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ALL YOU NEED TO KNOW ABOUT PARKS

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I. INTRODUCTION

When strolling through a beautiful BC park on a Sunday walk, one frequently ponders the nature of the park, articulating fascinating and existential questions into the forest mists. Who owns this beautiful place? Where did it come from? Why is a bylaw that has received the approval of the electors required in order for municipal council to cancel the dedication of this park and sell it to a corporate interest for redevelopment purposes?

Passersby stare, but you continue to wander along a winding, dirt trail, only to observe someone barbecuing on the edge of the park, having seemingly extended their wonderfully landscaped yard into what is surely parkland. How did this happen? This is my park…or is it?

These thoughts tend to leave a person unsettled. Sleepless nights ensue. How can one go on without the answers to such questions, so profound?

Look no further. This paper provides the answers you seek, exploring the legal nature of parks, how parks may be used, illegal tree removal, camping in parks and more.

Of course, the reader is advised that this paper is intended to be used for relaxation purposes only, to assist in achieving personal enlightenment, having been written by one or more espresso infused Young, Anderson lawyers. In the event of an actual legal issue concerning a park, it is important to obtain calm, considered legal advice.

II. WHAT IS A PARK?

What is a park, and why does it matter from a local government perspective? The term 'park' is used in many provisions of the *Community Charter* (the "CC") and the *Local Government Act* (the "LGA"). Those Acts set out mechanisms for creating parks, for funding parks and for regulating parks, and they include restrictions on how certain types of parks may be disposed of. However, neither of those Acts actually defines 'park'.

The Oxford Dictionary defines "park" as, "A large public garden or area of land used for recreation". Black's Law Dictionary Defines "park" as "An enclosed pleasure-ground in or near a city, set apart for the recreation of the public". In *Winnipeg (City) v. St. Vital (Rural Municipality)*, the Court approved of the following statement, "A 'park' may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement and enjoyment".

These definitions, while basic, illustrate the broad meaning attributed to 'park' and highlight that parks may be passive (gardens, forests with trails) or have more active elements (sports fields, playgrounds) and that parks are available for public use.

It is interesting to note that parks, as we now understand them, are a relatively recent development (approx. 150 years, in the US at least). In *Shoemaker v. United States*, the US Supreme Court noted, in concluding that land expropriated for a public park was taken for a public purpose:

> It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city. It is said, in Johnson's Cyclopaedia, that the Central Park of New York [established in 1857, according to Wikipedia] was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.
>
> [NOTE ADDED]

III. TYPES OF PARK

A. Park That Is Not Park?

Land may be used as a park, called a park and perceived as a park, without having any legal status that would attract the statutory or other restrictions on how parks may be used or sold. A local government can use a land as park, without any legal formality and may be free to cease using such land as park and sell the land, without going through any type of public approval process, or having to apply to court or to the Province. While such a sale might attract political criticism, the council or board can simply pass a resolution to authorize the sale.

At the same time, the *Canadian Charter of Rights and Freedoms* (the "*Charter*") will still apply to such a park, which can affect the enforceability of a park regulation that infringes on a *Charter* right, such as freedom of expression or religion.

While some park land may not have any special park status, many local government parks do have some legal status as park, that gives rise to legal restrictions on how they may be used and sold. In some cases, such restrictions arise as a result of how the park is acquired, such as where park is dedicated by way of a plan deposited in the land title office. In other cases, a council or board might purposefully set aside land as park, such as by enacting a bylaw.

B. Park Dedicated by Plan

Perhaps the most common way for land to acquire legal status as park is for the landowner to dedicate the land as park by depositing a plan in the land title office pursuant to section 107 of the Land Title Act (the "LTA"). Upon the deposit of such a plan, the land shown as park on the plan becomes dedicated as park. The area shown as park no longer has any title in the land title office.

If the dedicated land is in a municipality, the park vests with the municipality (section 29(1) of the CC). If the land lies outside a municipality, the regional district is entitled to possession and control of the park, but the park vests in the crown (section 279 of the LGA).

C. Park Required on Subdivision or Provided in Lieu of DCCs

Where an owner is required to provide parkland under section 510 of the LGA in connection with a subdivision of land, that parkland is to be shown as park on the subdivision plan and is dedicated as park under section 107 of the LTA.

