IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bamberger v. Vancouver (Board of Parks and Recreation),* 2022 BCSC 49

Date: 20220113
Docket: S218247
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

Between:

Kerry Bamberger and Jason Hebert

Petitioners

And

General Manager of the Vancouver Board of Parks and Recreation and Vancouver Board of Parks and Recreation

Respondents

- and -

Docket: S218710
Registry: Vancouver

Between:

Vancouver Board of Parks and Recreation

Petitioner

And

Kerry Bamberger, Jason Hebert and Other Persons

Respondents

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for Kerry Bamberger and Jason Hebert:	J. Riddle A. Kirby

Counsel for Vancouver Board of Parks and Recreation:	I.K. Dixon
Place and Dates of Hearing:	Vancouver, B.C. December 2-3, 2021
Place and Date of Judgment:	Vancouver, B.C. January 13, 2022

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I. INTRODUCTION

[1] In 1984, an encampment of some 60 tents was established at the site of what would become CRAB Park at Portside in Vancouver. The encampment was a protest designed to pressure government authorities into creating a public park at the site. The name of the park is taken from the acronym for the activist group—Create a Real Available Beach Committee—that envisioned the establishment of a waterfront public park in an area of the city short of green space. The community activism and the camp protest had its desired effect and, in 1987, CRAB Park at Portside ("CRAB Park" or the "Park") was established as a Vancouver public park on federal port land leased by the City.

[2] Today, tents have returned to CRAB Park but not out of protest. Rather, the Park is the most recent of Vancouver parks in or near the Downtown Eastside to see an encampment of Vancouver residents who are experiencing homelessness. The camp emerged in May and June of 2021. Since then, the General Manager of Parks and Recreation (the "General Manager"), an appointee of the Vancouver Board of Parks and Recreation (the "Park Board" or the "Board"), has made two orders (the "Orders"), purportedly under the Park Board's *Parks Control By-law* (the "*Bylaw*"), ordering the campers to leave the park. The validity and enforceability of those orders is at issue in these proceedings.

[3] The first Order, made July 8, 2021, prohibits any overnight sheltering in CRAB Park. The second, made September 7, 2021, closes a portion of CRAB Park to all members of the public for the purposes of rehabilitating the Park from the damage said to be caused by the encampment. The closed area includes the only area within the Park where overnight sheltering was permitted prior to the July 8 Order.

[4] As recognized by the seminal decision in *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams* BCCA], aff'g 2008 BCSC 1363 [*Adams* BCSC], where there are inadequate indoor shelter spaces to accommodate persons genuinely experiencing homelessness, those persons are entitled to erect overnight shelters in public parks

as a matter of their constitutional right to life, liberty, and security of the person. This right is guaranteed by s. 7 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*].

[5] On March 31, 2021, the Park Board, together with Province of British Columba and the City of Vancouver, signed a Memorandum of Understanding (the "MOU") acknowledging that homelessness "continues to grow" in Vancouver and elsewhere. Despite efforts by various levels of government to create affordable housing and sheltering options, the Park Board concedes there are insufficient indoor shelter spaces in Vancouver to accommodate the city's homeless population. However, it maintains there is adequate indoor space for those camping at CRAB Park.

[6] In Vancouver and elsewhere, a line of cases has developed since *Adams* as tensions between governments and persons experiencing homelessness arise, and a balance is sought between the *Charter* right to shelter and municipal efforts to protect public access to parks. As Justice Skolrood said in *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 at para. 42:

> [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.

[7] On this occasion, the issue comes before the court by way of two competing petitions. The first is brought by Kerry Bamberger and Jason Hebert (the "Petitioners"), both of whom are currently experiencing homelessness and living in tents in CRAB Park. They seek judicial review of the two Orders. They argue both were made without according rights of procedural fairness to those sheltering in the Park and both are unreasonable because they are grounded in an unsupported conclusion that there are sufficient and appropriate indoor sheltering spaces to accommodate those sheltering in the Park.

[8] The second petition, brought by the Park Board, seeks a statutory injunction to compel Ms. Bamberger, Mr. Hebert, and all other persons with notice to comply with the General Manager's September 7, 2021 Order.

[9] The Park Board further argues that even if the Orders are set aside on the Petitioners' judicial review, the Court should still grant the statutory injunction to enjoin those sheltering in CRAB Park from doing so in daytime hours in contravention of the *Bylaw*.

[10] For the reasons that follow, I have concluded the application for judicial review should be granted and the Orders should be set aside with the matter remitted back to the General Manager or the Park Board for reconsideration. In light of that conclusion, I will not grant the Park Board's application for an injunction to compel compliance with the September 7, 2021 Order. Further, the Park Board's application for an injunction to compel compliance with the *Bylaw* should be adjourned pending reconsideration of the Orders or sooner if there is a significant change in the circumstances of the encampment, including with respect to matters of health, safety or public nuisance.

