CITATION: Black et al. v. City of Toronto, 2020 ONSC 6398
COURT FILE NO.: CV-20-644217
DATE: 20201021

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DERRICK BLACK, MICHELLE PLOURD, MATINA KOUMOUDOUROS, ASHLEY ELLIS, NANCY FISHER, MARK MEDAS, JOAN SMITH, PAUL KAGER, RAYMOND MARTIN, MARK BARATTA, MARIE GRAVES, KATELYN BOWMAN, JOHN CULLEN, DANIEL CUNNINGHAM, TORONTO OVERDOSE PREVENTION SOCIETY and ONTARIO COALITION AGAINST POVERTY, Applicants

AND:

CITY OF TORONTO, Respondent

BEFORE: Paul B. Schabas J.

COUNSEL: Selwyn Pieters and Brendan Jowett, for the Applicants

Michael J. Sims, Nicholas Rolfe, Jennifer Boyczuk and Molly Lowson, for the Respondent

HEARD: October 1, 2020

REASONS ON MOTION FOR INJUNCTION

Introduction

[1] This case raises the challenges of addressing the needs of the homeless population during the COVID-19 pandemic. The applicants are 14 people experiencing homelessness who have been living in encampments in City of Toronto parks, and two organizations which work with the homeless population. They have brought a motion for an interlocutory injunction to prevent the City, during the COVID-19 pandemic, from enforcing its By-law prohibiting camping and the erection of tents or other structures in City parks. Specifically, the applicants move for an order that the City be restrained from taking further steps to evict or remove the applicants and other homeless individuals from encampments in City parks, "in particular but not limited to Moss Park, Dufferin Grove Park, Alexandra Park and Allan A. Lamport Stadium Park."

[2] It is argued that "in the context of the COVID-19 pandemic and Toronto's homelessness and housing crisis" enforcement of the City By-law violates the rights of the applicants and other homeless individuals under ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. (the "*Charter*"), and is not justified under s. 1 of the *Charter*, and is inconsistent with ss. 1, 2, 11 and 47(2) of the *Human Rights Code*, R.S.O. 1990, c. H.9.

[3] For the reasons that follow, I dismiss the motion for an injunction.

[4] The applicants do not seek to strike down the By-law (*City of Toronto Municipal Code*, c. 608), but rather ask that enforcement of the law should be suspended during the pandemic. This is due to concerns about the adequacy and safety of the City's shelter and housing facilities arising from the need to maintain physical distancing to avoid transmission of the virus. While I accept that some of the applicants fear the shelters for this reason and have other related concerns causing them to prefer to remain in camps rather than accept City assistance, and that this engages their rights under ss. 7 and 15 of the *Charter* and under the *Human Rights Code*, the evidence does not satisfy me that the broad relief sought by the applicants is justified, even on an interlocutory basis.

[5] The City has taken many steps in its shelter system to respond to COVID-19. This includes ensuring that shelter beds meet physical distancing requirements. The shelter system has been expanded, including acquiring a large number of hotel rooms. There is no evidence that the shelter system does not have capacity to accommodate, safely, those currently living in the parks who wish to seek shelter. A large number of people experiencing homelessness who were living in encampments have been moved indoors by the City during the pandemic. Indeed, most of the applicants have been offered, and several have accepted, offers of shelter by the City.

[6] Furthermore, parks are public resources, intended to be available and used by everyone. This is particularly the case during the pandemic when outdoor spaces are needed for people to meet and engage in recreational activities that cannot be done indoors. The encampments impair the use of parks by others.

[7] People experiencing homelessness is an unfortunate reality, and many homeless people live in City parks even when there is not a pandemic. But the City must have the tools to address situations where public health and safety is jeopardized, and where it limits or prevents the use of parks by the public at large. The applicants acknowledge this by not seeking to strike down the By-law, as they limit their application for a declaration to "the context of the COVID-19 pandemic," and only request a suspension of enforcement of the By-law during the pandemic.[1] In my view the request reaches too far, as it asks the Court to prevent, for an indeterminate time, any enforcement of the City's By-law. Furthermore, the relief sought is not supported having regard to the steps the City has taken to ensure shelters are available, comply with physical distancing requirements, and meet many of the other concerns raised by the applicants.

[8] To be clear, in dismissing the motion I am not directing the City to enforce its By-laws and to remove encampments in City parks. That will be up to the City. It must be recognized, as it was in argument, that the situation is evolving. My decision is based on evidence that dates from the summer months when the incidence of COVID-19 was low, the weather was warm, and the City had specific concerns about particular group encampments. By

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[1] This was confirmed in argument and is reflected in the applicants' Notice of Application as well as their Factum at paragraph 9 that "this application pertains specifically to the COVID-19 pandemic."

that time the City had also taken significant steps to respond to the COVID-19 threat in the shelter system after the "first wave" in the spring. It is now October and the incidence of COVID-19 has risen in what is described as a "second wave." As is the case in non-pandemic times, the City will have to consider how and when to enforce its By-law having regard to the continued availability of safe shelter spaces and the impact of the encampments on the parks and the public.

The Evidence

[9] The applicants filed evidence from three of the individual applicants who are living in encampments in City parks, and from a co-founder of the applicant Toronto Overdose Prevention Society ("TOPS"), Zoe Dodd, who is a support worker at South Riverdale Community Health Centre.

[10] Of the 14 individual applicants, 13 have been offered housing or shelter spaces, including 11 in hotels. Eight have accepted the offer of space in hotels.

[11] The lead applicant, Derrick Black, aged 60, lived with his elderly mother until March 2020 when the pandemic was declared, but was asked to leave by her after he continued to go into the community to visit his spouse, Michelle Plourd, who is also an applicant. Mr. Black receives a shelter payment of $390 per month from Ontario Works which he pays to his mother as rent. Ms. Plourd also has a home, a rent-geared-to-income apartment in the Fred Victor Centre across the street from Moss Park. The City has offered Mr. Black and Ms. Plourd spaces in hotels, including downtown, and has also them a centrally located one-bedroom apartment, which they have rejected. City staff are still working with them to process a housing application.

[12] Mr. Black says he and Ms. Plourd chose to move into the Moss Park encampment because they fear contracting COVID-19 in shelters and at the Fred Victor Centre. While he acknowledges speaking to City staff about moving into a hotel, Mr. Black says he has not been given specific details about where the hotel would be located and what rules and restrictions he would be subject to there. He suffers from diabetes and has mobility issues.

[13] John Cullen, aged 46, is now living in an encampment outside the downtown area. He has been receiving the $2,000 Canada Emergency Relief Benefit every four weeks. Mr. Cullen has a learning disability and suffers from depression. He usually works at carnivals during the summer months, but they were cancelled due to the pandemic. At the beginning of the outbreak Mr. Cullen stayed in a shelter and then paid for a hotel using his CERB benefit. After that he tried to call the Central Intake number for a bed but says he was told the shelters were either full or he could not get through.

[14] Mr. Cullen was apparently offered a hotel room in Markham by the City program Streets to Homes when camping at Nathan Phillips Square in the spring. He accepted but says Streets to Homes did not follow up and move him. Later, when he was told to move out of Nathan Phillips Square, Mr. Cullen was approached again about housing by Streets to Homes, but rejected their offer as, he said, he "had an established community at the encampment and I knew that it would be better for my mental health than to be isolated

somewhere far away like in Markham where they were going to send me before." Mr. Cullen also said he is worried about catching COVID-19 in a shelter and that he feels safer outside. He then moved to an encampment at Dufferin Grove, when he was again offered shelter services. In late July the City broke up the Dufferin Grove camp, and Mr. Cullen then began camping in a remote location with a few other people where he is less likely to be evicted, but which does not have easy access to water, food and other services. He would prefer to be in a larger encampment which may have better access to those things.

[15] Katelynn Bowman is an intersex person and is part Ojibwe. She has been the victim of discrimination, suffered trauma and has post-traumatic stress disorder, which causes her to feel threatened and fearful. She also suffers from depression and other mental health challenges. She moved to Toronto in January and has lived in shelters provided by the City. Ms. Bowman said that while she was at a shelter when "the pandemic was in full force" she was concerned that people in the shelter may have had COVID-19 and was concerned that the shelter did not enforce better isolation. She had bronchitis as a child and fears that this puts her at greater risk.