If an owner provides parkland in lieu of development cost charges under section 567 of the LGA, the owner may provide the land by way of a fee simple transfer (in which case there is no formal park dedication) or by showing the land as park on a subdivision plan, in which case section 107 of the LTA applies.

Where land is dedicated as park under section 510 or 567 of the LGA, the park vests in the municipality or, if outside a municipality, in the regional district. Note that the rule for regional districts differs here from other cases where land outside a municipality is dedicated as park by subdivision plan (where the regional district is only entitled to possession and control of the park) (section 279 of the LGA).

D. Park Dedicated by Bylaw

A municipal council may adopt a bylaw to dedicate or reserve municipal land for park purposes, by affirmative vote of at least 2/3 of all council members (section 30 of the CC).

A regional board also has this power (section 278 of the LGA).

E. Regional District - Regional Parks and Trails

While the *Park (Regional) Act* was repealed in 2003, regional parks and trails continue under the LGA. Under the Schedule to the LGA, 'regional park' is defined as a "park set aside and dedicated as a park under the *Park (Regional) Act* and continued under this Act or a park dedicated by a regional district under this Act". The term 'regional trail' has a similar definition.

Section 191 of the LGA provides that the repeal of the *Park (Regional Act)* does not affect the park status of regional parks or regional trails dedicated under that Act and provides for the continuation of regional park and regional trail services under letters patent, as if the service were provided under a service establishment bylaw.

It is worth noting that the definition of 'regional parks' indicates that all parks dedicated by a regional district are 'regional parks' under the LGA. This suggests that where a regional district dedicates land as park by way of bylaw (as discussed above), such land becomes regional park.

F. Trust Parks

A landowner may transfer land to a local government on the trust condition that the land be used for park purposes. The intention to create such a 'trust' might be expressly stated in the documents transferring the lands to the local government. Alternatively, a trust may arise by implication.

Whether a trust will arise in any given case involves two approaches: First, a consideration of the intentions of the municipality and the transferring owner as revealed by the deed of transfer, and second, a consideration of the intentions of the parties having regard to all the surrounding circumstances [*O'Neill Community Ratepayers Assn. v. Oshawa*].

At one time, municipalities had an express power to accept property subject to a trust, however, this power is now part of a municipality's 'natural persons powers' under section 8(1) of the CC.

Regional districts continue to have an express power to accept property subject to a trust (section 282 of the LGA).

G. Crown Grant Restrictions

In some cases, the terms of a crown grant may effectively limit the use of the land to park purposes. For instance, a grant from crown might be made on a 'condition subsequent' that the land be used for park purposes. If the condition is breached, such a breach gives rise to a right for the crown to re-enter the land.

Similarly, a grant of land could be subject to a limitation, such as, that the land is granted to the local government "for so long as the land is used for park purposes". If the local government ceases to use the land for park purposes, the ownership of the land reverts to the crown.

As a result, where a local government holds land on condition subsequent or subject to a possibility of reverter, non-park use may result in the land going back to the crown.

H. SRWs

A common way to hold parkland is for the local government to acquire a statutory right of way under section 218 of the LTA over private property, commonly for public trail or walkway purposes. In the normal case, the local government maintains and operates the trail as part of its trail network and the statutory right of way creates an interest in the subject property that permits the local government to operate and maintain the trail and to permit the public to use the trail.

I. Parks on Private Property?

Sometimes, such as in connection with a rezoning application, a developer will agree to having public access over private amenities, such as to walkways and trails, or a public plaza, located within the development. Such public use is typically secured by means of a use covenant under section 219 of the LTA in favour of the local government requiring the developer to use the affected areas as required. It is also prudent to obtain a statutory right of way under section 218 of the LTA enabling the local government to permit such public access and, possibly, to repair and maintain the public access area where the owner does not do so in accordance with the section 219 covenant.

IV. DISPOSING OF PARKLAND

Depending on the legal nature of the park, there can be significant impediments to selling parklands.

A. Park Dedicated by Plan

Where park is dedicated by deposit of a subdivision, reference or explanatory plan under section 107 of the LTA (including subdivision park under section 510 of the LGA and DCC park under section 567 of the LGA), the council may only dispose of the park by adopting a bylaw that has first received the approval of the electors (section 30 of the CC).

