<i>Calgary Transit By-law 4M81</i>	<i>Conduct of Transit Passengers By-law 8353</i>	<i>Calgary Transit By-law 4M81- "...it is desirable to regulate and control the conduct of the users of the Calgary transit system to ensure (a) the safety of users & Transit employees (b) interference and harassment free use of the transit system and (c) that the operation of the transit system is carried out effectively and efficiently."</i>
a. Using the transit/ restricted fare area without valid proof of payment	S-5(1) (a & b), S-5(5), S-9(a), S-9(b) (Minimum penalty \$150, Specific penalty \$250)	S-5 (Fine \$250)	<i>Transit Policy Objective (Calgary Transport Plan) 3.3 Transit-Objective To provide a safe, accessible, customer focused public transit service that is capable of becoming the preferred mobility choice of Calgarians"</i>
b. Sell, exchange, give away or receive a transit valid proof of payment	S-10 (Minimum penalty \$150, Specific penalty \$250)	S-7 (No transfer, unless it states on its face that it may be transferred) (\$250)	
c. (Trespassing) Enter on LRT tracks or corridors or fences or sit, play walk within 3 meters of any LRT tracks	S-11.1 (Minimum penalty \$200, Specific penalty \$350)	S-22 Trespass (\$250)	<i>Edmonton- Conduct of Transit Passengers By-law 8353 -S-1 "...is to regulate the conduct and activities of people using the Edmonton Transit System in order to promote the safety and</i>

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			<i>welfare of the users of the Edmonton transit System"</i>
d. Expectorate (spitting), Urinate or defecate on transit property	S-14(1)(a)(Min penalty \$200, Specific penalty \$300)	S-9 (\$250)	
e. Passenger Harassment, Fighting, interfering with the comfort of other transit users	S-14(1)(b) Fighting; S-14(1)(c) interfere with comfort of other users (Min. penalty \$200, Specific penalty \$300)	S-10 (\$250)	
f. Damage/Litter/ eating or Drinking/ putting feet on seat	S-13 Damage (Min \$300, Specific \$500) S-14(1.1) Litter (Min \$500; Specific \$500)	S-16 Eating & drinking (\$100) S17 Putting feet on seats (\$250)	
g. Loitering	----X----	S-12 (\$250)	
h. Applying Graffiti on Transit property	S-14(18) (Min \$2,500; Specific \$5,000)	----X----	
i. Bringing bike on LRT/ skateboarding/ rollerblades etc.	S-14.1 (Min \$150, Specific \$250)	S-26 (\$250)	
j. Remove any lost article from transit vehicle	S-15 (Min \$150, Specific \$250)	----X----	

g. Disturb the peace enjoyment of others	<i>S-20(b) (Specific penalty \$100)</i>	<i>S-9(a) (\$100)</i>
h. Damage/deface or destroy park property/attaching signs posters, etc.	<i>S-17 (\$200), S-18 (\$200) & S-20(c) (\$100), S-25(2)(\$100)</i>	
i. Disobey signs/ Enter restricted areas	<i>S-25 (Specific penalty \$100)</i>	<i>S-10(a) (\$100)</i>
j. Gather a crowd	<i>S-21(f) (Specific penalty \$50)</i>	<i>S-15(c) (\$100)</i>
k. Prohibited Activities e.g. No stunts, unsafe activity, that may injure others, swing a golf club, golf ball, archery, sport activities	<i>S-17 to 24 (Specific penalty S-17-\$200; S-18 \$200 S-19 \$100; S-20 \$100 S-21 \$50; S-22 \$50 S-23 \$100; S-24 \$100)</i>	<i>S-13(a) & S-14 (\$100)</i>
l. Climb any building, sculpture or equipment in park	<i>---X---</i>	<i>S-6(a) (\$100)</i>

3. Fighting in Public

Public Places By-law 14614- S-7 (Specific

Calgary - Public Behaviour By-law 54M2006- “..it is desirable to establish a bylaw to

<p>Public Behaviour By-law-54M2006- S-3 (Specific Penalty \$250)</p>	<p>penalty (\$250; Double for subsequent offence)</p>	<p><i>regulate problematic social behaviours that may have a negative impact on the enjoyment of public spaces ..”</i></p> <p>Public Behaviour Policy- CSPA023; Calgary Council - Purpose: <i>“the purpose of the Public Behaviour Policy and the implementation of bylaw 54M2006 are to enhance public health and safety by setting a standard to correct negative behaviours. Addressing these negative behaviours is one component of a broader community crime prevention and development strategy. The behaviours identified in this by law are problematic regardless of who commits the offence therefore; this policy applies to all members of society. “The public behaviour Policy and bylaw is in alignment with the principles and outcomes of the <u>Fair Calgary Policy CSPA034.</u></i></p>
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<p>4. Public Urination or Defecation</p>	<p>Public Behaviour By-law-54M2006- S-4 (Specific Penalty \$300)</p>	<p>Public Places By-law 14614 -S-5 (Specific penalty (\$250; Double for subsequent offence)</p>	<p>Edmonton - Public Places By-law 14614- S-1 Purpose, <i>“ The purpose of this bylaw is to regulate the conduct and activities of people in public places to promote the safe, enjoyable, and reasonable use of such property for the benefit of all citizens of the City”</i></p>
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5. Panhandling