II. THE RIGHT TO SHELTER IN PUBLIC PARKS

[11] In *Adams* BCSC, Madam Justice Ross found a Victoria bylaw prohibiting homeless persons from erecting temporary shelters in Victoria parks infringed their right to life, liberty, and security of the person, as guaranteed by s. 7 of the *Charter*. She found the number of homeless persons in Victoria far outnumbered the available shelter beds such that many of Victoria's homeless were forced to sleep outside. Despite this, the city's bylaw prohibited anyone from erecting temporary shelters, including tents, tarps, or even cardboard boxes, in public parks, leaving them exposed to serious and life-threatening conditions and depriving them of their dignity, independence, and ability to protect themselves.

[12] After a refinement of Ross J.'s order by the Court of Appeal, it was declared that the offending sections of Victoria's *Park Regulation Bylaw* were "inoperative insofar and only insofar as they apply to prevent homeless people from erecting

temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria": *Adams* BCCA at para. 166.

[13] The constitutional right as articulated in *Adams* was thus circumscribed in two respects: (1) the right is exercisable when the number of homeless outnumbered the available indoor sheltering spaces, and (2) the right to erect a temporary shelter is confined to overnight hours.

[14] Since *Adams*, many municipal bylaws and government actions that seek to limit or restrict the ability of persons experiencing homelessness to erect and maintain shelters have come under challenge in this court, including in: *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 [*Williams*]; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 [*Shantz*]; *British Columbia v. Adamson*, 2016 BCSC 584 [*Adamson No. 1*]; *British Columbia v. Adamson*, 2016 BCSC 1245 [*Adamson No. 2*]; *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 [*Courtoreille*]; *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876 [*Brett*]; and, most recently, *Prince George (City) v. Stewart*, 2021 BCSC 2089 [*Stewart*].[1]

[15] The basic constitutional right as framed in *Adams* has remained largely unchanged. However, it is now recognized that it is not just the number of available indoor sheltering spaces that frames the right but also whether those spaces are truly accessible to those sheltering in parks. In *Shantz*, for example, Hinkson C.J.S.C. stated:

> [82] Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impractical for many of the City's homeless. They simply cannot abide by the rules required in many of the facilities that I have discussed above, and lack the means to pay the required rents at others.

[16] More recently, in *Stewart,* Hinkson C.J.S.C. stated:

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[1] Both before and after *Adams*, other cases have dealt with "tent cities" that were established out of protest movements but did not squarely confront the issue of homelessness: *Vancouver (City) v. Maurice,* 2002 BCSC 1421; aff'd 2005 BCCA 37; *The Corporation of the City of Victoria v. Thompson*, 2011 BCSC 1810; and *Vancouver (City) v. O'Flynn-Magee,* 2011 BCSC 1647.

> [74] It is apparent that very few of the emergency shelter beds are low barrier, and it appears that many of the homeless persons in the City are ineligible to stay in at least some of the shelters. While the City contends that the availability of 81 shelter beds in the City is sufficient to house the encampment occupants, I am not satisfied that these shelter spaces are in fact accessible to all of the occupants of the encampments.

[17] The question of sheltering in public parks during daytime hours has also arisen in the cases since *Adams,* but the jurisprudence, thus far, has not extended the s. 7 *Charter* right to include it, at least not expressly. In *Shantz* at para. 276, Hinkson C.J.S.C. found "there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so" but held that a "minimally impairing response to balancing that need with the interests of other users" of the parks would be to allow overnight sheltering between 7:00 p.m. and 9:00 a.m.

[18] However, in *Adamson No. 1* and *Stewart*, Hinkson C.J.S.C. declined to grant injunctions to close specific homeless encampments and made no specific qualification that those sheltering in the parks could only do so during overnight hours. In *Adamson No. 1,* Hinkson C.J.S.C. did not squarely address the issue of daytime sheltering but nor did he tailor a remedy to require the encampment to be removed at sunrise.

[19] In *Stewart*, he addressed the issue more directly, noting at para. 73 that the closure of shelter spaces due to COVID-19 resulted in scores of people having nowhere to shelter "in either the daytime or the nighttime." He observed that these persons did not remove their tents or vacate the encampment each morning. In declining to grant the injunction, at least in respect of one, he did not consider or grant a more limited injunction that would restrict sheltering to overnight hours. He took judicial notice of the fact that "Prince George can be very cold in the fall and winter, and that people with nowhere warm to stay must find ways of keeping warm to stay alive": *Stewart* at para. 64.

[20] Thus, while neither *Adamson No. 1* nor *Stewart* purport to expand the scope of the constitutional right to daytime sheltering, it was not specifically enjoined in either case.

III. HOMELESSNESS IN VANCOUVER

[21] In *Brett,* Hinkson C.J.S.C. observed at para. 9 that "[t]he number of homeless individuals in Vancouver has been increasing since 2005. The 2019 Vancouver Homeless Count identified 2,223 individuals experiencing homelessness, of which 614 were unsheltered." The MOU recognizes that the Homeless Count undercounts the actual number of persons experiencing homelessness as not everyone is, or wants to be, identified by the volunteer enumerators.