The proceeds of the disposition must be placed in the municipality's parkland acquisition reserve under section 188 of the CC. Alternatively, the municipality can dispose of the park in exchange for other land suitable for a park. The disposition of the former park operates to cancel its dedication as park. The CLE Land Title Practice Manual sets out the land title office process to effect a disposition under section 27 of the CC.

Pursuant to section 281 of the LGA, section 27 applies to the disposition of regional district parks dedicated by plan under section 107 of the LTA, including those parks vested in the crown over which the regional district is entitled to possession and control.

B. Park Dedicated by Bylaw

If land is dedicated or reserved as park, in order to cancel the dedication or reservation, the council or board must adopt a bylaw, but only after the bylaw has received the approval of the electors (section 30(3) of the CC and section 278 of the LGA).

C. Regional Park

A regional district may sell regional park, but only by bylaw adopted with the approval of the electors (section 280 of the LGA). The regional district must place any money received from a sale in a reserve fund to acquire regional park or trail. Where land is received, it is dedicated for park purposes and vests in the regional district.

D. Trust Park

Where a municipality receives land subject to a trust that it be used for park purposes, if the council considers that the trusts are no longer in the best interests of the municipality, the council may apply to the BC Supreme Court for an order that the trust be varied as the court considers "will better further both the intention of the donor, settlor, transferor or will-maker and the best interests of the municipality" (section 184 of the CC and, for regional districts, section 282 of the LGA).

Where such a trust is for a public purpose, such as park purposes, the Attorney General stands for the public and is in a position to enforce such a trust. Accordingly, support from the Attorney General will greatly increase the chances of succeeding on such a court application.

E. Parks Subject to Crown Grant Restrictions

In theory, a condition subsequent or possibility of reverter does not prevent the local government, as owner, from selling the affected land. However, the new owner of the land will take subject to the condition subsequent or possibility of reverter. In other words, the new owner must use the land for the purpose set out in crown grant giving rise to the condition subsequent or reverter, or else risking having the land go back to the crown.

In order for the local government to deal with such lands free of such restrictions, the crown would need to release the condition subsequent or take steps to remove the possibility of reverter. The crown may expect to receive fair market value in return for giving up these use restrictions.

F. Public Notice and Assistance to Business

Importantly, the normal rules on providing notice of a land disposition (section 26 of the CC and section 286 of the LGA) apply to dispositions of parkland, whatever its legal status.

Furthermore, the general prohibition against providing assistance to a business also applies to such a disposition (section 24 of the CC and section 273 of the LGA). This rule helps ensure the local government receives fair market value (in land and money) in return when disposing of park to a business.

V. HOW CAN PARKLAND BE USED?

A. Statutory Restrictions

While the CC and the LGA include various restrictions and requirements relating to the sale of parkland, they contain very few restrictions or provisions relating to the use of park land.

For parks dedicated by bylaw, section 30(4) of the CC provides that council bylaws and works that directly affect land that is subject to a park reservation or dedication bylaw must be consistent with the park purposes as set out in the bylaw (this rule also applies to regional districts). The Acts do not contain any similar provisions for other parkland, such as parks dedicated by subdivision plan.

Nevertheless, in order for the dedication of parkland and the restrictions on the cancellation of such a dedication to be meaningful, legal dedication does have an effect on a local government's ability to deal with parkland.

B. Case Law

There are various court cases that have examined whether a particular use of parkland is permitted. Most of these cases relate to parks created by way of a trust and some of the decisions in those cases are quite restrictive, although they are very 'fact specific' resulting from a careful consideration of the trust documents themselves and the circumstances at the time of trust creation. These cases do, however, provide some guidance in relation to how other types of parkland may be used.

1. Construction of Agricultural Hall in Trust Park – *Anderson v. City of Victoria*

A group of residents challenged a proposal to use part of Beacon Hill Park in Victoria for an agricultural exhibition building, which the City owned pursuant to a trust. The Court held that the use of a public park was restricted to pleasure and recreation purposes for the general public and did not include the construction of buildings which are not strictly for that purpose.

2. Road Through Trust Park - *Armstrong v. Langley (City)*

In 1956, the Langley Athletic Association gave a property to the City. The City made an agreement with the Association, and adopted a bylaw, providing that the land would be used "only for the purpose of a public park, playground and for recreation facilities". In 1988, the City started to build a road across one corner as an extension of its downtown road system. Two ratepayers challenged the decision on the grounds that it breached the terms of the trust under which the City had accepted the land. The parties acknowledged that the while the new road would serve the park, its primary purposes was to facilitate traffic flows through the City's central district.