[16] Sometime in May, Ms. Bowman joined the encampment at Alexandra Park where she feels safer than being in an indoor setting, and where she feels people look after each other. She says that if she is forced out of the encampment she will probably stay on the streets, as she would not feel safe in a shelter "because of the high number of COVID-19 cases and the discrimination she has faced as an intersex person." Either way, she says she will suffer from stress and anxiety which may trigger depression and PTSD.

[17] Zoe Dodd works with people experiencing homelessness and who have drug addiction or dependency issues. She described her clients' concerns with the shelter system during the pandemic, including access to shelters and the ability to practice safe physical distancing in them. She also noted problems with isolation and drug use in shelters and hotels during the pandemic, as she has assisted moving people from encampments to hotels and continues to provide support to them there.

[18] In addition, the applicants filed expert opinion evidence from two physicians based in Hamilton, Ontario, addressing the social and medical profile of homeless people in Canadian cities and of people living in homeless encampments, the medical risks of clearing homeless people from their encampments, and the risks posed by COVID-19, including its risks of transmission within shelters. I will say more about this evidence later in these Reasons.

[19] The City provided evidence from three employees who work in the parks and in shelter services, as well as an affidavit attaching police occurrence reports relating to criminal activity in the parks, including encampments. The City's evidence covered the challenges of the encampments for the City's parks, including the wide range and seriousness of health and safety risks, property damage, and interference with other park users caused by people living in the parks. It also addressed the City's shelter system and its response to COVID-19, both in the parks and in the changes to shelters and the expansion of the housing available, including in hotels. The evidence also described the City's efforts to move

people out of encampments and transition them to permanent housing. I address this evidence in more detail below in discussing the balance of convenience.

[20] The City's three deponents were cross-examined, as were all the deponents for the applicant other than Ms. Dodd. In addition, in response to a summons from the applicant, a police officer was examined by counsel for the City and cross-examined by counsel for the applicants.

[21] All of the evidence before me dates from July and August, 2020. The Notice to remove tents from Moss Park that precipitated this application was issued on July 18, 2020, and this proceeding was commenced two days later. However, the COVID-19 pandemic has changed over time and continues to change. During the first months of the pandemic, declared in mid-March 2020, the number of cases was much higher than during the summer. It took time for steps to be implemented to address the virus, by the City and the healthcare system. As COVID-19 is an airborne virus, transmission is more likely indoors. The summer months saw a reduction in cases as people spent more time outdoors. The situation of several of the applicants also changed.

[22] When this motion was heard on October 1, 2020, it was acknowledged that a "second wave" of the virus had begun in Toronto. The number of documented COVID-19 cases has risen back to levels similar to those seen last spring.

[23] I was advised by counsel for the City that it has not taken steps to enforce its By-law by dismantling the encampments in the parks named in the pleading since the commencement of this application, but it has continued to make efforts to move homeless individuals living in parks into shelters and other indoor housing. Colder weather is now approaching, which will also have an impact on the encampments, and the shelter system.

[24] Further, as this is presented as a motion for interlocutory relief, the question of how long the COVID-19 situation will last is relevant but, alas, is unknown. While vaccines are being developed, none have yet been approved in Canada, and it is not known when a vaccine will be available.

Motion to exclude the applicants' expert evidence

[25] As a preliminary issue, the City objects to the admissibility of the expert evidence from Dr. Tim O'Shea and Dr. Gillian Wiwcharuk. The City argues that that these two physicians are advocates for the homeless population who lack the necessary independence to provide impartial expert evidence.

[26] In support of its argument, the City notes that Dr Wiwcharuk is a named applicant, and affiant, in what appears to be a nearly identical application brought against the City of Hamilton: *Bailey, et al. v. City of Hamilton*, Court File number CV-20-73435. Dr. O'Shea is a co-founder and current Medical Director of another applicant in that proceeding, the Hamilton Social Medicine Response Team ("HAMSMaRT"), which provides health services to homeless people and advocates for various issues, including opposing decisions by the City of Hamilton to clear tent encampments. Both physicians have published articles in print and on social media opposing the break-up of encampments during the COVID-19

pandemic, and both agreed in cross-examination that they support this application and hope it will be successful.

[27] The City also argues that the evidence should be excluded due to its reliance on hearsay and for making factual assertions not supported by evidence, and because the physicians have no direct knowledge of the situation in Toronto.

[28] I do not agree with the City's submissions. The expert evidence of Drs. O'Shea and Wiwcharuk meets the test for admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 at pp. 20-25. It is relevant and necessary evidence to assist the Court in understanding the risks of COVID-19 and its impact on the homeless population, the particular risks and vulnerabilities of homeless people generally, the role of encampments, the medical risks of shelters, including the risk of contracting COVID-19 in shelters, and concerns about the loss of shelter and the medical and social effects of breaking up encampments, particularly during a pandemic. As aptly summarized by the applicants, "the evidence of Drs. O'Shea and Wiwcharuk speaks to three general subjects:

> 1) The socio-medical profile of homeless people in Canadian cities and specifically that of people living in homeless encampments;
>
> 2) The medical risks of clearing homeless people from their encampments; and
>
> 3) The risks posed by COVID-19, including its means of transmission and risks of transmission within homeless shelters."

[29] The two physicians clearly have expertise on these issues. Both work closely with homeless patients and the homeless population. Dr. O'Shea is an internist and infectious diseases specialist and has a Master's degree in public health. Dr. O'Shea's expertise regarding the impact and control of COVID-19 as it relates to the homeless population is also recognized by his participation on a subcommittee that advises Hamilton's Emergency Operations Committee on those issues. Dr. Wiwcharuk practices "inner city family medicine" including providing primary care to the homeless population at shelters and on the street. She also works as an addiction medicine consultant with in-patients in hospitals and at clinics in shelters, and as an emergency room physician she has treated patients with COVID-19.

[30] Drs. O'Shea and Wiwcharuk were asked to provide expert evidence within their scope of expertise. They have signed the required Acknowledgement of Expert's Duty recognizing the nature of their duty to provide opinion evidence to the Court that "is fair, objective and non-partisan" and that is "related only to matters that are within [their] area[s] of expertise", and "to provide such additional assistance as the court may reasonably require." They have also acknowledged that this duty "prevails over any obligation which [they] may owe to any party."

[31] In public interest litigation of this kind, it would be surprising not to have experts who have expressed points of view and advocated for particular outcomes. Often, because of their commitment to their field and the conclusions they have reached, experts become involved in advocacy. However, this does not disqualify experts; if it did it would risk denying

courts important perspectives on many issues. Courts are not naïve and can, where necessary, discount or ignore testimony of experts if and when it becomes advocacy as opposed to evidence.

[32] In this case, the applicants have presented evidence from committed medical experts in the field of treating the homeless population. The experts are not mere activists, as was the case in *Galganov v. Russell (Township)*, 2010 ONSC 4566 at paras. 27-38, but have undisputed and extensive professional expertise. Their evidence provides the court with helpful, indeed necessary, evidence of the factual context and circumstances in which the applicants are asserting their rights. The evidence from them is largely objective, backed up by reports from government bodies and other institutions such as the World Health Organization ("WHO") and the U.S.-based Centers for Disease Control and Prevention ("CDC"), and cannot be described as simply an argument fed to the expert, as arose in *Alfano v. Piersanti*, 2012 ONCA 297 at para. 100. This also addresses the hearsay concern raised by the City which, in any event, is really a question of weight.

[33] There is no evidence that Drs. O'Shea and Wiwcharuk have a financial or personal interest in the outcome of this case, or that they have been involved in the legal strategy or been privy to confidential information which would raise concerns about their independence. There is also no evidence, nor is it suggested, that they have tailored their evidence or displayed any bias in their presentation of their evidence, much of which is not opinion evidence at all but, as noted, provides the Court with important contextual evidence. The actual opinion evidence from Drs. O'Shea and Wiwcharuk is limited and based on objective sources as well as their own expertise and experience.