[22] For the past several years, the Park Board has struggled to manage persistent homeless camps in Vancouver parks. The encampment at CRAB Park emerged shortly after another encampment at Strathcona Park, just southeast of the Downtown Eastside, was closed after many months. Before that, an encampment on lands belonging to the Vancouver Fraser Port Authority, adjacent to CRAB Park, was established and ordered closed pursuant to an injunction granted by the court: *Brett*. That encampment followed on the closure of yet another encampment at Oppenheimer Park near the Downtown Eastside.

[23] On September 15, 2020, around the time the Strathcona Park camp was being established, the Park Board amended the *Bylaw* to permit persons experiencing homelessness to shelter overnight in Vancouver parks. The amendment appears to have been an effort to bring the *Bylaw* into compliance with s. 7 of the *Charter* pursuant to *Adams*. It allows persons who are genuinely experiencing homelessness to shelter overnight in certain areas of city parks, but they must remove their shelters by 8:00 a.m. each day. It also authorizes the General Manager to designate areas in Vancouver parks for daytime sheltering, although I am advised she has never exercised that authority.

[24] The portions of the *Bylaw* relevant to these proceedings are as follows:

> 1. In this by-law, unless the context otherwise requires, the following expressions shall have the meanings hereinafter assigned to them, that is to say:
>
> …

(h) "HOMELESSNESS" means the state of having no access to permanent or temporary housing, accommodation, or shelter.

…

(o) "TEMPORARY SHELTER" means a tent or other temporary structure that provides shelter to a person experiencing homelessness and that is capable of being dismantled and moved, but does not include a vehicle.

…

10. No person shall conduct himself or herself in a disorderly or offensive manner, or molest or injure any other person, or loiter or take up a temporary abode overnight in any place on any portion of any park except as provided in section 11A, or obstruct the free use and enjoyment of any park or place by any other person, or violate any by-law, rule, regulation, notice or command of the Board, the General Manager, Peace Officer, or any other person in control of or maintaining, superintending, or supervising any park of or under the custody, control and management of the Board; and any person conducting himself or herself as aforesaid may be removed or otherwise dealt with as in this by-law provided.

11. No person shall erect, construct or build or cause to be erected, constructed or built in or on any park any tent, building, shelter, pavilion or other construction whatsoever without the permission of the General Manager, except that this provision does not apply to a temporary shelter that complies with the provisions of this by-law.

11A. A person experiencing homelessness may take up temporary abode in a park if that person:

(a) is in a park or a specified area of a park in which a temporary shelter is not prohibited by this by-law;

(b) erects a temporary shelter that complies with the provisions of this by-law; and

(c) dismantles and moves the temporary shelter in accordance with the provisions of this by-law.

11B. A temporary shelter:

(a) must not be erected:

i. within 25 metres of a playground or school;

ii. in, on or within a:

A. beach, pond, lake or dock;

B. trail, bridge, seawall, roadway or park entrance;

C. natural area;

D. garden or horticultural display area;

E. pool or water park;

F. sports field, sports court, skate park, fitness amenity or golf course;

G. community centre or fieldhouse;

H. bleacher, stage, gazebo, public monument, designated picnic site, picnic shelter or washroom;

I. designated off-leash dog area; or

J. designated special event area for which permission has been given in accordance with this by-law;

(b) may only be erected from dusk until 7:00 am the following day, unless in an area designated by the General Manager as acceptable for temporary daytime shelter;

(c) must be dismantled and moved by 8:00 am each day, unless in an area designated by the General Manager as acceptable for temporary daytime shelter;

(d) must not impede public use of, or access to, a park or facility;

(e) must not hinder or interrupt the ability of staff or contractors to perform their work, as set out in section 14(a) of this by-law;

(f) must not exceed a maximum footprint of 9 square metres (3m x 3m), with all belongings contained within that space;

(g) must not contain any campfire, lighted candles, propane lanterns or stoves, or other similar devices;

(h) must not be used to sell goods or conduct business without the permission of the Board, as set out in section 4(a)(i) and 4(a)(ii) of this by-law; and

(i) must not be left unattended.

[Emphasis added.]

[25] In March 2021, in conjunction with closing the Strathcona Park encampment, the Province, the City of Vancouver, and the Park Board entered into the MOU with the stated purpose of:

> …formaliz[ing] the parties' shared commitment to a coordinated approach to connect unsheltered residents to housing that preserves dignity for these residents, respects the need for culturally-appropriate services for Indigenous people, and considers the needs of the surrounding community.

[26] One of the stated objectives of the MOU is to:

> Recognize the combined obligation to act immediately in a positive and compassionate way with viable alternatives, along with access to social and

> health services to support unsheltered residents and those living in temporary shelters in parks in public spaces.

[27] Part 6 of the MOU expressly anticipates there will be further encampments in the future, despite the fact that indoor sheltering options were being provided to those who were camped in Strathcona Park. In this respect, the CRAB Park encampment could not have come as a surprise.