<p>Panhandling By-law 3M99- S-8(1) (Specific Penalty \$50; S-8(2) For subsequent/repeated offence within 24 months \$100)</p>	<p>Public Places By-law 14614 -S-4.1(1) “Aggressive panhandling”(Specific penalty (\$250; Double for subsequent offence)</p>	<p>Calgary - Panhandling Bylaw 3M99- “<i>panhandling has been identified as a significant social and safety concern...and ..a bylaw regulating panhandling is a required part of ...coordinated approach to ameliorate the negative impact of panhandling activities.</i>”</p> <p>Calgary - Panhandling Policy CSPS022 – Purpose “<i>..of the policy and bylaw is to provide strategies and restrictions in order to regulate panhandling and create public awareness around the social and safety concerns in an endeavour to improve the negative impact surrounding panhandling activities.</i>”</p>
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6. Jaywalking

<p>Calgary Traffic By-law 26M96- S-6(1) (Jaywalking Specific penalty \$25) S-6(3) Jaywalking on LRT right of way (\$60)</p>	<p>Edmonton Traffic By-law 5590 - S-59 “jaywalking on a highway” (Specific Penalty \$500)</p>	<p>Calgary - Calgary Traffic By-law E- Edmonton Traffic By-law 5590 S-1 Purpose “<i>The purpose of this bylaw is to regulate the use of highways under the direction, control and management of the City and to regulate the parking of vehicles on such highways as well as on privately owned property.</i>”</p>
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7. Littering

<p>Street By law 20M88 – S-17(1)(a) (Penalty \$500)</p>	<p>Public Places By-law 14614 -S-4 (\$250; Double for subsequent offence)</p>	<p>Calgary - Street By law 20M88</p>
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8. Spitting in Public

Public Behaviour By-law-54M2006- S-5 ----X----
 (Specific Penalty \$100)

9. Impoundment of Shopping Cart **Street By law 20M88 –** ----X----
 S-84(4)(c)(i) (Penalty \$25)

10. Unauthorised soliciting & selling/ street Vending **Street By law 20M88 –** **Traffic By-law 5590 S-**
 S- 3,4 & 5 (penalty 100 to 200) 67(1) (\$500)

11. Loitering & Obstruction **Public Behaviour By-law-54M2006- S-6(1)** **Traffic By-law 5590**
 (Specific Penalty \$250) S-60 (\$500)
 S-69 (\$500)

12. Climb/stand/put feet /interfere with any item of street furniture **Public Behaviour By-law-54M2006- S-6(2)** **Traffic By-law 5590 S-**
 (Specific Penalty \$50) 63(b) (\$500)

13. Carry a visible knife in public **Public Behaviour By-law-54M2006- S-7** ----X----
 (Specific Penalty \$50)

14. Smoking

	<i>The Smoking By-law 57M92</i> <i>S-3 (1 to 3) (Specific Penalty \$300</i> <i>S-3.2 Allow smoking where prohibited (\$200)</i> <i>S-4(2.2) & S-5.2(6) Allow under 18 person (\$300)</i>	<i>Public Places By-law 14614</i> -S-12 General smoking prohibition (\$250; Double for subsequent offence)	<i>The Smoking By-law 57M92 + Smoking Policy CSPS025, Purpose:</i> <i>“It is generally accepted that environmental tobacco smoke (or second hand smoke) has adverse public health effects and significantly distracts from the enjoyment of places open to public. Therefore, the purpose of the smoking policy and bylaw is to provide legislation that protects the health and welfare of the citizens of Calgary and people and activities in, on or near public places and places open to the public”.</i>
15. Hitchhiking	----X----	Traffic By-law 5590 S-62 (\$500)	
16. Harassing a pedestrian	----X----	Traffic By-law 5590 S-61 (\$500)	
17. No roller skating, inline skating, skateboarding etc. in downtown area/mall areas	<i>Stephen Avenue Mall By-law 52m2006</i> <i>S-6(2) No skateboard, roller-skating, riding, throwing projectiles etc. (Specific penalty \$75)</i>	Traffic By-law 5590 S-51 (\$250)	

*S-6(2.3) riding bicycles
interfering pedestrians
(Specific Penalty \$150)
S-17 Standing/put feet
on top/surface of any
food table placed on
Mall (\$25)*

18. Graffiti

Community Standards

By-law 5M2004

*S-19(2) person
applying graffiti (Min
penalty \$2,500,
Specific penalty
\$5,000) For Young
person- as defined in
the Youth Justice Act
RSA c Y-1- Applying
Graffiti- Minimum
penalty \$500, Specific
Penalty \$1,000)
S-19(3) Failure to
remove (Min penalty
\$50, Specific Penalty
\$150)*