[34] The evidence the experts have provided in this case is, to use the words of the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Company*, 2015 SCC 23, [2015] 2 S.C.R. 182 at para. 2, "fair, objective and non-partisan." As the applicants correctly point out, the onus rests on the party opposing admission to show a "realistic concern" that the expert is "unable and/or unwilling to comply with that duty" (at para. 48). The bar for exclusion is high:

> I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. [*White Burgess* at para. 49]

[35] As Cromwell J. also noted at para. 49 of *White Burgess*, "... it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection."

[36] In exercising its gatekeeper function, the court must engage in a cost-benefit analysis and weigh the probative value of the evidence against the risks associated with its admission. As the Supreme Court stated in *White Burgess* at para. 54: "At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the

risk of the dangers materializing that are associated with expert evidence." In my view, the balance here clearly weighs in favour of admitting the evidence which provides critical information and context to the matter before the court.

[37] I am aware of the perspectives of the experts, and that may have some impact on the probative value and weight to be given to their evidence, but it does not make it inadmissible: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 106. These physicians are experts who have acknowledged their duty to the court to provide independent and impartial evidence, and the City has not provided any compelling basis on which the court could have a "realistic concern" that they will not, or have not, complied with that obligation. Even if there was a concern, absent a showing that the expert cannot comply with his or her duty the evidence is still admissible and the concern about bias can go to what weight I choose to give it: *R. v. Natsis*, 2018 ONCA 425, 140 O.R. (3d) 721 at para. 11.

[38] Accordingly, I deny the City's motion to exclude the evidence of Drs. Wiwcharuk and O'Shea.

The test for an injunction

[39] The issue to be decided in this case is whether the Court should issue an interlocutory injunction. Pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court may grant an interlocutory injunction where it appears to the Court to be "just or convenient to do so." A party seeking an interlocutory injunction must address the three-part test stated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 334:

> (1) is there a serious issue to be tried?
>
> (2) will the applicant suffer irreparable harm if the injunction is not granted? and
>
> (3) which party will suffer the greater harm if the injunction is granted or refused – a balance of inconvenience test?

[40] The three questions must be assessed as a whole. Strength on one branch may compensate for weakness on another branch. As the motion is typically brought at an early stage of litigation, "a prolonged examination of the merits is generally neither necessary nor desirable." However, the Supreme Court has recognized exceptions to this rule in situations "when the result of the interlocutory motion will in effect amount to a final determination of the action." As the Court noted at p. 338:

> This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

[41] In such situations, the "serious issue to be tried" test may be elevated to a "strong *prima facie* case" test or a "strong chance of success" test. As R.J. Sharpe has observed in *Injunctions and Specific Performance*, loose-leaf (Toronto: Thomson Reuters Canada, updated November 2019) at para. 2.210, in these circumstances "it is essential, as a matter of justice, that the strength of the case be the predominant consideration." See also *Enbridge Pipelines Inc. v. Williams et al.*, 2017 ONSC 1642 at paras. 39-40; *Leopold Edwin Siberg v. Bruyère Continuing Care Inc*., 2018 ONSC 4235 at para. 18. Sharpe notes that the higher test has been applied in cases involving picketing, acts of civil disobedience, threatened winding-up proceedings, corporate "strike suits", time-sensitive corporate disputes, industrial property cases, and passing off cases (para. 2.240). It was recently applied by the Ontario Court of Appeal (in a panel that included Sharpe J.A.) in litigation involving the downsizing of City Council where the granting of a stay effectively determined the parties' rights: *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761, 142 O.R. (3d) 481, at para. 10.

[42] As I raised with counsel in argument, my decision may effectively determine the application, as the COVID-19 pandemic may end before the full application can be heard and determined. In this regard I observe that the applicants filed extensive evidence, including expert evidence, and the City responded with similarly extensive evidence. Most of the deponents were cross-examined, all of which took some time. While the notice of application indicates that a number of other affidavits may be filed, there is an extensive record before me on this motion.

[43] There is no way of knowing, at this time, when the pandemic will end, and so it may be unfair to the applicants to apply the higher test. Furthermore, both parties have approached the motion by applying the lower test. However, given the nature of the three-part test I make some observations on the strength of the applicants' case, and its likelihood of success. As suggested by Professor Kent Roach, where there is disagreement over the test, "[i]t may be advisable in doubtful cases for motion court judges to apply both the serious question and strong likelihood of success tests in the alternative:" Roach, *Constitutional Remedies in Canada*, loose-leaf, 2nd ed. (Thomson Reuters Canada, (online) updated October 2020) at 7.174.

Serious issue and likelihood of success

[44] The threshold for satisfying the "serious issue to be tried" test for an injunction is low. As the Supreme Court put in *RJR* at pp. 337-338:

> There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the case... Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial.

[45] The applicants in this case have raised violations of their rights under ss. 7, 12 and 15 of the *Charter*, and under ss. 1 and 2 of the *Human Rights Code*. In this case, the City agrees that the applicants have met the threshold for their claim under s. 7 of the *Charter*. Section 7 protects "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." However, the City does not agree that the enforcement of the City's By-laws constitutes "cruel and unusual treatment or punishment" under s. 12 of the *Charter*, or that its conduct constitutes discrimination contrary to s. 15 or the *Human Rights Code*.

[46] Concerns regarding the right to "security of the person" clearly arise in this case. The Notice issued by the City on July 18, 2020 requires that those staying in Moss Park remove their tents and other items from the park. By requiring the applicants to leave encampments where they live and feel safe with others and be faced with a choice of either going to a shelter or moving along to another location rather than "sheltering in place," the City's actions cause the applicants anxiety, physical and psychological distress, and puts their health at risk.

[47] The s. 7 *Charter* rights of homeless individuals facing the prospect of being moved out of encampments have been recognized by the courts in British Columbia.

[48] In *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29, the British Columbia Court of Appeal recognized that the s. 7 rights of homeless individuals were violated by municipal parks By-laws which prevented the erection of shelters and sleeping overnight in public parks when there were inadequate shelter facilities available to them. The Court stated at paras. 75 and 110:

> [T]he homeless represent some of the most vulnerable and marginalized members of our society, and the allegation of the respondents in this case, namely that the Bylaws impair their ability to provide themselves with shelter that affords adequate protection from the elements, in circumstances where there is no practicable shelter alternative, invokes one of the most basic and fundamental human rights guaranteed by our Constitution - the right to life, liberty and security of the person.

[49] I agree. As Professor Martha Jackman wrote in "The Protection of Welfare Rights Under the *Charter*" (1988), 20 Ottawa Law Review 257 at 326:

> ...[A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence. The *Charter* accords rights which can only be fully enjoyed by people

> who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church's brief to the Special Joint Committee declared: "other rights are hollow without these rights".

[50] In *Victoria (City) v. Adams*, the trial judge stated, at 2008 BCSC 1363 para. 145, that "[t]he ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision 'life'." Under s. 1, the Court of Appeal held on the facts of that case, at para. 129, that "[t]he serious health risks that homeless people face as a result of the absolute ban on shelter outweigh any benefit that may flow from the blanket prohibition."

[51] Similarly, in *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, 392 D.L.R. (4th) 106, Hinkson C.J.S.C. invoked s. 7 to strike down municipal By-laws against camping in parks insofar as they were used to evict homeless persons from public encampments where there were insufficient shelter spaces provided by the municipality.

[52] The application of s. 7 of the *Charter* is supported by the evidence in this case as well.

[53] The three applicants who have provided evidence on this motion have said they are concerned about moving into shelters due to the fear of contracting COVID-19. Two of them have mental health issues that may be worsened by being in a shelter. Two also have physical health issues that may place them at higher risk if they contract the illness.

[54] The expert evidence, and Toronto's experience with COVID-19 in the spring, supports the conclusion that people experiencing homelessness are at greater risk from COVID-19, and that staying at shelters may put people at increased risk of contracting the virus.

[55] The increased risk from COVID-19 is due to the generally poorer health of those experiencing homelessness, leaving them more vulnerable to more severe outcomes when infected. Compared to the general population, homeless people have shorter life expectancy and significantly higher rates of chronic diseases including cardiovascular and respiratory diseases, diabetes, Hepatitis C, HIV/AIDS, as well as a high prevalence of mental illness, cognitive impairment and substance abuse. Primary risk factors for severe outcomes from COVID-19 are age and pre-existing health conditions such as chronic lung disease, cardiac conditions, diabetes and immune deficiency; the latter of which may be the result of any one of a variety of causes, but which includes underlying HIV and/or Hepatitis C infection.