All three judges agreed that the agreement gave rise to a trust that was binding on the City at common law or by virtue of the former provision in the *Municipal Act* that required a municipality to operate and maintain a public park "subject to any trusts on which it is granted or given".

One judge held that the ratepayers did not have standing to enforce the trust.

The second judge held that the construction of a street within the park would only breach the trust "if the result were significantly to impair the character or usefulness of the land as 'a public park', or 'playground', or its usefulness for the creation of 'recreational facilities' "within the meaning of the 1956 agreement".

The third judge agreed with the first judge on standing, but disagreed with the second judge on compliance with the trust, concluding that the roadway was not for the purpose of enhancing the usefulness of the land as a public park.

3. Road Through Bylaw Park - *Duff v. Coquitlam*

Two residents sought to prevent the City from building a road across City property known as Glen Park. In 1962, the City had adopted a bylaw dedicating the land for park purposes. The plaintiffs argued that as a result the lands were "impressed with a trust and cannot thereafter be used for purposes other than as a park until the park dedication bylaw is rescinded or amended by the municipal council". While the Court did not reach any kind of conclusion on the whether the dedication resulted in any trust conditions, the Court held that the City was permitted to build the road across the park.

4. Folk Fest in Trust Park - *Victoria (City) v. Capital Region Festival Society*

The City owned Beacon Hill Park as a trustee pursuant to an express trust to maintain and preserve the park "for the use of recreation and enjoyment of the public…". Then current activities in the park included soccer and softball fields, lawn bowling and cricket (governed by agreements between the City and the clubs involved) and a free petting zoo (subject to an agreement between the City and the operator). Musical events were also held at the park in a band shell. Other events included walks and runs, orienteering, car shows, picnics and filming, Easter egg hunts and weddings.

The City applied to court for a determination as to whether the park could be used to hold an annual folk music festival. The festival would include four stages plus a main stage, a concession area and beer gardens, and would be held over three days every August long weekend, with day passes at $30 to $35.

The Court defined the park as "a nature park and ornamental pleasure ground, with playing fields" and stated that, "to achieve the trust objects, the trustee is under a duty to maintain and preserve that 'physical state as such'". The Court considered whether the festival was consistent with the trust use and stated that being "held captive…in an enclosed controlled environment, surrounded by commercial advertising is consistent with an amusement park, or a major league ball park; it is not consistent with a park whose cardinal features include 'natural shade, grass and spectacular beauty'". The Court was unwilling to accede to arguments that the profit-making concessions were aimed at "enlivening the ambience of the site" for an event operated by a non-profit organization or that the event was of short duration occupying only a part of the park. The Court did acknowledge that the fencing of the site was not, on its own, a problem, as all members of the public were invited to the festival.

5. Public Golf Course as a Public Park Use

In *Winnipeg v. St. Vital*, the Court interpreted the phrase 'public park' as including a golf course that was open to public use. The rationale was that the land was being used for the enjoyment and recreation of the public.

6. Parkade Structure Under 'Designated' Park – *Ladner v. Vancouver*

The Court allowed an underground parking structure to be built below a park and leased to a non-profit yacht club, but only after noting that the parking structure did not affect the use of the surface of the park and improved the parking opportunities around the park.

7. Restaurant in Trust Park - *Save Our Waterfront Parks Society v. Vancouver (City)*

The City proposed to permit the construction of a two-storey licensed sit-down restaurant in Kitsilano Beach Park and the Society sought an injunction to stop the project, on the basis that the City acquired the park subject to a public trust that prohibited the establishment of the proposed restaurant. The City had purchased the land comprising the park from the CPR over many years. The deed provided that the lands were transferred to the City "so long as the lands are used for the purposes of a public park…" and included a covenant that the City will not use the lands "for any purpose other than that of a public park". The Court concluded that there was a trust, as the parties' intentions were clear that the land was to be used solely as a public park.

The Society argued that the proposed restaurant was not necessary or incidental to, or consistent with the use of Kits beach as a public park and that no part of the park could be used for the general purpose of generating profit. The Court held that whether the restaurant was ancillary to park use required an examination of the standards of the day in 1919 when the trust was created. Before 1919, Kits Beach had included a dance hall, band shell, bath house and refreshment and food service. Stanley Park had a refreshment pavilion. The Court concluded that a restaurant would have been considered an ancillary use to a 'park purpose' at the time the deed was signed.

