IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nanaimo (City) v. Courtoreille,* 2018 BCSC 1629

Date: 20180921
Docket: S84809
Registry: Nanaimo

Between:

City of Nanaimo

Petitioner

And

Mercedes Courtoreille, Gina Watson, Mike Pindar, Mystie Wintoneak, Kent Sexton, Dean Kory, Jane Doe, John Doe and Other Unknown Persons

Respondents

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Petitioner:	T.J. DeSouza J.A. Plonka
Counsel for the Respondents, Gina Watson, Mike Pindar and Mystie Wintoneak:	N.J. Ross
Place and Date of Trial/Hearing:	Nanaimo, B.C. July 17, 18 and August 13, 2018
Place and Date of Judgment:	Nanaimo, B.C. September 21, 2018

Introduction

[1] The City of Nanaimo ("Nanaimo") seeks a statutory injunction aimed at closing down and removing a "tent city" that has been erected on lands located in downtown Nanaimo (the "Tent City").

[2] The named respondents are activists and advocates on issues relating to homelessness who have been involved in establishing the Tent City. Some but not all are currently staying in the Tent City.

[3] The respondents Gina Watson, Mike Pindar and Mystie Wintoneak are represented by counsel who appeared on their behalf at the hearing. The other named respondents are not represented and did not participate directly in the hearing. References in these Reasons to the respondents will be to those represented by counsel.

[4] Nanaimo alleges that the occupiers of the Tent City are trespassing and are in breach of zoning bylaws, and that the Tent City has had a significant negative impact on neighboring residents and businesses.

[5] For their part, the respondents contend that the Tent City provides residents with a safe community in which they can live and keep their personal effects. They submit that the Tent City contributes to the physical and psychological well-being of vulnerable and marginalized people who otherwise would be living on the streets. They submit further that the Tent City is necessary given the inadequate number of shelter beds available in Nanaimo for the homeless population.

[6] The respondents also take the position that the issues raised are not suitable for determination in a summary proceeding and that Nanaimo's petition should therefore be referred to the trial list.

Background

Establishment of the Tent City

[7] Prior to the creation of the Tent City, a protest camp was established in March 2018 on property located at Nanaimo City Hall. When that camp was shut down, a number of individuals began exploring other locations for the establishment of a more sustainable encampment.

[8] Mercedes Courtoreille, one of the key organizers of the Tent City, describes the process as follows in her affidavit sworn July 10, 2018:

> 4. When we were evicted from City Hall property, there was interest in setting up a sustainable tent city, which could not happen at City Hall.
>
> 5. I was in contact with organizers from other tent cities across the province, speaking to them about what it took to develop tent city [*sic*] and learning from their experience.
>
> 6. The weekend following the City Hall eviction, Fire Chief Karen Fry told me personally that people could camp near John Barsby secondary. Many people set up their tents there, and two days later the City of Nanaimo kicked them out.
>
> 7. After this we had a meeting at Bowen Park with organizers from Anita Place in Maple Ridge and Superintent City in Victoria came and talked to us about their experience. We discussed what it would take to set up a tent city, and those who were in attendance unanimously decided we would try and establish one in Nanaimo. Attendees/organizers included people experiencing homelessness as well as advocates such as myself. We met once a week for the next two months (this was just Nanaimo residents, no outsiders) to plan and talk, decide what the ground rules of a camp were going to be, discussed locations, establishing a Residents' Council etc.
>
> 8. The organizing group of homeless people and housed supporters picked 1 Port Drive because the space needed to meet several criteria, including being on publicly owned land and somewhere central, close to all social resources, publicly visible, large enough for many residents, and not in a residentially-zoned neighborhood.
>
> 9. One of the crucial things was that it be somewhere public in order to hold the City accountable. We noticed that during our stay at City Hall, City employees, bylaw officers etc. were fair and accommodating, but as soon as people left there, they immediately experienced more displacement and harassment by the City and bylaw.
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> …
>
> 11. When the first residents moved into DisconTent City there were 30 tents. Now there are approximately 110 as of early July…

[9] The property on which the Tent City has been erected (the "Property") occupies a prominent spot in downtown Nanaimo. It is located at 1 Port Drive and is adjacent to the Gabriola Ferry Terminal, the cruise ship terminal and a Seaspan shipbuilding site. Across the street are a number of commercial businesses, including a shopping mall known as the Port Place Mall.

[10] The Property is owned by Nanaimo and leased to the Island Corridor Foundation which in turn has sublet the Property to the Southern Railway of British Columbia.

[11] The Property is zoned under Nanaimo's Zoning Bylaw (the "Zoning Bylaw") as Community Service #3, which permits transportation uses such as ferry and bus terminals, rail yards and transportation storage. Camping for residential or recreational purposes is not a permitted use under the Zoning Bylaw.

[12] Prior to the establishment of the Tent City, the Property was enclosed by a locked chain link fence. On May 17, 2018, locks on a gate to the Property were cut and a number of people entered the Property and erected tents. Initially, there were approximately 25 tents.

[13] Corporal David Laberge of the Royal Canadian Mounted Police ("RCMP") describes the creation of the Tent City in these terms:

> I was present at the Property as part of the RCMP presence shortly after the Tent City was established. In its initial stages, Tent City was a protest, activist movement. The activists arrived at the site in vehicles with several dozen, new, identical tents and equipment. I did not recognize any of the individuals involved other than several of the local organizers/spokespersons who I knew were not homeless. The organizers erected their tents and secured the gate that had been cut open, so that they could control access/egress to the site, and posted camp rules on signs. These rules generally addressed issues of cleanliness and civil behaviour. Wooden shelter structures were erected near the camp entrance which would eventually serve as a receiving and storage area for donated items and as a food and cooking location.

[14] Two very different pictures of the Tent City emerge from the evidence of the parties. From Nanaimo's perspective, the Tent City has caused considerable disruption and negative impacts to neighboring residents and businesses. Affidavits

filed on behalf of Nanaimo describe numerous problems involving fire safety, violence, crime, drug use, garbage and general chaos attributable to the Tent City.

[15] In contrast, affidavits filed on behalf of the respondents describe a safe and structured community that provides considerable benefits to residents, including having an established place to live rather than constantly moving, safe storage for personal effects, safer conditions for drug users, fewer negative interactions with police and a sense of fellowship that comes from living in a community that supports one another.

[16] The evidence is voluminous on both sides and I do not intend to go through it in great detail. Rather, I will highlight some of the evidence that goes to the key points raised by each party.

Nanaimo's Concerns

[17] Nanaimo has identified numerous concerns that it says are directly related to the presence of the Tent City.

[18] Foremost amongst its concerns are issues relating to fire safety. Nanaimo adduced extensive evidence from Alan Millbank, a fire inspector with the Nanaimo Fire Rescue Department, who has had a lead role in monitoring safety conditions at the Tent City. Based on regular inspections of the Tent City, Mr. Millbank documents numerous fire safety issues, including:

a) Obstruction of site access for emergency services personnel;
b) Random and unsafe placement of tents;
c) Excessive fire loads and flammable materials within tents;
d) Improper storage of propane tanks;
e) Accumulations of combustible materials in close proximity to tents;
f) Improperly constructed wooden structures;
g) A "community kitchen" with numerous fire hazards;
h) Improper location of tents, including tents too close together and too close to combustion sources;

i) Improper disposal of cigarette butts; and

j) Extensive use of non-fire retardant tarps.

[19] On May 30, 2018, Mr. Millbank issued a Fire Commissioner's Order (the "May 30 Order") directing that certain steps be taken to address the many fire safety issues. The May 30 Order was subsequently amended on June 8, 2018.

[20] Mr. Millbank deposes that in subsequent inspections, he observed not only ongoing non-compliance with many aspects of the May 30 Order, but also increased fire risks due in large part to the expanding size of the Tent City. Further, Mr. Millbank deposes that during inspections that took place in July, various occupants of the Tent City acted in an aggressive manner towards the inspectors.