[56] The homeless population may have little, if any, access to basic sanitation services such as washrooms, showers, handwashing and drinking water, all of which makes them more vulnerable to diseases and viruses. Public urination and defecation creates broader public health concerns. There is a high incidence of violent crime, including sexual offences, and property crime involving the homeless population. The vulnerability of many to being victimized and exploited is exacerbated by drug dependencies, mental illness and cognitive disabilities, making some individuals easy targets for robbery, assaults, sexual assaults and trafficking.

[57] Homeless shelters are congregate living centres with environments prone to the transmission of infectious disease. Although physical distancing is the central public health strategy for managing and limiting the spread of the virus, this is difficult indoors in what may be crowded rooms or buildings. Preventative measures such as physical distancing, wearing a mask, and maintaining good hygiene such as frequent hand-washing, is not easy for people experiencing homelessness, whether in a shelter or an encampment. Even in shelters, shared facilities such as showers, toilets and telephones make distancing and proper hygiene difficult.

[58] Shelters, like long-term care homes, prisons, and migrant farm worker dormitories, have seen outbreaks of COVID-19. According to one study summarized by Dr. O'Shea, the number of diagnosed cases per 100,000 was 18 times higher in homeless shelters in the Greater Toronto Area than that in the general population. According to statistics agreed to by the parties, as of August 7, 2020, 632 users of the shelter system had tested positive for COVID-19 out of a total population served of approximately 10,000 people, although about half of those cases (310) related to outbreaks at 3 shelters that do not typically serve the homeless population coming from encampments. For example, the Willowdale Welcome Centre, a shelter for people who have recently arrived in Canada, had 153 cases.

[59] Most of the COVID-19 cases linked to the shelters occurred in April and May. Between July 29 and August 14, 2020, there were no confirmed cases linked to the City's shelters. As of September 29, 2020, I was advised that the number of cases in shelters since August 7 had increased only slightly, to 649 cases. At the time this motion was argued on October 1, 2020, there were only 5 active cases in the shelter system, all at the Kennedy House Youth Shelter. The City notes that a case "linked" to the shelter system does not necessarily mean that the virus was contracted at a shelter. Nevertheless, Dr. O'Shea states his opinion that "there is a substantially higher risk of transmission in congregate living settings, including homeless shelters, than among the general population of self-contained households, particularly in Toronto."

[60] While not necessary for my decision, I also conclude that the applicants have raised a serious issue to be tried relating to discrimination that may be a breach of s. 15 of the *Charter*, and of the *Human Rights Code*. As Dr. Wiwcharuk points out, "the homeless population generally is disproportionately comprised of members of groups marked by social disadvantage, mental and physical illness, and drug dependencies." Further, she observes that the occupants of homeless encampments tend to represent an even more vulnerable subset of that population.

[61] This population also includes a large number of Indigenous people "due to a deep mistrust of colonial institutions, often the result of intergenerational trauma." A 2018 Toronto study reported that Indigenous people make up 16% of the documented homeless population but constituted 38% of those living outdoors. That same report disclosed that people sleeping outdoors were more likely to identify as non-heterosexual which, says Dr. Wiwcharuk, reflects a concern that "shelters are not always queer and trans inclusive, and many have faced discrimination in shelter settings." One of the applicants has given evidence of experiencing this kind of discrimination.

[62] The applicants have led evidence, therefore, raising concerns about the discriminatory impact that may result from enforcement of the By-law on a number of the grounds set out in the *Charter* and the *Human Rights Code*, as well as on analogous grounds, and of a potential breach of the duty to accommodate in the shelter system, which satisfies the low test of a serious issue to be tried: see *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paras. 48-82. In reaching this conclusion, I am aware of the finding by Lederer J. in *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 at para. 136, that "homelessness" is not an analogous ground under s. 15 of the *Charter*; however, that case arose in a different context, and I would not apply that holding in this matter at this stage of this litigation.

[63] Recognizing that the applicants raise serious issues, however, is not a finding that they will succeed, or that they have a strong likelihood of success. As I address later, the British Columbia cases arose in circumstances where municipalities were not providing enough shelter spaces. Section 7 of the *Charter* also requires a finding of a breach of the principles of fundamental justice, which may be based on procedural unfairness or arbitrariness.

[64] Furthermore, s. 1 of the *Charter* provides that all rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," which involves considering the government's objectives and balancing those objectives with the rights of the individual: see, e.g., *R. v. Oakes*, [1984] 1 S.C.R. 103. The duty to accommodate is not unlimited, and only extends to the point of undue hardship: *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, at para. 23.

[65] I agree with Professor Roach that the issue of the strength of the case and consideration of the public interest which arises in *Charter* cases may be "better assessed under the balance of convenience where the courts have made healthy allowance for the public interest and where it will be suggested they can also draw on considerations of proportionality that play a central role in our constitutional law": *Constitutional Remedies in Canada* at paras. 7.175 -7.190. When addressing the balance of inconvenience, there are countervailing interests that must be considered in this case, as there would be in applying s. 1 of the *Charter*, which would support a finding that the application does not have a strong likelihood of success. This is an illustration of why the 3-part *RJR* test is flexible and its application will vary depending a range of factors.

[66] I observe, in this context, that the applicants do not challenge the validity of the By-law itself, but only argue that its application is unconstitutional during the pandemic. Thus, the case turns very much on the facts before the Court of the specific circumstances that arise due to the COVID-19 pandemic, and what has been done by the City to address it. The evidence from the City, which I review below, supports its position that the it is providing sufficient and safe shelter facilities during the pandemic such that any violation of life, liberty and security of the person, or equality rights, is limited and likely to be justified under s. 1 of the *Charter*, as homeless people are being reasonably accommodated in the shelter system, a conclusion also supported by the many people who have left encampments and been provided with shelter and housing by the City in the past several months.

Irreparable harm

[67] Irreparable harm refers to harm which cannot be adequately remedied through an award of damages or by an eventual disposition of the case. As stated in *RJR* at p. 341, "[i]t is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." The Supreme Court also notes that "irreparable" refers to the nature of the harm, not its magnitude.

[68] Sharpe writes that "courts should avoid taking a narrow view of irreparable harm…[i]n the context of preliminary relief, the test is a relative and flexible one" (*Injunctions and Specific Performance*, paras. 2.411, 2.450).

[69] Courts have recognized that "a risk of personal injury or assault" is sufficient to show irreparable harm. Irreparable harm is also established where there is "psychological harm that is more than transient or trifling:" *Toronto Standard Condominium Corporation No. 2395 v Wong*, 2016 ONSC 8000, at para. 32. On the other hand, the evidence establishing irreparable harm must be clear and not speculative.

[70] In this case the applicants submit that irreparable harm will be suffered by people in encampments if the City By-laws are enforced and they are forcibly removed from encampments. This harm includes: (1) psychological and physical harm through displacement, the loss of shelter and the ability to protect themselves and meet their basic needs; and (2) a real and substantial risk of contracting COVID-19 within the City's shelter system, and associated mental distress, due to their inability to shelter in place.

[71] If forced from the group encampments, the applicants fear loss of their tents, sleeping bags, coolers and other possessions that provide them with shelter and food. By being "moved along" and forced to leave group encampments, they may lose valuable community supports both within the camp and outside, such as access to clean water, sanitation supplies, food, and access to medical care and other supports, and be more vulnerable to being victims of crime. In this context, the applicants prefer living in encampments with others where they say they feel safer and more secure, than in a shelter or living on their own in a park or on the street.

[72] In the context of the COVID-19 pandemic, the applicants submit that the eviction of homeless people from encampments will remove their ability to protect themselves from infection as they argue that "[t]he City's shelter system has not proven to be a safe alternative in terms of risk of exposure," and that the "risk of contracting COVID-19 in shelters, and the mental distress induced by the perceived risk of transmission, present a serious risk of irreparable harm to the applicants and other homeless individuals." In contrast, they say that the risk of contracting COVID-19 in outdoor encampments is comparatively low, noting that "[t]here is no evidence on the record indicating a confirmed case of COVID-19 transmission within homeless encampments."