Community Standards

By-law 14600

*S-9(2)(a.1) (\$250,
double for subsequent
offence)*

<p>19. Scavenging/ No disturbance/interference/removal of waste set out for collection</p>	<p>Waste and Recycling By-law 20M2001 <i>S-4(1) Scavenging waste or recyclable material (Specific Penalty \$125)</i> <i>S-39(c) Scavenge at disposal site (Specific penalty (\$125))</i></p>	<p>Waste management By-law 13777 S- 45 (1st offence - \$250; 2nd Offence \$500; 3rd offence \$1,000)(Schedule-B)</p>
<p>20. Waste disposal on other's property without consent</p>	<p>Waste and Recycling By-law 20M2001 <i>S-5 & S-6 Waste deposited without consent (Specific penalty \$250)</i> <i>S-42 Deposit improper material at/around bins at community recycling depot (Specific penalty \$250)</i></p>	<p>Community Standards By-law 14600 S-12.1 (\$250, double for subsequent offence)</p>
<p>21. Nuisance on land – accumulation of materials/litters/garbage that creates offensive odours</p>	<p>Community Standards By-law 5M2004 <i>S-8(1)(a)- (Min penalty \$100, Specific penalty \$300)</i></p>	<p>Community Standards By-law 14600 S-6 (\$250, double for subsequent offence)</p>

22. Animal/Pet By-law offences	<i>Responsible Pet Ownership By-law 23M2006</i>	<i>Animal Licensing and Control By-law 13145</i>
a. Unlicensed Dog	<i>S-3(1) (Minimum penalty \$100, specific penalty \$250)</i>	<i>S-4(1) (Specific Fine \$250)</i>
b. Unlicensed Cat	<i>S-4(1) (Minimum penalty \$100, specific penalty \$250)</i>	<i>S-19(1) (Specific Fine \$250)</i>
c. Fail to remove animal feces/defecation	<i>S-22 (1) &(2) Minimum penalty \$150, specific penalty \$250)</i>	<i>S-11 (Specific Fine \$250)</i>
d. Animal making excessive Noise/barking/disturbing peace	<i>S-23(1) (Minimum penalty \$50, specific penalty \$100)</i>	<i>S-10 (Specific Fine \$250)</i>
e. Animal running at large/ off property of owner	<i>S-12 (Minimum penalty \$50, specific penalty \$100)</i>	<i>S-13(1) (Specific Fine \$250)</i>

Appendix B Bylaws in Other Alberta Municipalities

(a) LETHBRIDGE

- Street By-law 3446
 - S-3 Crowding on Streets (\$25)
 - S-11 Obstructing free use of Streets (\$25)
 - S-12 Selling on streets (\$25)
 - S-18 Deface or disfigure and public or private building etc. (\$50)
 - S-23 Throwing of Stones etc. (\$25)
 - S-25 Loitering, abusive language, blowing horns etc. (\$20)
 - S-25(2) Fighting of sidewalk, boulevard or highway (\$100)
- Smoking By-law 3896
 - S-9 Contravention of this by law is an offence (Specific Penalty \$250)
- Public Parks By-law 5651
 - S-3 Accessibility- prohibited access to an area of the park (\$500)
 - S-6 Assembly without permit (\$300)
 - S-10 camping in a park (\$100)
 - S-18 Reduce public enjoyment (\$100)
 - S-21 Entering after park Closure (\$500)
 - S-26 Garbage & Litter (\$300)
 - S-28 Hours of use & beyond (12-5) (\$100)
 - S-31 Liquor consumption in park (\$100)
 - S-37 Pathway – lack of care and attention (\$300)
 - S-53 Urinate or defecate in park (\$100)
- Waste By-law 5724
 - S-21 Deposit waste in bin without owner's consent
 - S-22 Dumping in unspecified area (\$125)
 - S-22(a) Improper dumping at Landfill (\$100)
 - S-22(b) Scavenging (\$50)
 - S-22(c) Dumping when prohibited (\$125)
- Graffiti By-law 5529

- S-3(1) Applying Graffiti (\$2,500)
- Unsightly Property By-law 5630
 - Specified penalty (\$300)
- Noise By-law 5270
 - Specific penalty 1st offence \$100; 2nd offence \$200, 3rd and subsequent \$300.
- Traffic By-law 3499
 - \$25 for offences listed in Schedule A
 - \$30 for offences listed in Schedule B
 - \$50 for offences listed in Schedule C
- Dog Control By-Law 5235
 - S-3 Dog Running at large (\$100)
 - S-4(a)(i) to (vii) dog bites/injures/chases, howls etc. (\$100 to 200)
 - S-5 Dog transported loose in an open box of truck (\$200)
 - S-7 Dog Defecation (\$100)
 - S-8 Dog in Heat (\$60)
 - S-10(a) Unlicensed Dog (\$150)
 - S-10(c) Dog not wearing license (\$25)
 - S-19 Dogs Left without ventilation (\$100)
 - S-20 Dogs in Restricted Area (\$100)