[21] Nanaimo's safety concerns extend to issues of drug use and violence within the Tent City. For example, on June 27, 2018, the RCMP attended the Tent City in response to a report of a possible drug overdose. A female resident of the Tent City was transported to Nanaimo Regional Hospital where she passed away. On another occasion, a female resident was sleeping in her tent when she was struck with a pellet fired from a BB gun. Corporal Kate Mooney of the RCMP deposes to other arrests for various assaults that have taken place within the Tent City.

[22] Another significant concern identified by Nanaimo is criminal activity within the Tent City and in the surrounding neighborhood. For example, on July 4, 2018, the RCMP was called to investigate a stabbing that occurred in the Tent City. Further, Corporal Mooney deposes to the number of calls received by police relating to incidents in and around the Tent City in May to July 2018. These include complaints of theft, including shoplifting, assault, mischief, drug possession, alcohol offences, uttering threats, weapons and trespassing.

[23] Merchants at the Port Place Mall have reported numerous incidents of shoplifting and theft, along with aggressive panhandling and other abusive behaviour. Similar evidence is provided by other local residents and merchants, who also describe significant increases in garbage, including discarded used needles,

public urination and defecation, noise, foul odours, confrontational behaviour and open drug use.

[24] Other concerns identified by Nanaimo include the presence of underage youth in the Tent City, unsanitary conditions, the presence of weapons and a general deterioration in the Tent City structure and leadership.

[25] With respect to this last point, a number of deponents who have interacted regularly with the Tent City occupants since its inception have described the changes they have observed over time. For example, Corporal Laberge states in his affidavit sworn July 12, 2018:

> As time progressed, the individuals who were ostensibly present and speaking on behalf of the occupants of the tent city began to change. Several of the organizers who had been "front and centre" whenever we entered the site was [*sic*] no longer present…
>
> By mid-June, 2018, the context of Tent City had changed substantially from when it had been initiated. On June 18, 2018, Bike Patrol officers counted a total of 115 tents or sleeping shelters on the site, a number of vehicles and a fifth-wheeler trailer. There were many people occupying or visiting the site that my colleagues and I had never seen before, even as "known" homeless.
>
> …
>
> The present state of the Tent City is much different from what it was in its inception in May. The conditions and environment had steadily deteriorated over time as the number of occupants has increased. My conclusion is based on the following which I have observed during my numerous visits:
>
> a. the presence of ostensible leadership, structure and order at the site is now less evident and completely absent at times;
> b. there are regular incidents of violence and assaults involving weapons and bodily harm, and conflicts among occupants;
> c. illicit drug use is more rampant,
> d. the Tent City site is now occupied by numerous people known by the RCMP to be drug dealers…
> e. there are regular incidents of drug overdose;
> f. I have observed a large number of discarded needles on the Tent City grounds during my attendances;
> g. A number of occupants are accumulating and hoarding materials which may pose a fire and safety hazard, and existing fire safety orders are being contravened…

[26] At the close of the Petition hearing, I granted an interim order requiring compliance with the May 30 Order. Subsequently, Nanaimo brought on an application to address ongoing safety issues and sought a police enforcement clause based on alleged non-compliance with the interim order. While I declined to grant the police enforcement clause, Nanaimo's evidence filed in support, particularly that of Mr. Millbank, indicated numerous ongoing safety issues.

Benefits Identified by the Respondents

[27] The respondents also filed extensive evidence from both organizers, supporters and residents of the Tent City and from local citizens. As indicated above, these individuals tout the many benefits they perceive from the Tent City.

[28] A significant benefit identified by homeless individuals is that the Tent City provides them with a secure place to store their possessions, something that is lacking in shelters or city parks. For example, Elizabeth van Aert deposes:

> It is very helpful not having to carry my stuff with me and not having to move my tent. Not having to move my stuff at DisconTent City and carry it with me is awesome. Instead of having to tear down and worry about bringing my stuff around with me and being able to leave and do my stuff is so much less stressful.

[29] Many residents spoke of the value they attach to the sense of community that they experience in the Tent City:

> Here at Discontent there is safety in numbers. When homeless people are forced to be alone in dark alleyways spread throughout Nanaimo they are at much more risk of getting robbed, raped or beaten. I have seen homeless people in this town assaulted many times because they are poor.
>
> …
>
> I have community here. I feel normal because I have a place to call home. I have somewhere to sleep and rest. I can get 8 hours of sleep. This has made my life more stable mentally. I am more clear minded and better able to care for myself. If Discontent got shut down I would be back to living on the streets and sleeping in doorways and alleyways doing whatever I can to find shelter (Angela Renee McGonigle).

[30] Safer conditions for drug use and access to harm reduction supplies is also a prevalent theme in the affidavits:

> Harm reduction supplies are more easily available here. I am a member of the harm reduction committee and when we need supplies I go to the OPS or Harris House and pick up rigs, swabs, and sharps containers. I regularly get narcan kits as well. We have set up our own safe injection site at the camp and I have been helping to keep the site clean and I pitch in by volunteering to be with people when they are using (Angela Renee McGonigle).
>
> …
>
> I am currently employed with S.O.L.I.D. Outreach as a harm reduction worker in DisconTent City. For a couple hours every week, I walk around camp and hand out clean using supplies and other resources people at camp might need. My work also involves sitting and talking to residents of DisconTent City, and picking up dirty rigs. People have better access to clean supplies here than they would on the streets because of the work of S.O.L.I.D. and other organizations including the street outreach nurses who come by and offer supplies (Robert Wayne Barker).

[31] Various residents spoke of the efforts made to provide structure and organization at the Tent City:

> We're taking care of the camp. When a crime has been reported, we follow up on it and mediate diplomatically. People clean up after themselves. We do perimeter checks, safety checks, and wellness checks. All to take care of the camp. A council was recently elected to increase organization of the camp. It's hard to give people positions of power when you're not sure exactly how trustworthy they are, so we're trying to find a balance (Darcy Kory).
>
> …
>
> I have attended every camp council meeting that has been held. Typically one is held everyday, sometimes two. At these meetings we discuss requests of the community, fire department, police and other camper requests. We strategize how best to communicate information to other campers and how to comply with requests from officials that come into the camp (Jonathan Womacks).

[32] Other benefits identified by residents include fewer negative interactions with police, better access to information and community services and access to cooking and bathroom facilities.

[33] In terms of the impact of the Tent City on neighboring residents and businesses, a number of individuals have deposed that conditions in the area adjacent to the Tent City have in fact improved:

> My observations of downtown as I enter and leave my studio (both day and night) has been that the downtown seems quieter and calmer, with fewer people in Diana Krall plaza in the evening and fewer people sleeping in the

> alcoves, doorways and bank kiosks. My studio has not been affected by Discontent City and I would assert that it has been a positive for downtown (Arlen Thompson).
>
> …
>
> I have noticed that since the camp was set up that there are fewer homeless people sleeping around town, under the bridge, in the parks and on the streets. There are fewer people begging on Commercial Street. The camp appears to be a safe place for vulnerable people…
>
> Until recently we have [*sic*] to deal with a huge amount of garbage and often needles in the parking lot next to our bookstore. Nicol Street is often strewn with debris. Since the camp started, both our parking lot and the street have been cleaner. I think the campers are also cleaning beyond the camp gates and up our street and I am appreciative (Diane Ruth Brown).

Alternatives to the Tent City

[34] Other tent city cases have considered the existence of alternative arrangements for sheltering homeless individuals. Here, Nanaimo has in place a policy permitting temporary overnight camping in certain designated parks.