C. Applying the Case Law to Parks Dedicated by Plan or Bylaw

The conclusions in these cases are highly dependent on the nature of the park and other circumstances. Where the park is created by way of a trust, the courts appear more likely to take a restrictive view on park use having regard to the specific wording of the trust documents and the circumstances at the time of trust creation. There is less jurisprudence for parks dedicated by plan or bylaw and perhaps the courts will have a more deferential view on council and board decisions. Following are some general thoughts on uses of parks dedicated by plan or bylaw:

1. Leases and Licences of Occupation

A lease or licence of parkland that has the effect of excluding some members of the public from parts of a park may be acceptable, where the public in general has an opportunity to use the applicable facilities, such as by paying a fee to enter or use the facilities within the leased or licensed area or by joining the organization that holds the lease or licence. For instance, a fenced pitch-and-put course that is open to the public for a fee is likely acceptable. The leasing of part of a park to a lawn-bowing club with open membership may be also be acceptable.

2. Profit Making

It would seem that a park use may involve the making of a profit.

3. Limited Private Use

Short term 'private use' of part of a park, such as for weddings or filming may be acceptable.

4. Private Use

Ongoing private use is unlikely to be acceptable, although as highlighted by underground parkade permitted in the *Ladner v. Vancouver* decision, ongoing private use may be acceptable where such use does not interfere with the public park use.

5. Encroachments

Generally speaking, it is doubtful that a local government may grant license to an adjoining landowner to extend their yard into parkland, as this is essentially allowing an ongoing, exclusive private use of a park. On the other hand, it might be acceptable a local government could permit an owner to install a retaining wall on the edge of parkland, if necessary to support the owner's property.

What about where a landowner has, without local government permission, extended their yard into adjoining parkland? It is unlikely that the local government is required to take enforcement proceedings to remove the encroachment. With that in mind, if the landowner were willing, could the local government and owner enter into an agreement to clarify the local government's right to remove the encroachments in the event the encroachment area is needed for park purposes? On the one hand, this would seem to reward the reckless or aggressive. On the other hand, such an agreement might clarify and improve the local governments legal rights, depending on the circumstances.

In light of the above, it seems likely that the ability to enter into an encroachment agreement or license for an adjoining owner to use parkland will depend on the particular circumstances, including the then current use of the parkland and the encroachment area, the nature of the encroachment, the impact of the encroachment on park use and the circumstances surrounding the creation of the encroachment.

6. Construction of Local Government Non-Park Services

Is the construction and operation of a local government service through a park permissible? It would seem that underground services may be acceptable if they do not affect the use of the park. With respect to surface road construction through park, a road that serves the park, at least to a significant degree, may be permitted even though it may also be a through road. However, it is less clear and perhaps doubtful that a road may be constructed through a park that is primarily a through road, as this would seem to run against the concept of such land having been 'dedicated' as park. Again, the circumstances will be key, including the extent of the road, its impact on the park and its benefit to the park.

VI. THE POWER TO REGULATE AND IMPOSE FEES

A council may, by bylaw, regulate, prohibit and impose requirements in relation to its parkland (sections 8(3)(b) and 63 of the CC).

A council may, by bylaw, impose a fee in respect of the use of park property and any services it provides in relation to a park (section 194 of the CC).

Regional districts also have similar bylaw making powers in respect of a park service (sections 335 and 397 of the LGA).

As the owner of parkland, a municipality or regional district may also be in a position to control some park uses by means of its power to make contracts and its powers as landowner (e.g. parking rules and regulations). A local government may also charge users a 'price', without enacting a bylaw (e.g. price of entry to an aquatic facility). Of course, these types of regulations are founded in contract and do not have the enforcement tools available when enforcing a bylaw.

VII. PROTECTING PARKS AND PUBLIC SPACES IN THE COURTS

Generally speaking, parks and public spaces are almost always utilized for the purpose they were designed: recreation, quiet enjoyment or temporary public gatherings for such things as festivals or concerts. However, in the very rare circumstances where public spaces are not used for these common purposes how do our courts respond? It would seem that in almost all circumstances our courts find a way to protect public spaces even in the most challenging of situations. This part of the paper examines two very different topics engaging public spaces and how our courts respond; one, being very clear for local government while the other leaving local government in a rather confused position.