[28] The MOU also recognizes the broader problem of homelessness in Vancouver, stating:

> Homelessness is a humanitarian crisis which continues to grow in Vancouver and across the region. Incomes – earned or government-subsidized – are not keeping pace with rising housing costs and residents are forced to compete in an overheated housing market with near zero vacancy rates. Homelessness has devastating consequences for the individual and is, at its simplest, the result of the compounding impacts of lack of affordable housing, deep poverty, and a mental health and addictions crisis. Often both driven and compounded by trauma, stigma, discrimination, unsupported mental health conditions, deep poverty, and racism, homelessness is a condition almost impossible to move from without public, social, and health supports or interventions.
>
> Vancouver has been home to a significant homeless population since starting an official homeless count in 2005. The most recent 2020 Homeless Count identified 2,095 people who were experiencing homelessness. This count is an undercount – not everyone who is experiencing homelessness is identified by volunteers, and not everyone identified wants to participate in a survey.
>
> People without adequate housing are forced to rely on friends or acquaintances for a place to sleep, or hope for a bed in an emergency shelter. Ultimately, if these alternatives are not available, they are forced to sleep outside in tents or other structures, usually in public spaces such as sidewalks or parks.
>
> …
>
> The parties to this MOU recognize that a collaborative approach to bringing unsheltered residents indoors is essential for the well-being of some of B.C.'s most marginalized and vulnerable residents, as well as for the well being of the broader community. The parties also acknowledge recent B.C. jurisprudence affirming the right of individuals to erect temporary shelters in public spaces overnight should there not be adequate shelter or housing options available.

[29] The Park Board concedes that the number of persons experiencing homelessness in Vancouver outnumbers the available indoor sheltering spaces.

Thus, sheltering overnight in outdoor locations is necessary for a number of persons experiencing homelessness. The Park Board contends, though, that there are sufficient indoor spaces to accommodate those camped at CRAB Park, even if there are insufficient spaces to accommodate the broader homeless population of Vancouver.

IV. THE CRAB PARK ENCAMPMENT

[30] The CRAB Park encampment emerged after the Strathcona Park encampment was disbanded in March 2021. The number of people sheltering in CRAB Park fluctuates from night-to-night. Estimates placed the number at around 30 to 40 in early July 2021 and more than 50 by early September. Tents have been consistently located in the southwest corner of the Park, around its perimeter. There is evidence that some tents have spilled outside of this area, but their occupants have complied when asked to move to the main camping area to accommodate other Park users.

[31] Persons sheltering in the Park have deposed, unsurprisingly, that the state of being homeless is difficult and dangerous. They universally state they would prefer to shelter indoors but they dispute there are sufficient indoor spaces to shelter them. They say the spaces that are available are not suitable to their needs or they do not feel they or their belongings are safe in many shelters. They generally depose that CRAB Park is the safest option for them as the community of people sheltering together provides security.

[32] CRAB Park is one of the few remaining public spaces in or around the Downtown Eastside where persons experiencing homelessness could shelter before the Orders were made. Both Oppenheimer Park and Strathcona Park have now been closed to any overnight sheltering.

V. THE GENERAL MANAGER'S ORDERS

[33] On July 8, 2021, the General Manager made the first Order, purportedly under s. 24 of the *Bylaw*, closing CRAB Park to overnight sheltering. (I say

"purportedly" because, as I discuss later, I am not convinced the General Manager has the authority under s. 24 to close a park to overnight sheltering.) The July 8, 2021 Order reads in part:

> Pursuant to Section 24 of the Parks Control By-law, the General Manager of the Vancouver Board of Parks and Recreation orders that temporary shelters and structures will not be permitted anywhere in CRAB Park at Portside, as shown in the map below, to ensure the park remains available to all park users.

[34] The campers at CRAB Park were given no prior notice of this Order or an opportunity to express their views on it before it was made. Rather, they learned of it when signs informing them of the Order were posted in the Park.

[35] In response, some campers left the Park but others stayed. Some, like Jason Hebert and Shane Bailey, left initially but returned after bad experiences camping in other locations. Thus, while some persons have complied with the Order, it is not in dispute that there is substantial non-compliance.

[36] On September 7, 2021, the General Manager issued a second Order, closing a portion of CRAB Park to all members of the public to allow for remediation work. The closed area includes the section where overnight sheltering was allowed prior to the July 8 Order. The September 7, 2021 Order reads in part:

> Effective Thursday, September 9, 2021, pursuant to the Parks Control By-law, the General Manager of the Vancouver Board of Parks and Recreation orders that the southwest section of CRAB Park at Portside (shaded in red below) will be temporarily closed to the public for grounds remediation. This order is further to the order issued on July 8, 2021, which remains in effect until further notice, that temporary shelters and structures will not be permitted anywhere in CRAB Park at Portside to ensure the park remains available to all park users.