(b) RED DEER

- Community Standards By-law 3383/2007
 - S-3(1) Making Noise (1st offence \$250; 2nd offence \$500; 3rd & Subsequent \$750)
 - S-3(3) Yelling, screaming or swearing (1st offence \$150; 2nd offence \$250; 3rd & Subsequent \$500)
 - S-12 Nuisance on private property (1st offence \$200; 2nd offence \$400; 3rd & Subsequent \$600)
 - S-13(a) Placing Graffiti on property (1st offence \$2500; 2nd offence \$5000; 3rd & Subsequent \$7500)
 - S-13(b) Failure to remove Graffiti (1st offence \$250; 2nd offence \$500; 3rd & Subsequent \$1000)
 - S-17 Nuisance on City property (\$500)
 - S-18(1) Littering on City property (1st offence \$500; 2nd offence \$750; 3rd & Subsequent \$1000)
 - S-18(2) Failing to remove litter (1st offence \$500; 2nd offence \$750; 3rd & Subsequent \$1000)
 - S-19(1) Urinating and/or defecating in a public place (1st offence \$500; 2nd offence \$750; 3rd & Subsequent \$1000)
 - S-19(2) Spitting (1st offence \$75; 2nd & Subsequent \$150)

- S-22 Fighting in a public place (1st offence \$500; 2nd offence \$750; 3rd & Subsequent \$1000)
- S-23 Being a member of assembly & failing to disperse (1st offence \$250; 2nd offence \$500; 3rd & Subsequent \$750)
- S-24 Loitering (1st offence \$250; 2nd offence \$500; 3rd & Subsequent \$750)
- S-25 Bullying (1st offence by a youth \$125; 2nd & Subsequent \$250 AND (1st offence by an adult \$500; 2nd & Subsequent \$1000))
- S-26 Panhandling (1st offence \$75; 2nd offence \$200; 3rd & Subsequent \$500)
- S-28 & 29 Breach of Curfew (Minors to be out in public b/w 12am to 6am) (1st offence \$125; 2nd offence \$250; 3rd & Subsequent \$500)
- Parks & Public Facilities By-law 3255/2000
 - S-4 Attaching ropes etc. to trees (\$50)
 - S-5(a) Injure, damage, destroy or remove trees or shrubs (\$100 + the cost to repair or restore)
 - S-5(b) Camping on any city lands other than a campground (\$50)
 - S-5(c) Conduct detrimental to use and enjoyment of park by others (\$100+ the cost to repair or restore)
 - S-5(g) Depositing waste or offensive matter (\$50)
 - S-5(h) using a park for the purpose of storage (\$100+ the cost to repair or restore)
 - S-5(i) Making a fire in a park in an undesignated site (\$100+ the cost to repair or restore)
 - S-5(m) Pollution (\$150 +penalty under *EPEA min\$250 for an individual*)
 - S-5(n) Selling without a license (\$150)
 - S-5(p) Vandalism (\$150 + the cost of repair)
 - S-7(2) participation in a public gathering b/w 11pm and 7am (1st Offence \$100, 2nd offence \$150; 3rd offence \$200)
 - S-7(8) Interference with peaceful enjoyment by others (1st Offence \$100, 2nd offence \$150; 3rd offence \$200)
 - S-13 Allowing another to breach the by-law (\$100)
- Smoke free By-law 3345/2005
 - Fine for the first offence \$200 and for the 2nd & subsequent \$200 to \$2,500)
- Use of Streets By-law 3161/96(By Law)
 - S-13 breach of this by-law – specific penalty for the 1st Offence \$250; any subsequent offence \$500)
- Traffic By-law 3186/97
 - S-14 Crossing streets when signs prohibit (jaywalking) (\$30)
 - S-15 Obstructing a highway (\$30)
 - S-16 obstructing vehicular/ pedestrian traffic / not involved in a Specific event (\$50)
 - S-17 Unauthorised public meetings (\$35)
 - S-19 Hitchhiking (\$30)
 - S-21 bicycles on sidewalk where prohibited (\$35)

- S-22 Skateboards on sidewalks where prohibited (\$35)
- S22.1 Operating bicycles, skateboards, roller blades in Transit Terminal (\$35)
- S-80(1) Failure to obey transit or parkade regulation (\$30)
- S-92 Storing material on City property without permit (\$100)
 - (Rest parking violations)
- Escort Service By-law 3319/2003
 - S-26 Unlicensed Escort (\$2,500)
 - S-27 Underage Escort (\$500)
 - S-28 Escort operating without Escort Agency (\$2,500)
 - S-32 *Employing services of unlicensed escort* (\$2,500)
 - S-33 *Employing Services of underage Escort* (\$5,000)
 - Incorrect, Incomplete or misleading Information (\$500)
 - S-37 fail to provide license (\$500)
- Dog By-law 3429/2009
 - S-9(1)(a) Failing to obtain a Dog tag (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-9(1)(c) Failing to ensure that the dog is wearing a Dog tag (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-9(3)(a) Failing to obtain an aggressive dog tag (1st offence \$500; 2nd Offence \$750; 3rd Offence \$1,000)
 - S-10(1)(b) Dog or Aggressive Barking/howling so as to disturb the peace (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-10(1)(c) Failure to immediately remove dog defecation (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-10(1)(d) Accumulation dog defecation on private property (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - Dog destroying/damaging property (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-10(1)(g) Taking dogs on parklands where prohibited (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-10.1 Dog running at large (1st offence \$250; 2nd Offence \$500; 3rd Offence \$750)
 - S-13(1)(a) Dog biting/attacking causing minor injury to another animal (1st offence \$500; 2nd Offence \$750; 3rd Offence \$1000)
 - S-13(1)(b) Dog biting/attacking causing minor injury to a person (1st offence \$1,000; 2nd Offence \$2,500; 3rd Offence \$5,000)
- Cat By-law 3174/96
 - S-6 interference with enforcement of bylaw (\$60)
 - S-13(a) Cat runs at large (\$30, 2nd offence \$60)
 - S-13(b) Cat damages public or private property (\$30, 2nd offence \$60)
 - S-14 Enticing the cat to run at large, tease, throe or poke objects fails to check hourly etc. (\$510)