A. Trespass and Damages Claims

A review of the jurisprudence indicates that those who willfully trespass and damage public lands are usually dealt with harshly by the courts.

In *Dykhuizen v. District of Saanich*, the Court commented on the extent of possible damages that could be awarded in favour of a local government:

> In the case of trees used for the purpose of public or private enjoyment, damage for their deliberate destructions is not limited to the resulting diminution in value of the land, or the value of the wood as lumber or firewood, or the value which might be awarded in respect of them as compensation for expropriation. The damages in such cases may extend to the cost of restoration or restitution, within reasonable bounds, together with compensation for loss of amenity to the extent that complete restoration cannot reasonably be affected.

One of the best examples of these principles in action is the 1994 case of *City of Prince Rupert v. Pederson*. In this case, Mr. Pederson trespassed onto City lands and cut an area approximately 30 metres by 60 metres which included some 90 mature hemlock and cedar trees. The purpose of cutting these trees from the public land was to enhance the view from a residence. After finding that the tree cutting was based on "greed" and a "deliberate trespass", the court awarded the City some $88,000 in general damages, restorative costs and punitive damages. If these damages were translated into 2018 dollars they would equal approximately $150,000. In rebuking the trespasser, the Court noted that "this case should be a reminder to all who are tempted to do as he did that, in British Columbia, trespass does not pay." The Court also awarded the City special costs which means effectively an indemnity of the legal fees paid to their lawyers.

In the more recent 2015 case of *R. v. Moshedian* in West Vancouver, the property owner was found guilty by a BC Provincial Court Judge of allowing works on his property to damage neighbouring lands including watercourses owned by the local government. At sentencing, the property owner was fined $100,000 for his reckless behavior. The Court noted, as in *Pederson*, that the selfish nature of the property owner was the driver in imposing a fine at this level.

It seems clear from these past cases that BC courts will continue to apply significant sanctions against property owners who purposely damage public lands including parks.

B. Public Occupation of Parks and Public Space

In the last decade, there have been a number of court cases dealing with 'tent cities' or homeless encampments in parks and public spaces. Unlike the trespass damages cases reviewed above, this area of the law is not simple and often engages constitutional and *Charter* issues. This arises from the numerous competing demands for the use of parks and public

spaces as between the homeless and the public, and the responsibility of local governments to maintain public parks for all citizens. Although our Courts have generally found that public spaces need to be protected for all citizens, they have not been shy to subject local government bylaws to constitutional scrutiny in the face of the on-going social and housing challenges for the less fortunate of our citizens. One of the most pronounced examples of this push and pull analysis was demonstrated in the seminal 2008 case of *Victoria (City) v. Adams*.

1. *Victoria (City) v. Adams*

The judge described this litigation as:

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

The litigation began with the City applying for a temporary injunction to remove the tent city from one of its parks. The City relied on its *Parks Regulation Bylaw* and *Streets and Traffic Bylaw* which prohibited loitering and taking up a temporary abode overnight. The Court granted the injunction and also dismissed the tent city application for an order requiring the City to "designate a suitable area near the downtown core where the [tent city] and others can sleep overnight and create suitable shelter until the constitutional issues in this action are determined." The tent city was cleared from the park in October, 2005. At trial, when the City sought a permanent injunction a constitutional argument under section 7 of the *Charter* was made. Section 7 of the *Charter* provides 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 principles of fundamental justice.

On the evidence at trial, the judge found that:

- There were 1,000 homeless people living in the City;
- The City had 141 shelter beds, expanding to 326 in extreme conditions, leaving hundreds of the homeless no option but to sleep outside in the public spaces of the City;
- The bylaws did not prohibit sleeping in public spaces but they did prohibit taking up a temporary abode. In practical terms this meant the City prohibited the homeless from erecting any form of overhead protection including, for example, a tent, even on a temporary basis; and
- Expert evidence established that exposure to the elements without adequate protection is associated with a number of significant risks to health including the

> risk of hypothermia, a potentially fatal condition and that some form of overhead protection is necessary for adequate protection from the elements.