[73] The applicants also point out, if necessary, that even if these harms could be compensable by money, the City's status as a municipality prevents an award of damages unless there is underlying or intentional wrongdoing: *Welbridge Holdings Lid. v. Greater Winnipeg*

(Municipality), [1971] SCR 957 at pp. 967 – 969; *563080 Alberta Lid. v. Calgary (City)*, [1996] 89 A.R. 166, 41 Alta. L.R. (3d) 76 at para. 21.

[74] The City disputes these assertions of irreparable harm. It challenges the scope of the risk of contracting COVID-19 in shelters having regard to the steps the City has taken to ensure its shelter system is accessible, safe, and responsive to the various and challenging needs of the homeless population.

[75] While the City's evidence does raise questions as to whether the enforcement of the By-laws will cause irreparable harm, if it were ultimately determined that the applicants' rights were violated there is unlikely to be any effective remedy for that breach. Accordingly, I find that the irreparable harm branch of the *RJR* test has been met here, and discuss the City's responses below in my discussion of the balance of inconvenience.

Balance of inconvenience

[76] This branch of the *RJR* test is usually where the hard work takes place, and on which many injunction decisions turn. It requires consideration of "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits." (*RJR*, p. 342.)

[77] As this case raises *Charter* issues "the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies": *RJR* at p. 343. This does not mean that the City has a "monopoly on the public interest" which overrides private rights. The applicants may also raise public interest concerns, all of which must be considered in the balancing exercise.

[78] This brings me to the City's evidence of its efforts to ensure a safe and accessible shelter system during the pandemic, the risks and burdens of encampments on both their occupants and other residents of the City, and the scope of what the applicants seek on this motion, and application.

Toronto's shelter system

[79] Generally, homeless people have available to them shelters and respite sites operated and funded by the City in order to have safe, indoor spaces to sleep. However, some choose to live on the streets, or in parks, sometimes in tents or more roughly.

[80] Toronto has an extensive shelter system operated by the Shelter Support and Housing Administration ("SSHA"). SSHA is the legislated Service Manager for the City of Toronto, pursuant to the *Housing Services Act, 2011*, S.O. 2011, c. 6, Sched. 1. SSHA is enabled to establish, administer and fund housing and homelessness programs and services and may also provide housing directly. As described by Scott McKean, Manager of Community Safety and Wellbeing Planning at the City, SSHA works "to ensure that vulnerable people can access temporary accommodation when they need it, and that permanent housing options are available, accessible and sustainable when possible. SSHA works with community partners, service users and other stakeholders to transform housing and

homelessness service networks into client-centered, outcome-focused systems that help households find and keep stable housing and improve overall well-being."

[81] Although it has the largest population experiencing homelessness in Canada, Toronto has more shelter beds per capita than any other Canadian city. This includes emergency and transitional shelter beds for families, youths, adults (single sex or all gender), 24-hour respite centres, and drop-in programs that offer services such as showers, food, laundry, health and medical services, information and support for housing and eviction prevention, and social and recreational activities.

[82] Prior to the COVID-19 outbreak, the City operated 64 homeless shelters and seven respite centres directly or in collaboration with community agencies, with over 7000 beds available. SSHA ensures that shelters operate in compliance with detailed standards to meet the needs of those who use them. Shelters may also adopt rules such as curfew times and may make bed checks during the night to ensure safety and to ensure that facilities are used. Shelters and respites, including hotels, have rules restricting or prohibiting guests, as this impedes the ability of shelter providers to monitor the safety and security of users and staff.

[83] Shelters have programs to prevent drug use and provide supports for those who use substances in order to ensure the safety of those individuals. Many shelters have naloxone kits, and some provide safe injection and inhalation equipment. People are advised not to use drugs alone, and referrals are made to treatment centres.

[84] The City operates the Streets to Homes program which assists people experiencing homelessness to transition from living on the street to living in permanent housing. This usually involves moving people from encampments to transitional spaces where the specific needs of individuals can be assessed before moving them to more permanent housing. Streets to Homes has transitioned 6000 people to housing over the past 10 years, and more than 80% of those people remained housed after one year.

[85] The City considers the particular needs of individuals when offering shelter space, including finding space for couples, women and those with pets. It tries to provide locations close to supports and services used by the individuals, and where this is not possible the City provides transit fare so that the individuals can access the necessary supports and services.

Toronto's shelter response to COVID-19

[86] On January 30, 2020, the WHO declared the COVID-19 outbreak to be a Public Health Emergency of International Concern and on March 11, 2020 it declared COVID-19 to be a pandemic, which is an "epidemic occurring worldwide or over a wide area, crossing international borders usually affecting large numbers of people." Canada's first confirmed case of COVID-19 was reported on January 25, 2020. The first confirmed death from COVID-19 in Canada was on March 9, 2020. The number of Canadians infected with COVID-19 and number of deaths increased dramatically into early May 2020. By July 28, 2020, the Public Health Agency of Canada reported 114,994 cases, including 8912 deaths.

[87] Ontario declared a state of emergency on March 17, 2020 on the basis that COVID-19 constitutes a danger of major proportions that could result in serious harm to persons. A state of emergency in the City of Toronto was declared by the Mayor on March 23 and extended by City Council on April 30, 2020. The provincial state of emergency was lifted on July 24, 2020, when the incidence of COVID-19 infections and deaths had diminished greatly during the summer months. However, as was acknowledged by everyone when this motion was argued on October 1, 2020, Toronto and other places in Canada are experiencing a "second wave" of COVID-19. The daily tally of new cases is similar to that seen in the spring and many restrictions have been re-introduced to combat the virus.

[88] Toronto has taken many steps to address the situation of the homeless population during the COVID-19 pandemic. The City opened 30 new shelter facilities and secured over 1200 additional hotel rooms at 19 hotels to ensure physical distancing could be in place in shelters and respite centres. From mid-March to August 1, the City moved over 3800 people to new spaces, including placing 1,570 homeless individuals from shelters and encampments into permanent housing.

[89] Shelter space has also been expanded by the ability to use housing units in apartments in buildings slated for demolition, and by the lower demand on the shelter system previously allocated to refugees as fewer people are entering Canada during the pandemic. Five shelters previously kept closed during the day have been opened.

[90] Standards have been adopted and implemented to achieve physical distancing, including that beds in shelters maintain a lateral separation of at least 2 metres. According to Gordon Tanner, Director of Homeless Initiatives and Prevention Services at SSHA, by mid-June 2020 99.5% of the 7000 beds available in Toronto's shelter system complied with the 2-metre physical distancing requirement. The City has provided $6.1M towards adopting new infection control measures developed in consultation with Toronto Public Health, including personal protective equipment, cleaning supplies and other steps to improve hygiene and prevent the spread of the virus.

[91] The City is also facing other litigation involving its response to the needs of the homeless population resulting from COVID-19, and I have read the very recent decision of Sossin J. in that matter dated October 15, 2020: *Sanctuary et al. v. Toronto (City) et al*., 2020 ONSC 6207.

[92] In *Sanctuary*, a number of advocacy and community organizations commenced litigation against the City challenging the City's shelter system standards which permitted the use of bunk beds and failed to require a minimum of 2-metre lateral spacing between beds. In May, the City entered into a settlement agreement in which it was to achieve "certain goals relating to the safety and capacity of Toronto's shelter system in the wake of the COVID-19 pandemic." The City asserted compliance on June 15, 2020.

[93] However, the applicants claimed that that the City had failed to comply with the settlement agreement and brought a motion in July to enforce the agreement, which was argued on October 1, 2020, the same day as this motion was heard.

[94] Although Justice Sossin concluded that the City was not in full compliance with the settlement agreement as some 32 beds out of 7,152 beds in the shelter system were not compliant with the physical distancing standards as of June 15, he noted that those beds, constituting less than one-half of one percent of the beds in the entire shelter system, were "decanted" from the system by September 9, 2020.

[95] Justice Sossin's findings are consistent with the evidence the City has put before me as to the efforts the City has made to ensure that the shelter system has safe shelter spaces, with appropriate physical distancing, to accommodate those who wish to use them. As Sossin J. notes, at para. 69: "There is no doubt that the City generally, and SSHA specifically, undertook a massive and complex project in a very tight time frame in attempting to ensure physical distancing across the entire shelter system as the COVID-19 emergency was unfolding." As the *Sanctuary* case demonstrates, advocacy and community organizations are holding the City to its commitment to do its best to provide safe shelter to the homeless population during the pandemic.