[37] The General Manager deposes she observed needles, feces, debris, damage to Park Board property, and small fires during her attendances at CRAB Park in August and September. She "concluded that a portion of the Park required remediation as these observations revealed damage to [the] ground and suggested the likelihood of soil contamination." She states this is the reason for the September

7, 2021 Order. She further explained the rationale for her conclusion as follows in her affidavit:

> The Park Board has dealt with encampments at a number of Vancouver Parks including Oppenheimer Park and Strathcona Park. It is the experience of Park Board staff that the majority of the damage caused by an encampment is not visible until everything is removed from the site. After previous encampments the remediation effort required the removal of the top layers of material as sharps and objects are often buried into the subsurface.

[38] Both the July 8, 2021 and September 7, 2021 Orders contain explanatory text referring to the Park Board's mission to provide, preserve, and advocate for parks and recreation for the benefit of all persons; the objective of ensuring equitable access to pubic parks as a high priority, especially in communities like the Downtown Eastside where there is a shortage of parks; and the Park Board's commitment in the MOU to prevent encampments in Vancouver parks "when there are suitable spaces available for unsheltered people to move indoors." The notice then directs persons to a 211 help line for assistance with sheltering.

[39] Both Orders state that, until further notice, temporary shelters are not permitted in CRAB Park, and the area must be vacated. As with the July 8, 2021 Order, it is not in dispute there has been widespread non-compliance with the September 7, 2021 Order.

VI. THE APPLICATION FOR JUDICIAL REVIEW

[40] The Petitioners seek judicial review of both Orders on grounds of procedural fairness and reasonableness.

A. Procedural Fairness

[41] The Petitioners argue the Orders are administrative decisions of a government authority that impact on the rights, interests, or privileges of those sheltering at CRAB Park and thus attract a duty of procedural fairness. They argue the Orders must be quashed since they were made without giving notice to those affected persons or giving them a right to be heard.

[42] The Park Board acknowledges the General Manager did not give the Petitioners advance notice of the Orders or a right to be heard. However, the Board maintains the Orders are legislative in nature and do not attract a duty of procedural fairness.

1. *Legal Principles*

[43] The duty of procedural fairness exists as a fundamental component of Canadian administrative law: *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 38. The duty lies on every public authority making an administrative decision which is not legislative in nature and which affects the rights, privileges, or interests of an individual: *Mavi* at para 38. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22, Justice L'Heureux-Dubé stated the purpose of the duty is to:

> [22]…ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[44] The scope of the duty, where it exists, varies with the circumstances and the legislative or administrative context: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 77 [*Vavilov*]; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker* at paras. 22–23. It is typically determined with reference to a non-exhaustive list of factors identified in *Baker* at paras. 23–27. The scope of the duty of procedural fairness generally requires, at a minimum, notice to those whose rights, privileges, or interests may be affected by the decision and an opportunity for those persons to be heard before the decision is made.

[45] Administrative decisions are reviewed for procedural fairness on a correctness standard: *Mission Institution v. Khela*, 2014 SCC 24 at para. 79. Failure to provide for appropriate procedural fairness in the decision-making process, where rights to procedural fairness exist, will result in the decision being set aside, whether or not it is substantively reasonable.

2. *Do the Orders Attract Procedural Fairness?*

[46] Government decisions that are legislative in nature do not attract a duty of procedural fairness: *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 170) v. British Columbia (Ministry of Labour and Citizens' Services)*, 2007 BCSC 1518 at paras. 35–39. The distinction between legislative and administrative powers is discussed in Donald J.M. Brown et al, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2020) at para. 7:38:

> While no precise definition of "legislative" power emerges from the case law, two characteristics seem important for the purpose of defining the extent of the duty of fairness. The first is the element of generality, that is, that the power is of general application and when its exercise will not be directed at a particular person. The second *indicium* of a legislative power is that its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct. Decisions of a legislative nature, it is said, create norms or policy, whereas those of administrative nature merely apply such norms to particular situations.

[47] In *United Assn. of Journeymen,* Justice Gerow summarized the principles applicable to considering whether a decision is legislative or administrative in nature. She stated at paras. 38–39:

> [38] In conducting the analysis to determine whether procedural fairness applies, the court looks at whether the decision arises from a power that the legislature has reserved to the executive branch in order that it can respond to social, economic and political concerns of the moment.
>
> [39] In *Knight*, the Supreme Court of Canada stated that the factors to be considered in determining whether a general duty of fairness exists are the nature of the decision, the relationship between the administrative body and the individual, and the effect of the decision on the individual's rights (at 669). The Court confirmed that the performance of a duty traditionally performed by the legislative branch or a decision of a preliminary nature will not attract a duty to act fairly (at 670). The Court noted that the right to procedural fairness only applies in cases where the decision is a significant one with an important impact on the individual (at 677).

[48] The Park Board argues the *Bylaw* confers on the General Manager a policy-making power to respond to concerns of the moment by allowing her to close a portion of any park to the general public to facilitate remediation when needed.

[49] I agree that the authority conferred on the General Manager might allow her to respond to concerns of the moment, but I do not agree this elevates her authority to a policy-making function such that her decisions can be described as “legislative” in nature.