[35] Cheryl Kuczerski, Nanaimo's Acting Manager, Community Liaison of the Bylaw, Regulation and Security Division, describes the policy in these terms:

> There are public parks in the City where genuinely homeless people may erect tents for temporary overnight occupation. Since the British Columbia Supreme Court decision in *Abbotsford v. Shantz*, the City has permitted temporary overnight abode in three public parks as follows:
>
> i) Bowen Park;
>
> ii) Colliery Dam Park; and
>
> iii) Pioneer Park….
>
> Caledonia Park which is directly across the street from Bowen Park also has shower facilities…
>
> …
>
> The City has a policy to permit homeless people to erect temporary overnight shelter provided they dismantle their tents and depart by 9:00 a.m. each morning.

[36] Another factor considered in the case law is the number of available shelter spaces in comparison to the number of homeless people. John Horn, a social

planner with the city, deposes that there are two emergency shelters operating year-round in Nanaimo:

a) The New Hope Centre operated by the Salvation Army which provides 23 emergency shelter beds for males 19 years of age and older; and

b) Samaritan House operated by the Island Crisis Care Society which provides 14 emergency shelter beds, 6 supportive housing beds, and 6 transitional beds for women.

[37] According to Mr. Horn, in May 2018, the New Hope Centre had 99% occupancy. From June 1-15, 2018, it had 85% occupancy. In May 2018, Samaritan House had three separate days in which there was one open bed.

[38] In addition, the First Unitarian Fellowship of Nanaimo operates a cold-weather shelter that is open from November 1 to March 31 and provides 24 emergency shelter beds. The number of beds is increased to 30 when the temperature goes below -2 degrees Celsius.

[39] The evidence does not establish with any precision the number of homeless people in Nanaimo. Sarah Miller, a local constituency assistant, refers in her affidavit to a report published by the Nanaimo Homeless Coalition setting out the results of a "point in time" homeless count conducted April 18, 2018, which identified 325 homeless people in Nanaimo. Ms. Miller suggests that the number of homeless people is actually far larger when the "hidden homeless" are accounted for. Hidden homelessness is defined in the point in time report as including "those who are living in temporary accommodations, time-limited housing or whose tenancy is to be terminated."

[40] These numbers have not been substantiated by any admissible evidence, however Nanaimo's own evidence (Millbank Affidavit #2) estimates the number of tents in the Tent City at 140 and the number of people upwards of 200. While it cannot be determined how many of the people in the Tent City are in fact homeless,

it can fairly be assumed that the number of homeless people in Nanaimo exceeds the number of available shelter beds.

Analysis

General Observations / Evidentiary Issues

[41] This case joins a growing list of cases in which the courts have been called upon to address conflicts arising between the needs of homeless people for adequate housing or shelter and the ability of public authorities to reasonably manage lands falling within their jurisdiction: see *Victoria (City) v. Adams*, 2008 BCSC 1363 at para. 1, var'd 2009 BCCA 563 [*Adams*]).

[42] As these cases illustrate, and as is demonstrated on the evidence filed in this specific case, homelessness is a multi-faceted social problem with no one cause and for which there is no single or obvious solution. It is also an issue that engenders strong feelings, both on the part of homeless people and advocates who decry the lack of available services and housing options, and in local citizens and merchants who deal with the manifestations of homelessness on a daily basis.

[43] That divide is apparent in the numerous affidavits filed by both parties, some of which I have referenced above. The respondents rely on the different perspectives provided in the contrasting affidavits to argue that there are conflicts in the evidence that can only be resolved at a full trial.

[44] For its part, Nanaimo submits that much of the affidavit evidence submitted by the respondents is inadmissible in that the affidavits are replete with conjecture, opinion, hearsay and argument.

[45] I agree that there are problems with many of the respondents' affidavits, however the same concern extends to many of the affidavits filed by Nanaimo, in which affiants offer their opinions about the impacts of the Tent City.

[46] For most of these affidavits, I have simply considered them for what they are — evidence of the different views of community members about the Tent City, which again underscores the complex and multi-faceted nature of the homelessness issue.

[47] One affidavit that I do find inadmissible is that of Bernadette Pauly, a registered nurse and researcher, who offers extensive opinion evidence about the effects of homelessness and the benefits of Tent City type arrangements. The affidavit does not comply with the requirements for admissible opinion evidence set out in Rule 11-6 and is therefore not properly in evidence.

Can Nanaimo Obtain a Final Order in This Summary Proceeding?

[48] The respondents take the position that this matter should have been brought by a notice of civil claim rather than by way of a petition. They submit further that this application should be treated as an application for an interlocutory injunction and that the hearing of Nanaimo's application for a final order should be referred to the trial list. The respondents again say that there are considerable conflicts in the evidence that can only be resolved by a proper trial. They say further that a summary petition proceeding is inappropriate for dealing with the sorts of complex issues, including under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], that arise in this case.

[49] Nanaimo submits that it is applying for a final order to enforce its Zoning Bylaw, which is intended to be a summary process brought by petition. It submits that there is no basis for referring this matter to the trial list.

[50] While a summary proceeding will often be appropriate for dealing with straightforward bylaw infraction or zoning matters, the issues that arise in this case are more complex. In particular, the response to petition filed by the respondents raises constitutional issues concerning the *Charter* rights of homeless people.

[51] It is worth noting that the constitutional issues are not clearly framed in the response to petition and the response does not articulate any specific grounds on

which Nanaimo's Zoning Bylaw may be found unconstitutional. Rather, it speaks in generalities:

> Part 5: LEGAL BASIS
>
> …
>
> 2. The remedy that the City is asking for raises issues in relation to the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982* …rights of the Petition Respondents, specifically Section 7 rights of Life, Liberty and Security of the Person.
>
> …
>
> 10. The City seeks to force homeless people out of a camp they call home in circumstances where they have nowhere else to go. This prohibition engages their section 7 and 15 *Charter* rights, and if the Bylaws that the City is claiming to have been violated are found to be unconstitutional, the Bylaw cannot stand, to the extent that such rights are violated.

[52] These allegations echo the grounds advanced in many other tent city cases, where the constitutionality of municipal bylaws has been directly challenged on the basis that they subject homeless people to conditions that potentially harm their physical and psychological well-being.

[53] Paragraph 12 of the Factual Basis section of the response to petition is also instructive:

> Allowing overnight camping in parks is insufficient to allow the City's homeless, including the Petition Respondents to meet their basic needs. The application respondents require space where they can sleep, rest, shelter, stay warm, eat, wash, attend to personal hygiene, and protect their personal safety and their belongings as it is not possible for the application respondents to carry their possessions with them every day.

[54] The essence of this allegation is that Nanaimo's current approach to accommodating homeless people by allowing them to erect temporary overnight shelters in public parks is not sufficient to adequately meet those individuals' *Charter* rights. This position arguably seeks to expand the scope of the protection afforded to homeless people under s. 7 of the *Charter* as defined in previous tent city cases, which is the right to erect basic shelters on a temporary, overnight basis: see e.g. *Adams* at para. 100.

[55] In my view, it is neither possible nor appropriate to determine the constitutional issues that arise in this case in a two-day summary proceeding and on the evidentiary record as it currently exists.