[96] More than 1900 homeless people, including people previously living in encampments, have been moved into hotels across the City since the pandemic began. Half of the hotel sites are in or near the downtown core. While hotels are suitable for many people, some who are particularly vulnerable or at risk often need supports that hotel rooms cannot provide and the City works to find appropriate shelter or respite space for those people. The City has also adjusted its rules against permitting people to be in each other's hotel rooms in order to reduce the risk of overdose deaths resulting from people taking drugs alone. While there continue to be suspected opioid deaths in shelters, there have also been suspected opioid deaths in park encampments.

[97] SSHA has had shelters adopt screening programs and implemented a service to transport people to a COVID-19 Assessment Centre if they have symptoms. Three hotel sites were established to isolate those awaiting results of a COVID-19 test, which were used by over 545 people. Two recovery sites were established for those who tested positive, and have accommodated over 640 people.

[98] Most of this activity occurred in the early months of the pandemic. Of the 649 cases in the shelter system, almost half arose in April (311) and 218 cases were reported in May followed by 96 in June. Only 6 new cases were reported in July. And as noted above, 310 of the cases were located in shelters that do not typically serve the homeless population coming from encampments. Between March 11, 2020 and July 1, 2020, the City's shelter system provided services to approximately 10,000 individuals.

[99] By July 31, 2020, only a few people remained in one of the recovery sites completing a 14-day isolation. On October 1, 2020, I was advised that there were only 5 cases in the system, all located at one youth shelter.

Toronto's encampments and the City's response

[100] Although there is no data before me, it appears to be common ground that the number of encampments in Toronto increased following the declaration of the pandemic in mid-

March, and larger encampments were established in a number of parks. Several reasons have been identified for this growth, including an unwillingness by some to access shelters due to concerns about COVID-19, and because the residents of the encampments value the sense of community and what they perceive as the relative safety of being in a larger group. As Dr. Wiwcharuk notes:

> There is often a sense of community that develops among encampment residents, and people come to rely on one another to watch their belongings when they leave the encampment site (although thefts do take place), to supervise drug consumption and respond to overdoses, and to share resources. There is also a sense of personal safety that comes from being around other people who are known to residents, rather than being isolated and alone.

[101] Dr. Wiwcharuk notes that encampments have arisen where services are in place or may be available nearby, such as hygiene facilities, safe consumption sites and drug treatment centres, community health services, meal programs, other social services and access to water. As a doctor who does street outreach, she is able to find and meet many patients at encampments and identify needs that might not otherwise be raised. Dr. Wiwcharuk observes, however, that the COVID-19 pandemic "led to the closure of many fast food restaurants and public washrooms" causing people to soil themselves or defecate in public due to a lack of facilities.

[102] The City did not take steps to clear group encampments in the early weeks of its response to the pandemic while the shelter system adapted and steps were taken to allow for physical distancing in the existing locations. During that time, according to Scott McKean, City staff attended encampment sites regularly. Streets to Homes, outreach agencies and Toronto Paramedic Services conducted wellness checks, engaged in prevention and control measures and assessed shelter and housing needs of people living in the encampments. Parks, Forestry and Recreation, Solid Waste Management, Transportation Services and Toronto Fire Services provided cleaning at sites to remove hazardous materials, waste and debris.

[103] The City has provided additional services to the homeless population in camps, including portable toilets and handwashing stations in several locations, and has provided expanded access to public washrooms and shower facilities in parks and community centres. Some of this may be seasonal, as swimming pool facilities were open during the summer months when the evidence was obtained. The City has also provided drinking water in some locations. It works with the residents of the encampments and community organizations to provide services. This is consistent with recommendations from an inquest in 2018 following the death of a homeless man in an encampment fire, that the City "[r]evise its existing policies to allow the provision of 'survival' equipment and/or supplies (e.g. sleeping bags, fire retardant blankets, safe heat sources) and/or safety information to individuals who stay outside rather than accessing shelter/low-barrier overnight services": OCC Inquest, Grant Faulkner, Ministry of the Solicitor General, 2018.

[104] The City has identified many concerns with the encampments. This includes limited or no access to adequate sanitation facilities. There are frequent reports of public urination and

defecation in parks. The lack of ready access to clean running water means it is difficult to wash and stay clean – a primary defence against the spread of COVID-19. Other concerns include drug overdoses including fatalities, inadequate physical distancing and lack of masks, sex trafficking, pervasive discarded needles and other drug paraphernalia, garbage, used condoms, human waste and unsanitary washroom messes, including interference with City staff cleaning and sanitizing washrooms, as well as the presence of rats.

[105] There have been many fires in encampments, endangering residents and impairing public safety, and damaging public property. Fires may result from the use of generators, propane tanks, improvised electrical wiring, and smoking in the encampments. Fires occurred at both Moss Park and Alexandra Park in July 2020. Between June 6 and July 21, the City has received 212 calls to its "311" service (the "311 data") that were complaints about fire risks in parks with encampments, 104 of which were about encampment fires. As the colder weather sets in and there is more need for heat, the frequency of fires may increase.

[106] The City has provided numerous reports from the Toronto Police Service of criminal activity in the parks, many of which are associated with encampments. The applicants rightly caution that many instances cited by the City did not involve crimes committed by residents of the encampments or in the four parks named in the application; however, the applicants acknowledge that many residents of encampments are victims of criminal activity. The crimes reported by the City range from property crimes to violent crimes involving weapons, sexual assault, drug and human trafficking, and exploitation of residents of the encampments who face violent retribution if they do not comply with demands made by others, such as non-resident drug traffickers.

[107] There is no evidence before me of COVID-19 outbreaks or transmission within the encampments. However, Dr. O'Shea acknowledges that tracking COVID outbreaks in encampments would be difficult compared to tracking in shelters, and he is of the view that "[h]ousing homeless individuals in hotel rooms with private sleeping and bathroom spaces likely reduces the risk of transmission to effectively the same as people who have their own self-contained dwelling unit or home."

[108] The City has received hundreds of complaints and reports by park users, neighbours and City staff regarding violence, drug trafficking, noise at all hours, garbage, threats and harassment at parks with encampments. Many people are afraid to enter certain parks, and families are unable to bring children to playgrounds due to the presence of needles. Police and the City have received many complaints about drug trafficking.

[109] The City's 311 data between June 6 and July 21 showed 392 complaints about physical distancing in the parks with encampments, 400 complaints about public drug use, and almost 600 complaints about garbage in and near parks with encampments, including complaints that encampments were attracting rats and other rodents. 332 complaints were about violence, almost 400 complaints were about threatening behaviour and there were 113 complaints of theft. 233 noise complaints were received. There were 472 complaints about human waste in the parks, including complaints of people defecating and urinating

in the park and on properties neighbouring the parks. City staff working in the parks with encampments have also been threatened.

[110] The City has expressed concern about the situation worsening as cold weather sets in, noting that it becomes harder to provide services to encampments in the winter, and that helping people move to warm spaces takes time and is best done well in advance of the colder weather.

[111] While the City has provided staffing and some supports to encampments, it has "prioritized creating access to safer spaces inside that include appropriate physical distancing, enhanced infection, prevention and control measures, sanitation, meals and onsite supports, rather than building infrastructure into encampments." As the City puts it, "[b]uilding infrastructure in encampments would require spending scarce resources in parks and risk encouraging larger encampments."

[112] Since April 29, 2020, the City has been actively working to move people living at encampments inside. Between April 29 and August 4, the City moved over 700 people from approximately 44 encampments to hotels, transitional housing, shelters and respites.

[113] When moving people out of camps, the City follows a number of steps. Outreach teams from Streets to Homes work with community partners well in advance of removal to identify needs and offer indoor spaces to camp residents. Parks ambassadors also work with people in encampments to encourage them to meet with Streets to Homes. If people accept spaces in shelters, respites or hotels, they are able to bring two bags of belongings with them, which may include a tent. If these offers are rejected, then trespass notices are issued requiring people in encampments to vacate within 72 hours following which the site will be cleared. Once people are residing in shelters or other indoor spaces the City is better able to work with them to find longer term housing solutions.