The Court was ultimately asked to address the following issue:

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

The Court found that the City's bylaws, when read together, did violate section 7 of the *Charter* but reasoned that the homeless were not to be given free rein to erect structures at will on public property. However, the Court noted:

> There is no "bright line" test to determine whether resources to shelter the homeless in Victoria are sufficient to render the provisions of the *Parks Regulation Bylaw* once again constitutional. We consider that the appropriate manner of dealing with this problem is to allow the City to apply to the Supreme Court for a termination of the declaration if it can demonstrate that the conditions that make the *Parks Regulation Bylaw* unconstitutional have ceased to exist.

In the result, the City was left to return to the Court when local conditions in the City along with available resources for the homeless had improved thus making its bylaws constitutional again. Later, the City did amend its bylaw to prohibit the erection and maintenance of structures in parks during daylight hours. In *Johnson v. Victoria (City)*, this bylaw was again challenged as being unconstitutional but the Court reasoned:

> During daytime hours it is expected that more services are available and the evidence establishes that there are drop-in centres and shelters in the City of Victoria where homeless people can go. During periods of time when the Victoria region enjoys its normal temperate climate, daytime shelter may not be required.

> The restrictions imposed by the Amended Bylaw allow those who wish to use parks and public places the freedom to do so without the presence of temporary shelters. The City is able to carry out its function and maintain its parks and prevent the damage that might be caused by the presence of temporary shelters at all times during the day. On the evidence presented I am satisfied that the City has established the Amended Bylaw s. 16A is justified under s. 1 of the *Charter.*

2. *Abbotsford v. Shantz*

In another similar case from 2015, *Abbotsford (City) v. Shantz* (which followed much of the reasoning of *Adams*) the Court permitted overnight stays in City parks (limited to between 7:00 p.m. and 9:00 a.m. the following day) and declared parts of the City's *Consolidated Parks Bylaw* and *Good Neighbour Bylaw* unconstitutional for violating section 7 of the *Charter*, to the extent that they applied to the City's homeless and prohibited sleeping or being in a City park overnight or erecting a temporary shelter without permits. The Court declined to order the permanent injunction sought by the City to force the removal of those homeless using the City parks for shelter.

In both *Adams and Shantz* the courts have established that in circumstances where there is no practicable shelter alternative and homeless people are exposed to a risk of serious harm that there is an interference that a homeless person's rights to life, liberty and security of the person are violated if a local government bylaws prohibits use of public spaces where no alternatives exist. These cases do not mean that parks and public spaces will forever be open for tent cities but force all levels of government to provide alternatives so public space is not needed for such uses. In reality, these Court judgments pressed all levels of government to ensure that enough homeless beds were available for the homeless.

3. Interim Injunction Cases

The *Adams* and *Shantz* cases detailed above were attempts by the local governments to obtain permanent injunctions to prohibit these tent cities. As this engaged a full trial it by necessity forced a full analysis of section 7 of the *Charter.* There have also been a number of cases brought by local government for interim (ie., temporary) injunctions dealing with homeless encampments. This attracts a less robust analysis of section 7 *Charter* rights and focusses more on the immediate harms associated with the homeless camps.

The British Columbia Supreme Court has recently considered applications for interim injunctions in both *Nanaimo (City) v. Courtoreille* and *Saanich (District) v. Brett*. In both of these cases, the Court granted the local government its temporary injunction primarily on safety concerns associated with the camps (e.g., fire safety/traffic safety). Both the *Nanaimo* and *Saanich* cases were sent to full trial to fully consider the constitutional arguments around use of public spaces and at the time of writing have not been decided.

C. Conclusion

In those local government jurisdictions where homeless encampments may be of concern in parks or on public lands, local governments should consider planning for such eventualities. For example, park bylaws can be customized to anticipate homeless encampments in a manner which may assist the local government if it finds itself before a court.

Some of the questions a local government will want to consider as part of its discussions would include:

- What is the extent of the homeless population in your jurisdiction?;
- Are there alternative accommodations available for the homeless in your jurisdiction?;
- Once established, is the encampment negatively impacting the general public's use of the park or public space?;
- Once established, is the encampment organized to provide the necessities of life or is it disorganized? (e.g., are there toilets, garbage receptacles etc.?); and
- Once established, is the encampment unsafe for those seeking shelter there or to neighbours?

As should be clear from this discussion, these issues are complex and legal advice should be taken as each local government's situation and needs will be unique.

NOTES