[50] The General Manager is not an elected member of the Park Board, although she is the senior administrative officer appointed by the Board. She is not tasked with making broad public policy determinations regarding the use of Vancouver parks. Rather, she is tasked with carrying out the Park Board’s broader policies, as stated in its mission statement and its bylaws.

[51] The *Bylaw* expressly permits overnight sheltering in city parks by persons experiencing homelessness. The decision to allow this was a legislative-type decision made by the Park Board, an elected body, through the *Bylaw*. While the General Manager is given some discretion to manage this broader policy, I find her authority is not elevated to the level of making legislative-type decisions, at least with respect to closing a park to overnight sheltering that is otherwise permitted under the *Bylaw*.

[52] Section 11B of the *Bylaw* does not confer on the General Manager a power to disallow sheltering in particular parks. She is given a discretion under subsections (b) and (c) to permit temporary daytime sheltering in a park for persons experiencing homelessness but she is not given a specific power to prohibit overnight sheltering.

[53] The General Manager purported to make the Orders closing CRAB Park to overnight sheltering under s. 24 of the *Bylaw*, which states:

> 24. The General Manager shall post areas within all parks and recreational facilities for the purpose of prohibiting, restricting or regulating any activity within the area posted and shall have the right to enforce all sections of this by-law herein.

[54] It is not clear to me that s. 24 confers on the General Manager a plenary authority to prohibit overnight sheltering in any park. I do not believe the section was intended to confer on the General Manager an unlimited power to prohibit, restrict, or

regulate any activity in parks, irrespective of other provisions of the *Bylaw*. Overnight sheltering is specifically authorized by ss. 11A and 11B of the *Bylaw* and is not otherwise prohibited by any section of the *Bylaw* to which I have been directed. I do not read s. 24 as giving the General Manager broad authority to override that.

[55] Section 24 is framed as creating a mandatory obligation on the part of the General Manager. It states that she "shall post areas within all parks and recreational facilities for the purpose of prohibiting, restricting or regulating any activity within the area posted". The meaning of "post areas" is ambiguous but given the mandatory nature of s. 24 and the reference to "all parks", it seems to me that its purpose is to have the General Manager cause signage or other notices to be posted in parks to identify for the public's benefit what restrictions apply in different areas of a park. For example, s. 24 may require the General Manager to post signs or mark areas where overnight sheltering is prohibited for one of the reasons stated in s. 11B(a) of the *Bylaw*. However, I do not read s. 24 as conferring a plenary discretionary power on the General Manager to effectively make regulations about how parks may or may not be used irrespective of other provisions of the *Bylaw*.

[56] However, since this point was not argued, I will assume s. 24 confers some authority on the General Manager to decide where overnight sheltering within a park may or may not be permitted or to close certain parks to overnight sheltering all together. Even then, however, I do not accept that s. 24 confers on the General Manager the authority or discretion to make decisions invoking "broad considerations of public policy" (Brown et al at para. 7:38) about the use of Vancouver parks. In this respect, I am not persuaded that an act purportedly taken under s. 24 amounts to a "legislative" decision.

[57] The Board argues the September 7, 2021 Order is not targeted at the campers but rather has "general application and prevents anyone from accessing parts of the Park". Since the September 7, 2021 Order applies broadly to all potential users of the Park, the Board argues it is legislative in nature and does not attract a right to procedural fairness specifically for those sheltering in CRAB Park. Further, it

argues the September 7 Order supersedes the July 8, 2021 Order such that, insofar as the July 8 Order is targeted to a specific group of people, that is irrelevant to characterizing the September 7 Order as being a legislative-type decision.

[58] I disagree. The September 7 Order expressly confirms the July 8 Order "remains in effect until further notice". It does not say the September 7 Order replaces or supersedes the July 8 Order. It is true that the September 7 Order excludes all members of the public from a defined area in the Park, but that area fully encompasses the limited area where overnight sheltering was previously allowed.

[59] I accept that one purpose of the September 7 Order is to clear the area for remediation, but that cannot be separated from the overall effort to close CRAB Park to overnight sheltering and remove those who were sheltering there as of the date of the Orders. This conclusion is reinforced by the fact that the September 7 Order repeats the rationale stated in the July 8 Order of "preventing encampments in Vancouver parks and enforcing the Parks Control By-laws when there are suitable spaces available for unsheltered people".

[60] The Park Board refers to *Shantz* at para. 277 for the proposition that determining the locations where temporary overnight shelters may be permitted is a legislative decision. However, *Shantz* is not comparable on this point. In that case, Hinkson C.J.S.C. considered a specific question of whether the court should make an order designating specific park land within the city for sheltering. He ultimately declined to do so, noting that it is "a legislative choice, and not an order that is open to [the Court] to make." This has no bearing on whether a decision made by a municipal officer with delegated authority under a bylaw is legislative or administrative in nature.