[56] Various courts have expressed similar concerns. For example, in *Schooff v. Medical Services Commission*, 2009 BCSC 1596, rev'd in part 2010 BCCA 396, Madam Justice Smith held that a petition proceeding was inappropriate for determining complex issues concerning the constitutionality of certain sections of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286. She said at para. 35:

> These proceedings are at an early stage, and there must be some flexibility as they evolve. However, this much is already clear. It will be necessary to find facts in a complex area, on the basis of rigorously-contested evidence, in order to consider properly the Constitutional Issues that the Plaintiffs raise, both as to whether there is a section 7 *Charter* infringement, and, if so, whether such infringement is justifiable under s. 1. Although I do not doubt that the experienced counsel involved in this case could devise ways to present the case through affidavits including those of experts, with exhibits and written arguments, there is every prospect that the volume of material will be very extensive. I note the difficulties inherent in summary proceedings where there are complex issues and a large volume of material (see *Simon Fraser Student Society v. Canadian Federation of Students* at para. 16-22). I further note that significant expert evidence can sometimes be more effective in assisting the Court when given by the expert in the courtroom because there is the opportunity for responses to questions by the Court…

[57] Mr. Justice Willcock, as he then was, expressed similar views in *L'Association des parents de l'ecole Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89, where he underscored the importance of the evidentiary record in *Charter* and constitutional cases. He said at paras. 41-42:

> [41] *Charter* and constitutional cases, however, raise broader issues than judicial review cases that are not founded upon constitutional arguments. They affect strangers to the litigation and may require the decision maker to seek a broader evidentiary foundation than required to address a mandamus application that is not founded upon a breach of a constitutionally-protected right.
>
> [42] Where the respondent to a petition has yet to file affidavit evidence the court may be unable to say, upon an application to move a petition to the trial list, whether there will be a factual dispute. In *Vancouver (City) v. Zhang*, 2006 BCSC 2023, aff'd 2007 BCCA 280, Stromberg-Stein J. held at para. 12: "Simply because constitutional issues are raised does not require an automatic referral to the trial list." However, in constitutional cases, the courts

> should satisfy themselves that there will be a sufficient factual underpinning for determining questions that may have a social and political impact beyond the parties to the litigation. In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, Cory J., for the Court, wrote at p. 361:
>
> > *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

[58] Mr. Justice Willcock was considering an application to refer a petition to the trial list, however he declined to do so in the specific circumstances of that case.

[59] In the present case, I am satisfied that it is appropriate to refer Nanaimo's petition to the trial list, in accordance with Rule 22-1(7) and to treat the present application as an application for an interim injunction.

[60] I find support for proceeding in this fashion in the fact that of the many tent city cases that have come before this Court in recent times, I am not aware of any that have proceeded by way of a summary petition directly to the final order stage. Rather, such cases are typically brought by way of an action with the relevant governmental authority applying for an interlocutory injunction.

[61] I discuss a number of those cases below.

What is the Proper Test for Granting an Injunction?

[62] Nanaimo submits that the test that governs statutory injunctions is the one set out in *Maple Ridge (District) v. Thornhill Aggregates Ltd.,* [1998] B.C.J. No. 1485 (C.A.) [*Thornhill*], leave to appeal to SCC refused, [1998] S.C.C.A. No. 407, while

the respondents submit that the test is that established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*].

The RJR-MacDonald Test

[63] In *RJR-MacDonald* the Supreme Court of Canada established a comprehensive approach to injunctive relief including applications for relief in the context of *Charter* applications, building on the framework established in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers Local 832,* [1987] 1 S.C.R. 110 [*Metropolitan Stores*]. At 334, the Court affirmed the three-part test when considering an application for an interlocutory injunction as:

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

[64] At 348, the Court summarized the factors to be considered in an application for interlocutory relief in a *Charter* case:

> At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.
>
> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.
>
> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest

> of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. …

The Thornhill Test

[65] In *Thornhill*, the Court of Appeal considered an appeal by property owners who were enjoined from using a ready-mix cement plant on a gravel pit they owned because the District of Maple Ridge's rezoning of the land in question made such a use incompatible with the new zoning requirements.

[66] The Court of Appeal stated that ordinarily, when a public authority seeks an injunction in respect of an alleged contravention of a public statute, regulation or bylaw, the courts should be reluctant to refuse the application on discretionary grounds. Mr. Justice Cumming stated the principle at para. 9 as follows:

> Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed. See: *Saskatchewan (Minister of the Environment) v. Redberry Development Corp*., [1987] 4 W.W.R. 654 (Sask. Q.B.); aff'd [1992] 2 W.W.R. 544 (Sask. C.A.), where Barclay J. said at p. 660:
>
> > I am of the opinion that although I have a discretion under s.18 of the Environmental Assessment Act to refuse the Crown injunction relief, the nature of the discretion to be exercised in such cases appears to differ from that applied in cases between private litigants simply because the court is required to weigh the public interest. The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It has been held that where the Attorney General sues to restrain breach of a statutory provision and where he is able to establish a statutory provision the courts will be very reluctant to refuse him on discretionary grounds: *A.G. v. Premier Line, Ltd*., [1932] 1 Ch. 303.
> >
> > In the case of *A.G. v. Bastow*, [1957] 1 Q.B. 514, [1957] 2 W.L.R. 340, [1957] 1 All E.R. 497, Devlin J. held that although the court retains a discretion once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law. Once a clear breach of the right has been shown the court should only refuse the application in exceptional circumstances.

In *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647 [*O'Flynn-Magee*], Associate Chief Justice MacKenzie, as she then was, summarized the principles underlying the *Thornhill* test at paras. 26-28:

> [26] Although constitutional challenges and other complex arguments may be relevant to the dispute, at the interlocutory injunction stage, pending a trial on the merits, the public interest suggests that the statutory regime or status quo be maintained (*R. v. Bernard*, [2000] N.B.J. No. 138, para. 76; *Okanagan Indian Band*, para. 19).
>
> [27] There is a difference in principle and rationale between an equitable interlocutory injunction and one that is based upon statutory authority. The rationale for not requiring the equitable injunction test where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large (*Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at p. 697).
>
> [28] Therefore, the irreparable harm and balance of convenience factors are pre-emptively satisfied in ensuring complying with law that is in the public interest (*Thompson-Nicola (Regional District) v. Galbraith*, [1998] B.C.J. No. 1436, para. 2). To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed (*Thornhill*, para 9).

[67] Associate Chief Justice MacKenzie summarized the *Thornhill* test as follows at para. 30:

> …the onus is on the City to show that there has been a clear breach of the by-law. If it does, the court will grant the injunction unless there are exceptional circumstances that permit it to use its narrow discretion to deny it.

Application of the Thornhill and RJR-MacDonald Tests in Subsequent Case Law

Vancouver (City) v. Maurice, 2002 BCSC 1421, aff'd 2005 BCCA 37

[68] The *Thornhill* test was accepted and applied in *Vancouver (City) v. Maurice*, 2002 BCSC 1421, aff'd 2005 BCCA 37 [*Maurice*], where the City of Vancouver made an application for a statutory injunction to enforce a city bylaw against 200 people who erected a tent city outside a building in downtown Vancouver.

[69] Mr. Justice Lowry, as he then was, considered the *Thornhill* test at para. 12 and accepted the City's position that where a statutory injunction is sought to prevent ongoing unlawful conduct, considerations that customarily relate to

assessing the balance of convenience in respect of equitable injunctive remedies do not apply.

[70] At para. 25, Lowry J. stated that while the *Charter* was invoked by the defendants, the defendants did not seek to have the City's bylaw struck down:

> The defendants then turn to the ***Canadian Charter of Rights and Freedoms*****.** They do not, on this application, seek to invoke the ***Charter*** to have the City's by-law or the applicable provisions of the ***Vancouver Charter*** struck or read down as being constitutionally invalid. Rather, they say that one or more of the sections of the ***Charter*** are engaged and that the court must exercise its discretion having regard for *Charter* values.…

[71] Mr. Justice Lowry applied the *Thornhill* test at paras. 27-34 despite the fact that the defendants alleged various *Charter* breaches, and he granted the statutory injunction. In doing so, he held that poverty was not an exceptional circumstance that would entitle the court to deny injunctive relief and that even if the *Charter* applied, it did not justify the defendants' conduct as any obstruction was unlawful.

[72] Mr. Justice Lowry's approach and use of the *Thornhill* test was implicitly upheld on appeal: 2005 BCCA 37, which involved an appeal on procedural issues. Madam Justice Rowles for the Court of Appeal stated at para. 34:

> …where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998)...