[114] An example of the involvement of community organizations in moving people from camps to indoor spaces is found in the evidence of Zoe Dodd, who worked with the City to move people out of the parks and into hotels and apartments in July. At that time, Ms. Dodd raised with the City her concern for overdose risks in hotels and apartments due to rules prohibiting residents from having outside guests or other residents in their rooms, which would cause people to use drugs alone, placing them at a much higher risk. The City responded immediately to change the rules to permit residents to enter each other's rooms. And while there were opioid overdose deaths in shelters in July, there were also opioid overdose deaths in encampments during the same period.

[115] The numbers are unclear as to how many people are still living in encampments, or the size of those camps. As of August 5, 2020, the City estimated approximately 1000 tents existed in 140 city parks. The City has continued its efforts, through Streets to Homes, to move more people into indoor living facilities.

[116] The applicants' pleadings and evidence make reference to particular encampments in Moss Park, Dufferin Grove Park, Alexandra Park and Allan A. Lamport Stadium Park, which I address below.

Moss Park

[117] At its peak in mid-July, Moss Park in downtown Toronto had 64 encampments, or tents. It is not clear how many people are now camped in Moss Park, but Derrick Black, who lives there, describes it as "a few groups of tents in a few areas in the park" which "don't take up too much space." The washroom and shower facilities in the Moss Park Community Centre are open, but only from 8AM to 10PM. The City's information is that it has provided portable toilets and handwashing facilities, as well as wellness checks, housing assessments, maintenance and clean-up services and fire safety checks at Moss Park since the beginning of the pandemic.

[118] Through Streets to Homes the City has worked with community health centres and the Moss Park Overdose Prevention Site to identify how best to transition people to indoor spaces. In late June and early July, Streets to Homes moved people out of Moss Park. According to Mr. McKean, as of July 26 at least 180 people had been moved from encampments "at and around the Moss Park encampment to inside spaces." Approximately 150 were moved in the week preceding the July 18 notice.

Alexandra Park

[119] Katelynn Bowman lives at Alexandra Park in what she describes as a "small cluster of tents on a patch of grass near the library." Ms. Bowman advises that she has access to a port-a-potty and there are shower facilities at the pool which Ms. Bowman says were recently "closed off." The City's material indicates that there is also hand washing available and it donated bottled water to a local community centre to distribute to those residing in Alexandra Park.

[120] As of July 28, 2020, while the City was engaging with the residents of Alexandra Park it had not, at that time, offered space in shelters to those residents "due to other priorities." However, the City expressed concerns about health and safety and has increased garbage pick-up, including litter and needle clean-up near the encampment.

[121] The City received complaints about the impact the encampment had on a summer day camp in the park due to "issues such as violence and substance abuse in the vicinity of where the camp would operate." According to Mr. McKean, "[s]ome day camps that operate close to encampments have had to modify programming by prohibiting access to the parks or closing all together to ensure the safety of children and staff."

Dufferin Grove Park

[122] John Cullen moved to Dufferin Grove Park in early July after receiving a trespass notice at Nathan Phillips Square. On July 27, the Dufferin Grove encampment was taken down and he has now moved with two others to a remote location in another city park. In Dufferin Grove, Mr. Cullen says there was access to bathrooms in the park during the day. Apparently people in the encampment had access to electricity and hooked up a water hose, but the City required they be removed.

Lamport Stadium Park

[123] The City's evidence about the Lamport Stadium Park encampment is that with the help of community organizations it moved 66 people into indoor spaces in the last week of July, and that efforts continue to move more people inside. The City has also provided increased access to sanitation facilities and portable toilets with handwashing stations available around the clock. Nevertheless, there has been a high volume of complaints from nearby residents in Liberty Village and from local businesses about public urination and defecation, drug dealing and drug use, violence, theft and vandalism related to the encampment.

Concerns with removal of encampments

[124] Put against the City's evidence are the concerns of some individual applicants and the experts about why some people experiencing homelessness resist going to shelters and the harm that may come to them when they are "moved along."

[125] Dr. Wiwcharuk points out that "people choose to sleep in encampments for a variety of reasons, including difficulties they have experienced within the shelter system and a shortage of shelter beds." She notes that "[s]ome find the rules in shelters to be too restrictive, and these rules often fail to take into account the particular needs of shelter clients." These concerns are not unique to the COVID-19 pandemic. Although she notes that rules in shelters and hotels against having guests "poses particular risks to people with drug addictions, who may rely on the supervision of others to ensure safe consumption of substances," the City has taken steps to address this concern.

[126] Dr. Wiwcharuk also notes other circumstances which deter individuals from using shelters. These include people with pets, couples who wish to stay together, people with mental health issues such as anxiety and paranoia that "make it difficult to be in close contact with so many people," exposure to drug use and users, fear of theft and "a sense of a lack of personal security in a 'dorm-style setting'." Again, however, these are not circumstances unique to the COVID-19 pandemic. Furthermore, the evidence is that the City has taken steps in the past several months to not only provide more separation in dorm-style shelters, but also to provide individual rooms in hotels and even apartment units for couples, as was offered to the applicants Derrick Black and Michelle Plourd.

[127] Dr. Wiwcharuk also speaks to the fact that when encampments are broken up, residents' lives are destabilized. If people cannot use, or are unwilling to use, shelter services, they lose access to hygiene and medical services and food. Connections with their friends and other supports and support workers are lost, including access to drug treatment programs. In Dr. Wiwcharuk's experience, this dislocation has a particularly negative impact on mental and physical health of those displaced. Personal security and safety is put in jeopardy, and those who are "moved along" are at an increased risk of being victims of crime.

[128] I have no doubt that what Dr. Wiwcharuk says is correct; however, it is not unique to the current COVID-19 situation, on which the applicants' case depends. Both Drs. Wiwcharuk and O'Shea would prefer to see people living indoors rather than in encampments. Dr. Wiwcharuk makes clear that she is not advocating for encampments as a "solution to

shortages of available housing or as a means to de-crowd shelters"; rather, "that efforts must be made to secure safe and stable housing for people experiencing homelessness, that alternate accommodations such as hotels and shelters must be responsive to the needs of encampment residents including provision of adequate social supports, and that people living in encampments should not be forcibly removed in the context of a global pandemic."

[129] The concern raised by the applicants and their experts with clearing the encampments during the pandemic is that, according to Dr. Wiwcharuk, it "puts a population which is the most predisposed to experiencing severe symptomology and worse health outcomes of COVID-19 at a higher and unnecessary risk of contracting COVID-19 if they are moved into congregate living facilities such as shelters." Further, she notes that these risks may be exacerbated by the fact that the homeless population tends to be transient and people may move from one shelter to another, and because the use of drugs and prevalence of mental health issues in the population makes compliance with public health guidelines less likely.

[130] In support of this position, Dr. Wiwcharuk cites a recommendation from the CDC made in July 2020 as follows:

> Unless individual housing units are available, do not clear encampments during community spread of COVID-19. Clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread. [Emphasis added]

[131] I have emphasized the opening words of that recommendation as it highlights the weakness in the applicants' position on this motion, which is that there is no evidence that safe shelter spaces, including individual housing units are not available to the homeless population.

[132] In a recent publication, Drs. Wiwcharuk and O'Shea identified four factors as "particularly important" in reducing the spread of COVID within the Hamilton shelter system:

1. increased capacity of shelter space by opening surge shelters and hotel rooms, allowing for more effective physical distancing in congregate shelters;

2. access to rapid assessment and testing on site when symptomatic residents or staff are identified through active screening;

3. restructuring of physical spaces to accommodate isolation of residents with confirmed COVID-19 and those awaiting test results; and

4. rapid turnaround of test results through collaboration with our regional laboratory program allowing triage of individuals into isolation spaces without exceeding available capacity.

   [O'Shea, T., et al., "Pandemic Planning in Homeless Shelters: A pilot study of a COVID-19 testing and support program to mitigate the risk of COVID-19 outbreaks in congregate settings"]

[133] The City of Toronto has implemented the first three measures and advocated to the province for the fourth. Furthermore, many steps have been taken by SSHA to adapt the shelter system to respond to COVID-19. A large number of people have moved out of encampments into shelters, with the support of community organizations and front-line workers such as Ms. Dodd, and that process continues.