(c) MEDICINE HAT

- Public Safety By-law 4009
 - S-3(1) Fighting in public place (Specific penalty \$ 250)
 - S-4(1) Loitering & Obstruct (\$250)
 - S-4(2) Stand/put on top or surface of any table, bench, planter or sculpture (\$200)
 - S-5(a)-(d) Panhandling prohibitions (\$200)
 - S-6(1) Bullying (\$250)
 - S-6(2) Encouraging Bullying (\$200)
- Parks & Recreational Areas By-law 2527
 - S-5(2) Allowing dog or livestock to disturb vegetation or comfort or safety of persons using park (\$100)
 - S-6(2)(d) Selling for articles for a fee (business activity) (\$100)
 - S-7(1-3) Public Gathering (\$50)
 - S-9(2) Casting stones, or other dangerous objects (\$100)
 - S-9(3) propelling golf balls and/or shooting arrows (\$100)
 - S-10(2) Walking, standing or sitting on flower beds or shrub beds (\$50)
 - S-10.3 Walking, crossing or using any grass, plot or land where prohibited (\$50)
 - S-13(1) Obstructing free use or enjoyment of park (\$50)
 - S-13(2) Public Nuisance (\$50)
 - S-13(3) Consumption of alcohol (\$150)
 - S-13(4) Entering park while intoxicated (\$150)
 - S-14(1) Starting fire in places other than receptacles for such use (\$50)
 - S-14(4) Removing firewood from park (\$50)
 - S-16 Riding bicycle in a restricted area (\$50)
 - S-17 Camping without permission (\$50)
 - S-18(2) Entering parks or recreational areas after the designated hours (\$50)
 - S-20(1)(a) Fishing where prohibited (\$50)
 - S-20(5) Fishing in a swimming lake (\$50)
 - S-20(5)(a) Fishing other than with rod and reel (\$50)
 - S-20(6)(b) Feeding farm animals (\$50)
 - S-20(6)(c) Entering barn or animal enclosures without permission (\$50)
- Street By-law 1556
 - S-6 No throwing any materials on streets-16 Prohibition of scattering any advertising matter on street
 - S-17 No parade possession

- S-22 Sidewalk use
- S-35 Street Noise prohibition
 - Specific penalty is \$100
- Graffiti By-law 3679
 - S-3(1) Applying graffiti (\$2,500)
 - S-3(2) failing to remove (\$50)
 - S-3(3) Possession of Graffiti Instrument (\$1,000)
- Skateboarding By-law 3506
 - S-3(a) Skateboarding on a road in the City centre (\$50)
 - S-3(a) Skateboarding on a Property in the City centre without the consent of the owner (\$50)
 - S-4(a) Skateboarding on a road Outside the City centre where prohibited (\$50)
 - S-4(b) Skateboarding on a Property Outside the City when prohibited by sign (\$50)
- Anti-Noise By-law 1926
 - S-7 prohibitions (except (i)) (As a First offence may voluntarily pay the penalty of \$40)
- Smoke Fee Outdoor Public Places By-law 4136
 - S-3 Prohibitions (\$100)
- Smoke Free Vehicles for Minors Y-law 4053
 - S-3 Prohibitions (\$100)
- Waste By-law 1805
 - S-5 Accumulation of waste prohibited
 - Specific penalty is \$100 for any contraventions except S-18(1) &(2)
 - *Specific Penalty of S-18(1) &(2) is \$500 (not relevant)*
- Escort Services By-law 3472
 - S-9.3 Unlicensed Escort (\$500)
 - S-9.4 Underage Escort (\$300)
 - S-9.5 Escort Operating Without an Agency (\$500)
 - S-9.20 Failure to provide License (\$500)
 - S-9.21 Carry on Business from Unspecified Location (\$500)
- Outside Burning By-law 2703
 - S-2 General Prohibition on Outside burning

- S-7 Liable upon summary conviction to pay fine of \$100 or in default of payment to be imprisoned for a period not exceeding 60 days.