Vancouver Parks Board v. Mickelson, 2003 BCSC 1271

[73] In *Vancouver Parks Board v. Mickelson*, 2003 BCSC 1271 [*Mickelson*], Mr. Justice Pitfield heard an application by the City of Vancouver for an interlocutory injunction restraining the erection of tents. The City based its claim on the respondent's contravention of a municipal bylaw. The bylaw prohibited the erection of any tents in parks without the City's permission.

[74] The City argued that it was entitled to a statutory injunction. The defendants argued that the court should consider his allegations of violations of the group's

rights to free expression, free association, fundamental justice and equality in considering whether there was a triable issue upon which to base the injunction.

[75] Justice Pitfield considered which test for injunctive relief was appropriate on the facts. After considering the *Thornhill* test, Pitfield J. distinguished that case on the ground that it did not deal with a constitutional challenge. At paras. 18-21, Pitfield J. stated:

> [18] In neither the [*Thornhill*] nor *Alpha Manufacturing* cases was a challenge raised to the constitutional validity of the enactment there in question. In each case, the court respected the presumption of legislative or constitutional validity and held that a law should be enforced, and respect for it compelled, until the law was proved to be invalid.
>
> [19] Different principles apply, however, when constitutional validity is in issue…
>
> [20] In *Metropolitan Stores*, the court concluded that the usual conditions for the granting of an injunction should apply with due consideration for the nature of the public interest engaged in the assessment of the balance of convenience. It is that course which I will follow in ruling upon the Parks Board application now before me.
>
> [21] It must be recognized that the 'usual conditions' are assessed from the perspective of the applicant and are summed up in three questions. Has the applicant demonstrated there is a fair question to be tried? Will the applicant suffer irreparable harm if an injunction is not granted? Does the balance of convenience favour the granting of an injunction?

[76] After applying the *Metropolitan Stores* test for injunctive relief at paras. 22-35 (which is the same test as the *RJR-MacDonald* test), Pitfield J. allowed the application in part:

> [23] Counsel for the defendants claimed that I should factor their constitutional objections into the determination whether the Parks Board has demonstrated that there is a fair question to be tried. With respect, I disagree. In relation to this condition, the question is whether the applicant has demonstrated that it has raised a question to be tried. The issue must be assessed from the applicant's perspective and not from the perspective of any defence that may be advanced by a defendant. In present circumstances, the Parks Board has demonstrated contravention of s. 11 of the by-law by the defendants. Constitutional validity is not part of the Parks Board case. Constitutional invalidity is part of the defence case. As such, the concern for the constitutional validity of s. 11 of the by-law must be assessed in the context of balance of convenience. I am satisfied the first condition relevant to the exercise of discretion has been satisfied.

> [24] The second concern is whether the Parks Board will suffer irreparable harm in the event the injunction is not granted. Irreparable harm is that which cannot be readily compensated by an award of damages: see *Metropolitan Stores*, supra, at p. 334.
>
> [25] In the context of the use of public property, damages have little, if any, relevance and would not serve to compensate the community for the loss it sustains as a result of a contravention of s. 11 of the by-law in present circumstances. I am satisfied that if the by-law is not upheld, the Parks Board will suffer irreparable harm as it cannot be properly compensated in damages for the violation of the by-law.
>
> [26] The remaining issue is whether the balance of convenience favours an injunction. In that regard, I must balance the right of the Parks Board to compel respect for, and adherence to, its by-law with the right of the defendants to advance their constitutional challenge to its validity.
>
> …
>
> [33] Absent the suggestion that constitutional defences might be available to the defendants, the balance of convenience very much favours the Parks Board. That board is responsible for the care and management of the park including the health, safety and benefit of all those who are entitled to use it. It cannot properly discharge its mandate for the benefit of the entire community if the defendants and others are permitted to live there. One of the defendants has indicated that one of the objectives of those living there is to encourage others to join them in a form of political action. Politics, at least as regards the issue of housing for the homeless in Vancouver, is not part of the Parks Board mandate nor is housing an issue with which it should be required to cope. The omission of grant an injunction would be construed as an open invitation to permit others in similar circumstances to erect additional structures in Thornton Park and to create tent villages, towns, or cities in other parks in Vancouver.

[77] Importantly, Pitfield J. stated that the defendants' constitutional arguments are to be considered in the balance of convenience analysis of the *RJR-MacDonald* test. He found that even if the defendants' s. 7 and 15 *Charter* rights were engaged, this did not tip the balance of convenience in his favour. Justice Pitfield concluded the balance of convenience favoured allowing the injunction as "the public interest must be afforded precedence in present circumstances" (para. 35).

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

[78] In *The Corporation of the City of Victoria v. Thompson*, 2011 BCSC 1810 [*Thompson*], the court heard an application by the City of Victoria for interlocutory injunctive relief requiring the dismantling of a tent city associated with the Occupy movement. The City argued that the tent city contravened its Parks Bylaw, which

prohibited overnight camping in parks, except for time-limited camping by homeless persons. The City further argued that the tent city created health and safety hazards. The respondents argued that the injunction should not be granted because the bylaw violated their s. 2(b) *Charter* right to freedom of expression.

[79] Mr. Justice Schultes considered *Maurice* and stated the following at para. 31:

> It is clear that, absent a challenge to the constitutional validity of underlying legislation, injunctions to prevent breaches of a statute should be approached in accordance with the following passage from the judgment of Madam Justice Rowles in *Vancouver (City) v. Maurice*, 2005 BCCA 37, at para. 34…
>
> [Emphasis added.]

[80] However, unlike in *Maurice*, the respondents in *Thompson* challenged the constitutional validity of the bylaw. Mr. Justice Schultes considered the relevance of the alleged *Charter* breaches in the injunction analysis at paras. 36-38:

> [36] … counsel focused on the argument that the bylaw's violation of the respondents' rights to freedom of expression, as guaranteed by s. 2(b), and the apparent inability of the petitioner to justify that infringement pursuant to s. 1 should lead to a declaration at this stage that it is an invalid bylaw and that, even short of such a declaration, the breach should persuade me not to grant the injunction.
>
> [37] This leads to the critical question that must be resolved on this application: to what extent should I consider the potential violation of s. 2(b) rights by the relevant sections of the bylaw in deciding whether or not to grant the requested injunction?
>
> [38] It is not open to me, as a matter of law, to declare the bylaw invalid at this stage. The required notices under the *Constitutional Question Act* have not been given, and indeed counsel for Ms. Nagji sensibly did not press the availability of such a declaration.

[81] Mr. Justice Schultes then cited Mr. Justice Beetz's comments in *Metropolitan Stores* to reject the applicability of the *Thornhill* test at paras. 40-41:

> [40] In *Metropolitan Stores*, Mr. Justice Beetz, for the court, rejected the proposition that any sort of "presumption of validity" could apply to legislation on an application for an injunction or stay of proceedings in which the question of its constitutional validity had been raised. Such an approach, he concluded, would be "in conflict with the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms*" (para. 16).
>
> [41] Instead, in such cases a court should apply the usual tests for an injunction: (1) is there a serious issue to be tried? (2) will the party seeking

> the order suffer irreparable harm if it is not granted? and (3) does the balance of convenience favour the applicant?

[82] Mr. Justice Schultes ultimately adopted the *RJR-MacDonald* test (at paras. 47-49) and allowed the application. He concluded that there was a serious question to be tried, and that the City would suffer irreparable harm if the injunction was not granted. There was no amount of damages that could compensate the City for its inability to use the square for the general public good. The balance of convenience favoured the City as the benefit the public received from the City being able to allocate the use of its space according to its broad mandate substantially outweighed whatever benefits might accrue to the public from the ongoing dialogue and engagement made possible by the protest (paras. 62-72).