[61] I agree with the Petitioners that the Orders here are more akin to a decision to close a school, as considered in *Potter v. Halifax Regional School Board*, 2002 NSCA 88 and *Comox Valley Citizens v. School District No. 71 (Comox Valley),* 2008 BCSC 1071. While a decision to close a school has inescapable policy elements,

and arguably affects all persons (or at least all parents and students) who live in the school district, the court in *Potter* recognized (at para. 41) that "there is a qualitative difference between the impact on parents of children in the closed school and those other parents who live in the district". This court expressly followed *Potter* in *Comox Valley Citizens* at para. 48, where Justice Johnston found that decisions to close schools are "largely administrative in nature, not legislative".

[62] In my view, there is a "qualitative difference" between the impact of the Orders on those sheltering in the Park at the time the Orders were made and other persons living in the City of Vancouver. I am satisfied the Orders have a significant and important impact on those persons as individuals such that they are entitled to notice and right to be heard: *Knight* at p. 677.

[63] At stake for them is nothing less than their s. 7 *Charter* right to life, liberty, and security of the person. This elevates their right to be heard above ordinary users of the Park, or even particular users of the Park, such as (to take counsel's example) a soccer team whose game is cancelled when a field is closed for maintenance.

[64] Thus, I find both Orders attract a duty of procedural fairness. They have a particular impact on those persons who were sheltering at CRAB Park at the time the Orders were made, and those individuals ought to have had notice and an opportunity to be heard before being ordered to leave the Park.

3. *Scope of the Duty*

[65] The Park Board argues in the alternative that if a duty of procedural fairness applies, it attracts a very low standard. It invites the Court to determine the degree of procedural fairness the Board owed to persons sheltering at CRAB Park when making the Orders.

[66] It is not for the Court to design a fair process for the parties. In *Baker,* the court stated that choices of procedure made by the administrative decision maker are themselves relevant to considering the overall fairness of the process. In other words, the decision-maker has some freedom to design the process, but the

adequacy of that process may be judicially reviewed. The Board conceded the Orders were made without notice or an opportunity to be heard. This case therefore lacks the factual matrix on which to adjudicate the suitability of a process.

[67] I leave it to the General Manager or the Park Board to determine the choice of procedure to reconsider the Orders. I also do not wish to pre-empt the ability of affected persons to make submissions to the General Manager or the Park Board as to the appropriate scope and extent of the process required. However, I make the following observations.

[68] I agree with the Park Board that the duty does not extend to notifying, consulting with, or allowing every potential or actual park user to be heard before prohibiting a particular activity in the Park. Nor, for that matter, must the General Manager or the Board give notice to and hear from potentially all persons in Vancouver experiencing homelessness.

[69] I find that the Orders particularly affect those persons experiencing homelessness who were sheltering in CRAB Park when the Orders were made. Those individuals have a right to notice and a right to be heard, as their rights, privileges, or interests are uniquely affected.

[70] Further, the right to be heard may not extend to all persons who were sheltering in the Park when the Orders were made. The evidence suggests that some persons were not experiencing homelessness but chose to stay in the Park in support of others. The right to be heard does not extend to these persons. Their right to life, liberty, and security of the person under s. 7 of the *Charter* or their right to shelter overnight in a park under the *Bylaw* are not affected or triggered as they are not genuinely experiencing homelessness. Furthermore, persons who took up shelter in the Park after the Orders were made may not be entitled to the same procedural rights.

[71] I agree with the suggestion made by counsel for the Petitioners that adequate notice does not need to be overly formalistic. Notice might be effected by distributing

leaflets to the campers or posting notices around the Park. Further, since at least two of the campers (the Petitioners) are represented by counsel, I would anticipate notice would be given to their counsel.

[72] Depending on the circumstances, it may be unnecessary for the Board or the General Manager to afford the affected persons a public hearing. For some people who may be challenged in presenting written submissions, a meeting in the Park may provide sufficient opportunity to be heard. For persons represented by counsel, written submissions to the General Manager or the Board may be a sufficient process by which they can express their interests, although I make no finding to that effect.

[73] Beyond this, I would leave it to the General Manager or the Park Board to determine the choice of procedure to reconsider the Orders, likely with input on the process from the affected persons.

4. *Conclusion on Procedural Fairness*

[74] Since the Park Board concedes that rights of procedural fairness were not accorded to the Petitioners in respect of either Order, I would set aside both Orders and remit them back to the General Manager or the Park Board for reconsideration.

B. Reasonableness of the Orders

[75] The Petitioners challenge the reasonableness of the Orders. They argue there is an inadequate factual basis to reasonably support the General Manager's conclusion that there were suitable indoor spaces available to those sheltered in the Park at the time the Orders were made. This conclusion was based on advice the General Manager received from British Columbia Housing Management Commission ("B.C. Housing"). The Petitioners argue this advice was conclusory in nature and lacked sufficient detail to reasonably support the General Manager's conclusion. They argue it was incumbent on her to at least verify the accuracy of the information before ordering the Park closed to sheltering. The Petitioners have led evidence to demonstrate significant shortcomings in that information such that it was

not reasonable for the General Manager to rely on it. They also argue the General Manager did not consider the specific needs of those sheltering in the Park.