(d) FORT MCMURRAY

- Public Disturbance by-law 02/011
 - S-2 Prohibition to public fighting or other physical confrontation
 - S-3 Specific Penalty \$250
- Smoke Free By-law 07/042
 - S-26 Specific Penalty (\$250) (in default 6 months imprisonment s-27)
- Roads & Transportation By-law 02/079
 - S-6.01 Jaywalking (\$120)
 - S-6.02 Walking across where traffic control device prohibits (\$120)
 - S-13.08 damage to any street furniture (\$500 + repair/replacement cost)
 - S-13.09 Littering
 - (<20kg or <0.5 cubic meters in volume- (Minimum \$500 +Clean-up cost)
 - (>20kg or > 0.5 cubic meters in volume- (Minimum \$1000 +Clean-up cost)
 - S-13.16(A) Defacing highway or street furniture (Min \$1,000 +Cost of repair)
 - S-13.16(D1) Remove any other street furniture (\$500 + replacement cost)
- Animal Control By-law 02/031
 - S-3 Licensing provisions
 - S-4 Animal Control provisions
 - S-5 Vicious Animal provisions
 - S-8 Penalties Specific Penalties for offences under S-5 (vicious animal) is &1,000 as per Appendix-B)
 - S-8.03 General Penalty by law for offences under other sections
 - S-8.04 Violation ticket pursuant to Part-2 of the *Provincial Offences Procedure Act*
- Solid Waste Collection & Disposal Bylaw 07/043
 - S-21 Setting out unacceptable waste for collection (\$150)
 - S-24 Allowing waste to accumulate (\$125 + Clean-up cost)
 - S-63 Smoking within the boundaries of sanitary landfill (\$125)
 - S-67 Disposal at Unauthorized Location (\$500 + Clean-up cost)
 - S-69 Unauthorized Scavenging at a sanitary landfill (\$125)

- Open Air Fire By-law 01/084
 - S-4.6 Fire pit operation without permit (\$500)
 - S-7.1(b) Ignite open air fire without a permit (\$50)
 - S-7.1(c) Burn or permit to be burned prohibited debris (\$100)
 - S-7.1(i) Cause smoke in inhabited areas in excess of permitted levels (\$100)
- Nuisance Property By-law 00/078
 - S-3.1 Nuisance on private property
 - S-3.2 Nuisance on public property
 - S-3.4 Littering on public property
 - No specific Penalty - S-4- Remedy/penalty clause – Notices + on Non-compliance – recover the Cost of the work.
- Parks & Recreational Area By-law 99/028
 - S-6 Prohibition to enter any body of water
 - S-7 Various prohibitions on Park Use
 - S-8 Prohibition against public gathering
 - S-9 Prohibition on camping or erecting a tent in the park
 - S-10 Prohibition on fires
 - S-11 Prohibition on sale of goods & services
 - S-12 defines hours of operation of park
 - No Specific Penalty: S-14 provides provisions for violation tickets pursuant to Part-2 of the *Provincial Offences Procedure Act*
- Noise By-law 83/24
 - Part 8 Penalties S- 12 (Minimum fine for first offence \$25 & for 2nd offence minimum fine \$50)
- Single use Shopping Bag By-law 12/007
 - S2(e) “Retail Establishment” means any location where goods are offered for sale
 - Specific Penalty for violation of any section (1st offence \$250; 2nd Offence \$500; 3rd Offence \$1,000 Schedule-A)

(e) CITY OF TABER

- Community Standard By-law 4-2015
 - S-3&4 Parent/Guardian allowing a minor in public places during curfew period (11pm to 6am per day) (1st offence \$100; 2nd & subsequent \$200)
 - S7 Graffiti) (1st offence \$2,500; 2nd offence - \$5,000; & 3rd & subsequent \$7,500)

- S-9 Urinating or defecating in public (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
- S-10 Spitting in a public place (1st offence \$75; 2nd & subsequent \$150)
- S-11 Fighting (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
- S-12 Assembly and failing to disperse (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
- S-13 Loitering (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
- S-14 Panhandling (1st offence \$75; 2nd offence - \$200; &3rd & subsequent \$300)
- S-15 Yelling, screaming, swearing (1st offence \$150; 2nd offence - \$250; &3rd & subsequent \$500)
- S-16 to 21 Noise (1st offence \$150; 2nd offence - \$250; &3rd & subsequent \$500)
- The Nuisance By-law 4-2008
 - S-3 Nuisance
 - S-5 Littering
 - S-7 Noise
 - Violation tickets fines 1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$400)
- Burning Control By-law 4-99
 - S-9 Penalty under this by-law (\$250 on summary conviction)
- Traffic Control By-law 6-2005
 - S-3 Parades or Possessions (\$115)
 - S-4 Conduct in case of Fires (\$57)
 - S-9 Rights & Duties of Pedestrians
 - S-9.01 No pedestrian shall crowd or jostle others to cause discomfort, disturbance or confusion (\$57)
 - S-9.02 (a) No person shall stand in a group of 3 or more resulting obstruction (\$57)
 - S-9.04 Hitchhiking (\$57)
 - S-9.05 Racing on roadways (\$57)
 - S-15 Cyclist, skaters, horses and horse drawn vehicles
 - S-15.01 No cycling with a wheel with a diameter exceeding 40 cm. (\$57)
 - S-15.02 No ice skating or tobogganing on roadways (\$57)
 - S-18.01(c) No person shall remove a shopping cart (\$57)
 - (other Traffic & Parking Offences deleted from the list)
- Dog Control By-law 3-2008
 - S-4.a(i) Dog running at large (\$25 to \$100 as per specific offences)
 - S-4.a(ii) Dog bites a person (\$500)
 - S-4.a(iii) Dog injures a person (\$250)