Vancouver (City) v. O'Flynn-Magee

[83] In *O'Flynn-Magee*, MacKenzie A.C.J.S.C. heard an application by the City of Vancouver for an interlocutory statutory injunction forcing the defendant tent city occupants to comply with a city bylaw.

[84] Associate Chief Justice MacKenzie considered the appropriate injunctive relief test to apply in circumstances where the defendants were not challenging the validity of the bylaw at the interlocutory stage, but contended that *Charter* rights were relevant and engaged such that the bylaw was "constitutionally suspect".

[85] Associate Chief Justice MacKenzie stated at para. 21 that the "case law is somewhat confusing" as to what the proper test to be applied is where the constitutional validity of the bylaw is not challenged but nevertheless *Charter* rights may be engaged. She noted the inconsistency of *Maurice* (which applied the *Thornhill* test even though *Charter* rights were engaged) and *Mickelson* (which held that the *RJR-MacDonald* test applies where *Charter* challenges are made to the bylaw).

[86] Ultimately, MacKenzie A.C.J.S.C. declined to decide whether the appropriate test in the circumstances was the *Thornhill* or the *RJR-MacDonald* test, commenting at para. 24 that "either way, this application for an interlocutory injunction must

succeed." She then proceeded to first apply the *Thornhill* test and then the *RJR-MacDonald* test, both of which resulted in the granting of the interlocutory injunction.

[87] In her analysis of the *Thornhill* test, MacKenzie A.C.J.S.C. made the following comments about whether the court should consider constitutional arguments in an injunction application at para. 41:

> [41] The defendants also raise a constitutional argument regarding the validity of the *City Land Regulation By-law*. The argument is based on *Vancouver (City) v. Zhang*, 2010 BCCA 450 and *Adams*. However, an interlocutory injunction application is not the appropriate time to address constitutional arguments (*Okanagan Indian Band*). Rather, constitutional arguments are properly examined at the trial of the matter to provide the parties sufficient time to prepare and to allow the Attorney General the opportunity to intervene pursuant to s. 8 (2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.
>
> [Emphasis added.]

[88] When considering whether "exceptional circumstances" existed in the second part of the *Thornhill* test, MacKenzie A.C.J.S.C. stated the following at paras. 47-49:

> [47] In *Alpha,* the court provided a non-exhaustive list of the type of exceptional circumstances that might justify the refusal of an interlocutory injunction. The exceptional circumstances listed in *Alpha*, namely, the willingness of the defendants to refrain from the unlawful act, the fact there may not be a clear case of "flouting" the law because the defendant has ceased the primary unlawful activity, or the absence of proof that the activity carried on was related to the mischief the statute was designed to address, do not exist in the present case.
>
> [48] Here, the evidence of "flouting" of the by-law is clear. The defendants have expressed their intention to continue their violation of the by-law and their activities are related to the mischief the *City Land Regulation By-law* is intended to address.
>
> [49] Finally, although an interlocutory injunction may result in inconvenience to the defendants, personal hardship is not an exceptional circumstance (*Maurice* (B.C.S.C.), para. 19). Therefore, based on the evidence, there are no exceptional circumstances to justify the court's use of its narrow discretion to refuse an interlocutory statutory injunction where there is a clear breach of the by-law.

[89] Associate Chief Justice MacKenzie concluded the City had made out its case for an injunction under the *Thornhill* test at para. 50.

[90] She then proceeded to apply the *RJR-MacDonald* test. On the issue of the constitutional validity of the bylaw, she stated that it "is not at issue when determining whether there is a fair question to be tried because it is not part of the applicant's case." She then considered the second part of the test (irreparable harm) and concluded at para. 60:

> I agree with the City that as the representative of the public, it will suffer irreparable harm if the injunction is not granted. "Irreparable" refers to the nature of the harm suffered rather than its magnitude (*RJR-MacDonald*, p. 405). It is harm that cannot be readily compensated by an award of damages (*Mickelson*, para. 24). In the circumstances, an award of damages cannot properly compensate the public for the irreparable harm in terms of the use of public property.

[91] On balance of convenience, MacKenzie A.C.J.S.C. concluded at paras. 65-67:

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

Abbotsford (City) v. Shantz, 2013 BCSC 2612

[92] In *Abbotsford (City) v. Shantz*, 2013 BCSC 2612 [*Shantz* (2013)], Mr. Justice Williams heard an application by the City of Abbotsford for an interim injunction requiring the defendants to remove themselves and their encampment from a city park.

[93] When considering which test for injunctive relief to apply, Williams J. noted that in the absence of the core issue underlying the litigation, which was a s. 7 *Charter* challenge to the legislation in question, he would have applied the *Thornhill* test. At para. 20 of his reasons, he comments on the scope of the *Thornhill* test:

> However, it is evident to me that the authorities have generally elected not to apply [the *Thornhill* test] where *Charter* arguments are meaningfully raised in the application. …

[94] Justice Williams applied the *RJR-MacDonald* test and granted the interlocutory injunction.

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

[95] In *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 [*Williams*], Madam Justice Duncan heard an application by the Vancouver Park Board for an interlocutory injunction requiring the defendants to comply with a bylaw regulating access to public parks. The Park Board wanted all tents and other structures removed from the park.

[96] The Park Board argued that the court should apply the *Thornhill* test while the respondents argued that the *RJR-MacDonald* test should apply and that the bylaw breached their s. 7 rights.

[97] Justice Duncan first considered the *Thornhill* test and stated at para. 50 that there was a bylaw violation and there were no exceptional circumstances that should prevent the Board from attaining an interlocutory injunction.

[98] Justice Duncan then considered whether the appropriate test was the *RJR-MacDonald* test given the defendants' challenge to the constitutional validity of the bylaw at para. 57:

> While [counsel for the respondent] concedes I cannot make a decision in this context on the constitutional validity of the bylaw, he urges me to find the strength of the defendants' constitutional case weighs heavily in the balance, particularly since the defendants are only seeking a suspension of the bylaw's enforcement until provisions can be made to address their housing needs. They will suffer harm if they are enjoined from staying at the Park until

> such a gap can be addressed. He asserts that fire and safety concerns can be managed at the Park pending the location of sufficient housing.

[99] Justice Duncan then cited Williams J.'s reasons in *Shantz* (2013) and concluded at para. 60:

> I am inclined to the view that the *RJR-MacDonald* test is the appropriate one to be applied in the circumstances before me. The evolution of the type of litigation in question here favours an approach which takes into account *Charter* issues rather than the consideration of a pure statutory breach approach to injunctive relief. But whether one applies the *Thornhill* test or the *RJR-MacDon*ald test, the Park board is entitled to an injunction…

British Columbia v. Adamson, 2016 BCSC 584

[100] In *British Columbia v. Adamson,* 2016 BCSC 584 [*Adamson (#1)*], Chief Justice Hinkson heard an application by the plaintiffs (the Province and Attorney General) for an interlocutory injunction restraining the defendant residents of a homeless encampment from trespassing on the Victoria Law Courts green space.

[101] The parties disagreed as to the test to be applied on the application for interim relief. The plaintiffs argued that the *RJR-MacDonald* test did not apply in a case of trespass. The plaintiffs submitted that once both an interference with property rights and an intention on the part of the defendants to continue that interference was shown, entitlement to an injunction was established.