[134] It is not clear how many people are like the three applicants who either do not wish to go to a shelter or have not been offered accommodation that is to their liking, but some of the other named applicants have moved indoors through City and community efforts. As Dr. Wiwcharuk recognizes, there will always be challenges in persuading some to go to shelters, even absent concerns about COVID-19.

Application of legal principles

[135] As noted at the outset of my discussion of the balance of inconvenience, the public interest is an important factor in injunction motions that engage constitutional rights and the validity of legislation or the ability to enforce laws*: RJR* at p. 343, citing with approval Blair J. (as he then was) in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993) 14 O.R. (3d) 280, at pp. 303-4. Both sides may raise public interest issues which may "tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. 'Public interest' includes both the concerns of society generally and the particular interests of identifiable groups": *RJR* at p. 344.

[136] But the onus of proof will differ. As the Supreme Court said at p. 344 of *RJR*, "[w]hen a private applicant alleges that the public interest is at risk that harm must be demonstrated." In contrast, as the Court noted at p. 346, "[i]n the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant." Justices Sopinka and Cory continued:

> This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[137] Subsequently, in *Harper v Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57, the Supreme Court confirmed this presumption that the law will "produce a public good," stating at para. 9:

> Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and

Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [citation omitted] at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2*(b)* right of freedom of expression; indeed, the violation at issue in *RJR--MacDonald* was of s. 2*(b*). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[138] In this case, the public interest considerations favour the City.

[139] The By-law applicable in this case, *City of Toronto Municipal Code*, c. 608, prohibits the following activities without permission:

- accessing or occupying a park for non-recreational uses (§ 608-9(A));
- using, entering or gathering in a park between 12:01 a.m. and 5:30 a.m. (§ 608-9(B));
- dwelling, camping or lodging in a park (§ 608-13); and
- erecting a tent, structure or shelter at, in or to a park (§ 608-14).

[140] The By-law was the subject of consideration in *Batty v. City of Toronto*, 2011 ONSC 6862. There, D.M. Brown J. (as he then was) considered the constitutionality of a trespass notice issued under the By-law in the context of an encampment set up as part of a protest movement called "Occupy Toronto." It was argued that enforcement of the By-law would infringe freedom of expression protected by s. 2*(b)* of the *Charter*, and that the By-law was impermissibly overbroad and vague in allowing expression to be muzzled by the prohibitions on camping and erecting tents, and consequently failed the "prescribed by law" requirement in s. 1 of the *Charter*.

[141] Brown J. dismissed the application observing, at paras. 91 and 95:

> Toronto is a densely populated city. Competing demands for the use of its limited parklands are numerous. Without some balancing of what people can and cannot do in parks, chaos would reign; parks would become battlegrounds of competing uses, rather than oases of tranquility in the concrete jungle. Or, parks would become places where the stronger, by use of occupation and intimidation, could exclude the weaker or those who are not prepared to resort to confrontation to carve out a piece of the park for their own use. The evidence filed before me from the residents indicates that that is precisely the effect of the Protesters' occupation of the Park -- the tents and other shelters hog the park land and non-Protesters who seek to use the Park face a chilly and somewhat intimidating reception.
>
> …
>
> When read as a whole, the objective of the Parks By-law is quite clear and sensible - it is an attempt to balance, in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them. The Parks By-law certainly contains restrictions, but ones with the evident purposes of enabling all to share a common resource and ensuring that the uses of the parks will have a minimal adverse impact on the quiet enjoyment of surrounding residential lands. [emphasis added]

[142] As Brown J. stated, the purpose of the By-law is to balance, in the public interest, the different uses everyone wishes to make of parks. The prohibition on camping in parks fosters this purpose and is in the public interest. Indeed, the applicants do not challenge this but ask for a suspension of its enforcement during the pandemic, or until the application is heard, which may be many months from now.

[143] The COVID-19 pandemic affects everyone. As people are prevented from socializing indoors, public outdoor spaces such as parks take on added importance as a resource. Toronto is indeed a densely populated city and has limited parkland. In my view, the public interest purpose of the By-law, to make parks available to everyone, outweighs the interests of the applicants who seek a sweeping order preventing enforcement of the By-law in all City parks. The City cannot have its hands tied and be prevented from managing its parks so that they are safe and accessible to everyone.

[144] In argument, I invited counsel for the applicants to propose ways in which the broad relief sought might be tailored more narrowly to reflect the public interest while still permitting some encampments, but no alternatives were suggested other than the order apply only to homeless persons, which was not helpful. The claim was made that the City could still enforce other By-laws such as littering, and the police and fire departments could still enforce criminal laws and fire code dangers without breaking up the camps. This is unconvincing and not supported by evidence. Tickets issued for littering or other By-law infringements will likely become more litter. Fire poses a danger to everyone, and the significant increase in fires in parks and in encampments this year speaks to a danger that must be prevented, not simply responded to each time it happens. They place an additional burden on firefighters, who are not police and have limited jurisdiction to compel actions

by individuals. Criminal activity in parks increases when there are encampments, putting an additional burden on police.

[145] The availability of shelter spaces, and the steps taken by the City to address COVID-19 concerns makes this case quite different from the British Columbia cases, *Victoria (City) v. Adams* and *Abbotsford*, cited above and relied on by the applicants. Those cases involved situations in which the municipalities did not have sufficient shelter space available, nor were there other options for obtaining shelter. As was emphasized by the British Columbia Court of Appeal in *Adams*, the trial judge's decision was "premised on her finding of fact that there were not enough shelter spaces to accommodate all of the City's homeless, from which she drew the obvious inferences that some people will be sleeping outside, and that those people require some shelter." As the trial judge stated at para. 191 of her Reasons, quoted at para. 73 of the Court of Appeal decision:

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

[146] Accordingly, as the British Columbia Court of Appeal observed in upholding the order declaring the Victoria By-law invalid (at para. 74):

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

[147] Similarly, in *Abbotsford*, Hinkson C.J.S.C. concluded that there was insufficient shelter space in the city to house all the city's homeless people. What shelters existed were often practically inaccessible because of stringent entry requirements like sobriety or rent (para. 82). When considering whether the Parks By-law violated the applicants' s. 7 rights, Hinkson C.J.S.C. held that "[w]hile I accept that the choice to erect an outdoor shelter without permit, when there are other accessible options, is not a fundamental personal choice engaging dignity concerns, I have found that there are, at present, insufficient viable and accessible options for all of the City's homeless" (at para. 222, emphasis added, see also para. 188).

[148] Similar concerns regarding having nowhere to go has driven other decisions about encampments in British Columbia, including *Vancouver (City) v. Wallstam*, 2017 BCSC 937, and *British Columbia v. Adamson*, 2016 BCSC 584. However, the evidence before this Court, on this case, is quite different. Shelters and housing are available, and the City has taken extraordinary steps to address the concerns arising from COVID-19 in its shelter and housing system.

[149] The City has addressed concerns regarding the risk of COVID-19 in the shelter system. Is it perfect? No, but everyone is affected by this pandemic and everyone faces risks of exposure to the virus in different ways. While I appreciate that some people experiencing homelessness continue to distrust, or fear, the shelters during the pandemic, the evidence does not support those concerns. The applicants' fears of shelters due to COVID-19 have been addressed by the City such that there are adequate safe alternatives to sleeping in encampments. One is left with a situation where a limited group of people, such as the three applicants who gave evidence on this motion, may continue to resist using the shelter system despite the City's best efforts. This resistance is not unique to the pandemic, and does not, in my view, give rise to a right to live in encampments in City parks, contrary to a valid By-law, during the course of the COVID-pandemic.

[150] Accordingly, the applicants have not met the burden of establishing harm to the public interest that would justify suspending the City's ability to enforce its By-law preventing camping in all of its parks during the COVID-19 pandemic. The sweeping relief sought would unjustifiably tie the City's hands in dealing with encampments that raise serious health and safety concerns for an indefinite duration, and would unduly prevent the use of parks by others. This causes me to find that the balance of inconvenience favours the City and the public interest in ensuring that parks are a common resource available to everyone, which is the purpose of the By-law.

Conclusion

[151] The applicants have failed to meet the test for injunctive relief and the motion is dismissed. As agreed between the parties, there will be no order as to costs.

Paul B. Schabas J.

Date: October 21, 2020