- S-4.a(iv) Dog chases a person (\$250)
- S-4.a(vii) Dog causes damage to the property or other animals (\$100)
- Neglect of Dog (\$250)
- S-8 Dog Defecation (\$50)
- S-11.a Dog not licensed (\$100)
- S-11.c Dog not wearing license (\$100)
- S-13.c No one million dollar insurance for an aggressive dog (\$500)
- S-16 Obstruction (\$500)
- S-22 Dogs in restricted area (\$100)
 - For Second offence Double fine of the above, for 3rd –triple the amount)
- Cat Control By-law 3-2003
 - S-3.4 Licence for cats
 - S-3.9 Public Nuisance by cat
 - S-3.10 No person shall tease, torment annoy, loose, untie or otherwise free the cat
 - S-4 Running at large penalty by the owner as per Schedule A (MISSING)
- Extended Dance Event By-law 12-2001
 - S-19 Participate in an unlicensed Extended Dance Event (Min penalty \$1,500 Specific Penalty \$2,500)

(f) CITY OF CARDSTON

- Community Standards By-law #1639
 - S-3(1) Make Noise (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
 - S-3(2) Permit Noise (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$750)
 - S-3(3) Yelling, Screaming or swearing (1st offence \$150; 2nd offence - \$250; &3rd & subsequent \$500)
 - S-12 Permit Nuisance on Private Property (1st offence \$200; 2nd offence - \$400; &3rd & subsequent \$600)
 - S-13(a) Placing Graffiti on property (1st offence \$500; 2nd offence - \$1,000; &3rd & subsequent \$2,500)
 - S-13(b) failure to remove Graffiti (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$1,000)
 - S-17 Nuisance upon City property (\$250)
 - S-18(1) Depositing Litter on City Property (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$1,000)
 - S-18(2) failure to remove litter (1st offence \$250; 2nd offence - \$500; &3rd & subsequent \$1,000)
 - S-19(1) Urinating or depositing human waste in a public place (1st offence \$500; 2nd offence - \$750; &3rd & subsequent \$1,000)
 - S-19(2) Spitting in public (1st offence \$75; 2nd offence - \$150)
 - S-20 Placing objects (pamphlets etc.) on motor vehicles (\$50)

- S-22 Fighting in public (1st offence \$250; 2nd offence - \$500; & 3rd & subsequent \$1,000)
- S-23 being a member of an assembly and fail to disperse (1st offence \$250; 2nd offence - \$500; & 3rd & subsequent \$750)
- S-24 Loitering (1st offence \$150; 2nd offence - \$300; & 3rd & subsequent \$500)
- S25 Bullying (1st offence \$125; 2nd offence - \$250)
- S-26 Panhandling (1st offence \$75; 2nd offence - \$150; & 3rd & subsequent \$300)
- S-28 Breach of Curfew (for Minors(BELOW 16YEARS OF AGE) 12am to 6am) (1st offence \$100; 2nd offence - \$200; & 3rd & subsequent \$500)
- Smoking By-law #1626
 - S-2 prohibition
 - S-4(b) Minimum Penalty (1st offence \$50; 2nd offence - \$100; & 3rd & subsequent \$200)
- Traffic Safety By-law #1618
 - S-6.04 Obstruct authorized parade or procession \$50
 - S-8.01 Running unorganized races on highways or sidewalks \$30
 - S-8.02 Playing games in street or lane \$30
 - S-8.03 Dangerous conduct in street or lane \$30
 - S-8.04 Group obstruction \$30
 - S-8.05 Disturbing pedestrians \$30
 - S-8.06 Climbing on rails, fences, trees or posts \$40
 - S-8.08 Defacing public/private property \$100
 - S-8.09 Unlawful placing/posting of posters or handbills \$50
 - S-8.11 Destroy landscape in public place \$100
 - S-8.12 Unlawful auctioning on street \$50
 - S-8.13 Obstruct street, sidewalk with merchandise \$50
 - S-8.14 Ski, toboggan on street or sidewalk \$50
 - S-8.15 (i) Riding bicycle on sidewalk \$25
 - S-8.15 (ii) Skateboard, inline skates, etc. on sidewalk of Main Street \$25
 - S-8.19 Walking on roadway \$25
 - S-8.20 Walking the wrong way on roadway \$50
 - S-8.20 Pedestrian impedes traffic? \$100
 - S-8.21 Obstructions on sidewalks or boulevard \$50
 - S-8.22 Cross a roadway not on a crosswalk \$50
 - S-8.23 Crossing a crosswalk when a control device prohibits crossing \$50