[102] Chief Justice Hinkson concluded that the plaintiffs failed to establish a clear breach of the *Trespass Act*, R.S.B.C. 1996, c. 462 (paras. 28-29). He then considered whether the appropriate test for injunctive relief in the circumstances was the *Thornhill* test or the *RJR-MacDonald* test. After reviewing Duncan J.'s analysis in *Williams*, he stated the following at para. 35:

> This Court has repeatedly opined that the *Thornhill* analysis is not appropriate in cases where *Charter* issues are raised: *Williams* at para. 60; *Abbotsford (City) v. Shantz* (20 December 2013), New Westminster S156820 at para. 20 (B.C.S.C.); *Vancouver Parks Board v. Mickelson*, 2003 BCSC 1271 at para. 20. I therefore agree with Duncan J.'s analysis and her view that *RJR-MacDonald* is the proper test to follow in applications such as this one.
>
> [Emphasis added.]

[103] Chief Justice Hinkson then rejected the plaintiffs' argument that they must only satisfy the first step of the *RJR-MacDonald* test (para. 52). As such, he embarked upon a full *RJR-MacDonald* analysis and concluded the balance of convenience favoured not granting the injunction (paras. 183-186).

British Columbia v. Adamson, 2016 BCSC 1245

[104] In *British Columbia v. Adamson*, 2016 BCSC 1245, Chief Justice Hinkson heard a second application by the plaintiffs (the Province and Attorney General) for interim injunctive relief with respect to the same encampment at the Victoria Courthouse.

[105] Chief Justice Hinkson repeated his conclusion from *Adamson* (*#1*), that the appropriate test to apply for an application for interim injunctive relief was the *RJR-MacDonald* test. However, based on the plaintiffs' remedial actions (agreeing to make housing available to the occupants of the tent city), Hinkson C.J.S.C. re-analyzed the balance of convenience at para. 83:

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

[106] Chief Justice Hinkson made an order requiring the tent city to be cleared but with occupants allowed to stay until housing became available to them (paras. 85-86).

Vancouver (City) v. Wallstam, 2017 BCSC 937

[107] More recently, in *Vancouver (City) v. Wallstam*, 2017 BCSC 937 [*Wallstam*], Madam Justice Sharma heard an application by the City of Vancouver for an interlocutory injunction requiring occupants of a tent city to vacate and remove all tents and other structures from the site. The City sought the injunctive relief based on both the *Thornhill* and the *RJR-MacDonald* tests.

[108] The City conceded that the *RJR-MacDonald* test applies where *Charter* issues are raised (para. 35). However, the City argued that the defendants had not filed any materials indicating constitutional issues would be raised and that, without any such materials, the court should not assume *Charter* issues were implicated: para. 36.

[109] Justice Sharma considered that the tent city occupants did not have legal counsel and that the defendant stated in her submissions that the occupants' "life, liberty and security of the person" would be negatively impacted if an injunction was granted. Based on that submission, Sharma J. was willing to read in a constitutional challenge by making an inference from the evidence that constitutional issues had been raised, stating at para. 36 that she was "…satisfied that a constitutional issue about the enforceability of the City's bylaw in the context of this case has been raised." She therefore applied the *RJR-MacDonald* test and concluded at para. 64 that the City failed to meet the second and third branches of the test, and dismissed the City's application without prejudice to bring it again.

Conclusion on the Appropriate Test for Injunctive Relief

[110] The cases reviewed above establish that the *Thornhill* test is limited to situations where there is no underlying constitutional challenge to the statute, bylaw or regulation on which the government authority relies as the basis for its injunctive relief. Where the underlying constitutional validity is challenged, the appropriate test to be applied is the *RJR-MacDonald* test: *Thompson* at para. 50; *Shantz* (2013) at paras. 20-21; *Williams* at para. 60; *Adamson (#1)* at para. 35*; Wallstam* at para. 38.

[111] While the constitutional challenge in this case, as noted, is not clearly framed, I am nonetheless satisfied that Nanaimo's application raises *Charter* issues concerning the rights of homeless people and that the *RJR-MacDonald* test therefore applies.

[112] I now turn to the application of that test.

Application of the RJR-MacDonald Test in This Case

[113] My analysis of the *RJR-MacDonald* test is hampered somewhat by the position taken by Nanaimo, which again argued that it is the *Thornhill* test that governs. Accordingly, Nanaimo's submissions did not address the elements of the *RJR-MacDonald* test. Nonetheless, I am satisfied that I am able to consider and apply that test based on the evidence before the Court.

Serious Issue to be Tried

[114] The respondents concede that Nanaimo has established a serious issue to be tried. That is a fair concession given that, as Nanaimo submits, it is clear on the evidence that the residents of the Tent City are occupying the Property in violation of Nanaimo's Zoning Bylaw and that the ongoing occupation constitutes a trespass.

Irreparable Harm

[115] Irreparable harm was described by the Supreme Court of Canada in *RJR-MacDonald* at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…

[116] I would note that many of the concerns identified by Nanaimo, such as increased panhandling, garbage, noise, business disruption etc. are not necessarily the result of the Tent City, but rather are incidents of homelessness: *Adamson (#1)* at para. 185. Homelessness, by its nature, can be messy and disruptive due to the extremely difficult circumstances in which homeless people find themselves. That is not to say that these concerns are not real, it is simply that they do not reach the level of irreparable harm.

[117] In many of the other tent city cases, the issue of irreparable harm has focused on interference with use and access to public spaces, for example public parks. That is not an issue in this case given the nature of the Property which, while owned by Nanaimo, was not available for public use and, in fact, was leased to third parties.

The respondents submit that this factor sets the case apart from other cases in which injunctive relief has been granted.

[118] In my view, the fact that the Property may not be purely public in nature, in that members of the public have no right of use or access, strengthens rather than weakens the case for an injunction. Specifically, the unlawful access and ongoing occupation of the Property in breach of the Zoning Bylaw, which also involves interference with third party rights in respect of the Property, is a form of harm that is not quantifiable or compensable in monetary terms.

[119] I am further satisfied that the safety and related concerns identified by Nanaimo, both within the Tent City and those affecting neighboring residents and businesses, are sufficient to meet the test for irreparable harm. I will address those harms further below.

Balance of Convenience

[120] The critical issue, as it is in the majority of similar cases, is whether the balance of convenience favours granting the injunction.

[121] It is at this stage that the strength of the respondents' *Charter* arguments must be considered: *Mickelson* at para. 23. While this Court's assessment of the *Charter* issues is necessarily limited on an interlocutory application, even such a limited review suggests that the respondents' *Charter* arguments are suspect.

[122] As I have noted, the *Charter* arguments, while not clearly framed, seek to expand the s. 7 protections beyond what has been established by the existing jurisprudence. I will touch on some of that jurisprudence now.

[123] In *Adams*, the Court of Appeal characterized the scope of the asserted right as follows at para. 100:

> The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a temporary basis in areas where the City acknowledges that people can, and must, sleep. This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose

> significant and potentially severe health risks on one of the City's most vulnerable and marginalized populations.

[124] Elsewhere in *Adams*, the court said at para. 95:

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

[125] It is important to note that the bylaws in issue in *Adams* were targeted in nature and specifically prohibited the erection of any form of overhead shelter by individuals sleeping outdoors in public spaces. That is very different from the general Zoning Bylaw in issue here which simply prohibits camping generally in the designated area.

[126] The court's findings in *Adams* were explained further in *Johnston v. Victoria (City)*, 2011 BCCA 400 where it was stated at paras. 13-15:

> [13] In my view, the effect of *Adams* was to prevent interference with the efforts of the homeless in sheltering themselves at night on City property. That does not set up a presumed s. 7 breach for daytime regulation.
>
> [14] The appellant says that he did not have to prove either the need for daytime shelters or their lack of availability; the onus was on the respondent to justify its breach and it failed to do so. When asked how s. 7 is engaged by the daytime problem, he advanced a proposition based on human dignity. According to this theory, restricting homeless persons from erecting their own dwellings inflicts an indignity upon them and implicates life, liberty and security of the person.
>
> [15] With respect, I am unable to give effect to either of these points.

[127] In *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 [*Shantz* (2015)], Chief Justice Hinkson held that the *Charter* does not guarantee a right to housing (para. 174). He went on to find (consistent with the findings in *Adams*) at paras. 276-277:

> [276] …allowing the City's homeless to set up shelters overnight while taking them down during the day would reasonably balance the needs of the homeless and the rights of other residents of the City. The evidence shows, however, that there is a legitimate need for people to shelter and rest during

> the day and no indoor shelter in which to do so. A minimally impairing response to balancing that need with the interests of other users of developed parks would be to allow overnight shelters to be erected I public spaces between 7:00 p.m. and 9:00 a.m. the following day.
>
> [277] The question then becomes, in which public spaces the shelters should be permitted between those times. I have given serious thought to granting an order that specific park land in the City be designated for use by the homeless. Indeed, DWS seeks an order designating specific lands for overnight camping, namely Lonzo Park and/or the Triangle. While the designation of specific public parkland for use by the homeless would afford a degree of certainty to the homeless, and the City, as well as to residents of the City, it is my view, that this is a legislative choice, and not an order that is open to me to make.

[128] Here, Nanaimo has made the legislative choice referred to by Chief Justice Hinkson and has designated specific public parks for the purpose of permitting the erection of temporary overnight shelters. Nanaimo's evidence is that it developed its policy in this regard based on the Chief Justice's findings in *Shantz* (2015).

[129] Moreover, the respondents' position goes even further than what was rejected in *Adams*, *Johnston* and *Shantz* (2015), which was an asserted right to maintain temporary shelters during daytime hours. As Nanaimo fairly submits, no Canadian court has yet recognized the right to establish a permanent or semi-permanent encampment on publicly-owned land.

[130] There is considerable merit in the respondents' submissions about the benefits that result from having a community of homeless people come together in the Tent City, including greater security for possessions, enhanced privacy, stability from not having to decamp each morning, better access to services and safer conditions for drug use. However, those factors have also existed in many of the other cases considered above in which the courts have granted injunctions similar to that sought by Nanaimo here.

[131] The fact that there are arguably both benefits and harms that result from the Tent City and similar encampments underscores the point that developing solutions to address the growing homelessness issue involves policy and legislative choices that are within the purview of government, not the courts.

[132] Many of the cases have also involved situations in which, on the evidence, it was clear that the number of homeless people exceeded the number of available shelter beds. Indeed, that factual finding was at the heart of the court's conclusions in *Adams*. The respondents here argue that given the shortage of shelter beds in Nanaimo, residents of the Tent City have no reasonable alternatives. There are two responses to this argument:

a) While I have found (at para. 40) that it is fair to assume that the number of homeless people in Nanaimo exceeds the number of shelter beds, there is no accurate evidence as to the number of truly homeless people in the Tent City. There is however evidence that the existing shelters have had availability while the Tent City has been ongoing; and

b) In cases in which the courts have found an absence of available alternative accommodation, it has been held that the minimally impairing response is to permit the erection of temporary overnight shelters (see for example *Shantz* (2015) at para. 276), which again is consistent with Nanaimo's policy here.

[133] Ultimately, I am satisfied that there are certain key factors that tip the balance of convenience in favour of granting the injunction. Specifically:

a) There are significant ongoing safety issues in the Tent City. I accept the evidence of Mr. Millbank that, despite efforts by some campers, the May 30 Order has not been complied with and that, in fact, the fire risks have increased due to the expanded size of the encampment. I also accept Mr. Millbank's evidence that some residents have actively and aggressively opposed efforts to enforce the May 30 Order. In the circumstances, I have concluded that the Tent City can no longer be safely maintained and occupied;

b) The oppositional attitudes of some residents points to a second key factor, which is the deteriorating leadership structure within the Tent City. While it

is apparent that efforts were made initially to establish a form of governance structure within the Tent City, the expanding size and changing composition of the Tent City has significantly undermined those efforts. For example, on the respondents' own evidence (Affidavit of Mike Pindar sworn July 12, 2018), though initially there were attempts to register people as they entered the Tent City, only about one-quarter of the camp members registered and it has not been possible to maintain an accurate and updated list. Further, as Mr. Pindar notes, there is no way of regulating or controlling who is coming and going from the Tent City;

c) A third key factor is the existence of crime and violence within the Tent City. Two specific incidents are described in paras. 21-22 above. There is also evidence of criminal elements taking over portions of the Tent City which gives rise to very real concerns about the safety and well-being of residents;

d) Finally, I accept the evidence of the various police witnesses that there has been significant criminal activity in the neighboring areas. There is evidence that Nanaimo has had a significant homelessness problem for some time with associated criminal activity, however I am satisfied that the concentration of people in the Tent City has led to an increase in such activity in the downtown core that is harming local businesses.

[134] These factors, combined with the questionable strength of the respondents' *Charter* arguments on the law as it currently stands, lead to the conclusion that an interlocutory injunction requiring the dismantling of the Tent City is warranted.

Conclusion

[135] For the reasons set out above, I am satisfied that determination of Nanaimo's application for a permanent injunction requires a trial and, accordingly, I order pursuant to Rule 22-1(7)(d) that Nanaimo's petition be referred to the trial list. I decline to make any further procedural orders concerning the conduct of that

proceeding but leave it to counsel to agree on further steps or seek further directions from the Court.

[136] I am further satisfied that Nanaimo has met the test for an interlocutory injunction requiring removal of the Tent City. Given the length of time that the Tent City has been in place, and the precarious circumstances of many of the residents, it is important that the dismantling occur in an "orderly and sensitive fashion" (*Williams* at para. 61) and in a time frame that permits people to look for suitable alternative accommodation. In my view, 21 days from the date of this Order is reasonable.

[137] The interlocutory injunction will therefore operate on the following terms:

1. The respondents and all persons having knowledge of this Order shall, within 21 days of the date of this Order:

    a) Vacate and cease the continuous occupation of the Property located at 1 Port Drive, Nanaimo, British Columbia, legally described as:

        PID: 029-036-500
        Lot A, Section 1 and
        Part of the Bed of the Public Harbour of Nanaimo
        Nanaimo District Plan EPP27507;

    b) Remove all items of personal property and all structures, tents, shelters, shopping carts, stoves, rubbish, objects, personal chattels, and other things on the Property; and

    c) Refrain from re-entering the Property except as authorized by the Petitioner.

2. Upon the expiry of 21 days from the date of this Order, Nanaimo, through its employees, agents or contractors, shall be authorized to remove and dispose of all structures, tents, shelters, shopping carts, stoves, rubbish,

objects, personal chattels and any other things remaining on the Property in contravention of this Order, without recourse to Nanaimo.

[138] I decline to make the broader order sought by Nanaimo which would prohibt the erection of tents and other structures on any property owned by Nanaimo without its written authorization. Any such future encampments can only be assessed in light of the circumstances existing at the time.

[139] In its petition, Nanaimo seeks an order for an enforcement clause. As noted, I declined to include such a clause in my interim order requiring compliance with the May 30 Order. However, given the aggressive response by certain occupants to the previous efforts of fire safety officials, I am satisfied that an enforcement clause is appropriate here. Accordingly, the Order will include the following term as set out in the petition:

3. Upon the expiry of 21 days from the date of this Order, any police officer with the Nanaimo Division of the Royal Canadian Mounted Police (“RCMP”) is authorized to arrest and remove any person who has received notice of or has knowledge of this Order and who the RCMP have reasonable and probable grounds to believe is contravening the terms of this Order.

[140] In its application for an enforcement clause with respect to my interim order, Nanaimo proposed more extensive language which was apparently endorsed by the RCMP. If additional terms are sought or required to make the enforcement clause effective, the parties may apply for further directions.

[141] The parties agreed to adjourn the issue of costs until after the release of these Reasons. If the parties cannot agree on costs, they may make arrangements to speak to the issue.

“Skolrood J.”