- S-8.24 Placing poster, handbill, etc. on traffic control device \$50
- S-10.02 Mischief to public property \$50
- S-10.03 Unauthorized vehicle on Town-owned land \$100
- Graffiti By-law #1615
 - S-7(b) Specific Penalties –Schedule A (*Schedule was missing*)
- Litter By-law #1598
 - S-3 Littering on Streets (Specific Fine \$50)
 - S-4 Littering on other town property (Specific Fine \$50)
- Public Safety By-law #1608
 - S-3 Fighting in Public
 - S-4 Loitering
 - S-5 Panhandling
 - S-6 Urination & Defecation
 - S-7 Spitting
 - S-8 Flyers of vehicles
 - S-9 Dangerous Actions like throwing objects
 - S-10 cause Disturbance by noise
 - Specific penalties – Schedule A (*But Schedule A was missing*)
- Curfew By-law #1535B
 - (Not in this by-law BUT under - S-28 of the Community Standards By-law: Breach of Curfew (for Minors(BELOW 16YEARS OF AGE) 12am to 6am) (1st offence \$100; 2nd offence - \$200; &3rd and subsequent \$500)
- Cat By-law #1632
 - S-3 Fail to license cat (1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$300)
 - S-3(a) Fail to wear license (1st offence \$75; 2nd offence - \$150; &3rd & subsequent \$225)
 - S-8.a Running at large (1st offence \$75; 2nd offence - \$150; &3rd & subsequent \$225)
 - S-8.b Fail to remove defecation (1st offence \$75; 2nd offence - \$150; &3rd & subsequent \$225)
 - S-8.c (1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$300)
 - S-8.d Cause damage (1st offence \$75; 2nd offence - \$150; &3rd & subsequent \$225)
 - S-8.e Upset waste receptacle (1st offence \$75; 2nd offence - \$150; &3rd & subsequent \$225)
 - S-8.g Injure a person (1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$300)
 - S-9.e Release cat from Private Trap (1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$300)
 - S-9.f provoke Cat (1st offence \$100; 2nd offence - \$200; &3rd & subsequent \$300)

- Dog By-law #1625
 - Specific Penalties in Schedule A, Classifies Offences under this by-law into 4 levels (ABCD) depending upon the intensity and gravity
 - For level A Offences- (1st offence WARNING; 2nd offence - \$200; & 3rd offence \$400)
 - For Level B Offences (1st offence \$500; 2nd offence - \$750; & 3rd & subsequent \$1000)
 - For Level C Offences (1st offence \$1000; 2nd offence - \$2000; & 3rd & subsequent \$5000)
 - For Level D offences (1st offence \$2,500 to \$10,000; 2nd offence - \$5,000 and some to be decided by court; & 3rd Offence \$7500 & some to be decided by court)

Appendix C Practical Reforms

Currently, the City of Calgary offers low-income monthly transit passes for \$44 per month, and beginning in April 2017, the cost of a monthly bus pass will be based on a sliding household income scale so that the passes are more affordable. However, even if homeless individuals are able to pay \$44 for a transit pass for the month, the service is not necessarily accessible for everyone. In order to qualify for a low-income pass, individuals must present proof that they are resident of Calgary by providing an address, and PO Boxes and bank statements are not accepted. Further, the pass user must carry photo identification in order to present to transit and peace officers upon request,⁵⁷⁴ and for many homeless individuals who do not have birth certificates or social insurance numbers, obtaining photo ID is virtually impossible. Additionally, although Calgary Transit does not define what actually constitutes misuse, individuals who misuse the low-income pass may incur fines under the *Transit Bylaw* and have their passes suspended.⁵⁷⁵

Seattle Transit and King County Metro have partnered with local non-profit agencies to distribute free metro tickets to individuals. However, this program is not without issue. Non-profits must pay a discounted rate for the tickets that they distribute, and when distributing the tickets, they must collect personal information from clients and can only provide limited amounts of tickets at one time.⁵⁷⁶ The City of Calgary has a similar program for providing low-income and homeless individuals with free transit tickets through the Drop-In & Rehab Centre (the DI).⁵⁷⁷ Additionally, the City of Edmonton has launched a pilot to provide 100 vulnerable youth with free monthly passes, which are to be distributed by social agencies. At the end of each month, the youth are asked to return the passes and answer questions that will give

⁵⁷⁴ Calgary Transit, “Low Income Monthly Pass” *The City of Calgary* (2015) online:

<<https://www.calgarytransit.com/fares-passes/passes/low-income-monthly-pass>> [Low Income Monthly Pass]

⁵⁷⁵ Low Income Monthly Pass.

⁵⁷⁶ Brent White, “Three Steps to Free Monthly ORCA Passes for the Homeless” *Seattle Transit Blog* (11 April 2016) online: <<https://www.seattlettransitblog.com/2016/04/11/two-steps-to-free-monthly-orca-passes-for-the-homeless/>>

⁵⁷⁷ Calgary Transit, “The Calgary Transit PIC Program” online: <<http://www.homepics.ca/>>.

program coordinators insight into how the passes are used and the impact of the program on the lives of the youth.⁵⁷⁸

For homeless and some low-income individuals, the provision of free transit passes with photos of the individuals directly on the pass is likely the most promising solution. Certainly, the objective that requires transit riders to pay fares is valid, but the system must have some means of differentiating between those who can pay the fares and those who cannot. Putting individual photos on each pass would prevent selling and transference of the passes, and if they are lost or stolen, they could potentially be recovered and returned. Additionally, this would eliminate problems with access to identification, because the people using the passes would not be required to carry around photo identification in order to present to peace officers. Calgary Transit could work with agencies that provide services to homeless individuals, such as the Alex and the DI, to distribute the passes and take photos.

⁵⁷⁸ Caley Ramsey & Slav Kornik, “City Approves Free Transit for Vulnerable Edmonton Youth” *Global News* (14 September 2015) online: <http://globalnews.ca/news/2218248/city-considers-free-transit-for-vulnerable-edmonton-youth/>.