[76] The Park Board argues it was reasonable for the General Manager to rely on advice from B.C. Housing, which is the branch of government responsible for locating, securing, and managing indoor sheltering spaces. The Board argues assessing the availability of indoor shelter spaces is outside of the General Manager's expertise and she must reasonably rely on the informed advice of B.C. Housing.

1. *Reasonableness Review: Vavilov*

[77] The parties agree that a judicial review of the Orders is to be done on a reasonableness standard: *Vavilov*.

[78] A review for reasonableness begins with the decision-maker's reasons, where reasons are provided. Reasons "are the means by which the decision maker communicates the rationale for its decision." Courts are required to give considerable deference to administrative decisions of government by exercising "judicial restraint", but a court must also still satisfy itself through a "robust form of review" that the outcome of the decision is transparent, intelligible, and justified, having regard to any reasons given for the decision and its broader context: *Vavilov* at paras. 13–14.

[79] In cases where reasons are not required of the decision-maker, a court must assess the reasoning process that underlies the decision by looking at the record as a whole and the larger context to understand the decision: *Vavilov* at paras. 137–138. In such cases, the analysis will tend to focus on the outcome rather than the reasoning process. Even where reasons are provided, the "reasons first" approach in *Vavilov* does not exclude consideration of broader context of the decision.

[80] A reasonable decision must be one that is justified in light of the evidentiary record before the decision maker and the factual matrix that bears on the decision. If a decision maker misapprehends the evidence or fails to account for it, the

reasonableness of the decision is jeopardized: *Vavilov* at para. 126. Likewise, a decision may be unreasonable when its conclusions are not based on the evidence that was actually before the decision maker: *Vavilov* at para. 126. The court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" and be satisfied that a line of analysis reasonably leads the decision maker from the evidence before it to the conclusion at which it arrived: *Vavilov* at para. 102.

[81] The impact of the decision on the rights and interests of the affected individual(s) is also relevant to a reasonableness inquiry. A failure to grapple with particularly severe or harsh consequences of a decision engages concerns of arbitrariness and may render a decision unreasonable: *Vavilov* at para. 134. Where the impact is severe, the reasons must reflect those stakes. As stated in *Vavilov* at paras. 133 and 135:

> [133] … The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> …
>
> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

[82] The party challenging the decision must persuade the reviewing court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para. 100. Flaws that are merely superficial, peripheral to the merits of the decision, or that constitute minor missteps will not invalidate the decision. They must be "sufficiently central or significant to render the decision unreasonable": *Vavilov* at para. 100.

2. Analysis

(a) The Reasons for the General Manager's Decision

[83] The parties disagree as to whether the General Manger provided reasons for her decision. The Petitioners argue the two notices posted at CRAB Park on July 8, 2021 and September 7, 2021 contain the General Manager's reasons. The Park Board argues these notices simply inform the public of the Orders but do not represent, or at least exhaust, the General Manager's reasons. The Board also argues this is a case where reasons were not required and thus the reasonableness of the Orders must be discerned from the broader factual matrix in which they were made.

[84] I accept that the notices do not exhaust the General Manager's reasons, as the "reasons first" approach does not exclude consideration of the broader context of the decision. In my view, however, they are an appropriate starting point to assess the General Manager's "chain of analysis".

[85] As I have found earlier, both Orders are directed at, or uniquely affect, those camped at CRAB Park. The notices posted for both Orders contain explanatory text that speaks to the objective of equitable access to parks and the Board's commitments under the MOU:

> The Park Board's mission is to "*provide, preserve and advocate for parks and recreation to benefit all people, communities and the environment"*. Ensuring equitable access to public parks is a high priority, especially in communities such as the Downtown Eastside where there is a shortage of parks and green space. Additionally, through a Memorandum of Understanding (MOU) with the City of Vancouver and the Province of B.C., the Park Board has committed to preventing encampments in Vancouver parks and enforcing the Parks Control By-laws when there are suitable spaces available for unsheltered people to move indoors.
>
> For more information call:
>
> 211 - Shelter and Street Help Line | 311 - City Services

[86] The Orders make no mention of the constitutional rights of those experiencing homelessness to shelter overnight in public parks. Nor do they acknowledge the right to do so under ss. 11A and 11B of the *Bylaw*. The Orders focus on the

objective of providing access to public parks for all people and the Park Board's task under the MOU to prevent encampments when suitable indoor space is available. There is little evidence in the record that the General Manager seriously turned her mind to the *Charter* rights of those affected by the Orders. It is evident from what is stated in the Order that her primary focus was on maintaining public access to the Park.

[87] The General Manager states in her affidavit she was "completely satisfied" that sufficient and appropriate indoor sheltering options were available for those sheltering in CRAB Park. This was the central rationale, or at least an essential pre-condition, for the Order.

[88] The Petitioners argue that the facts before the General Manager were insufficient to reasonably support that conclusion. I agree.

[89] For the General Manager's conclusion to be rationally supported, the following three facts must have been true:

a) there must be <u>enough</u> indoor spaces for the number of homeless persons that would otherwise be sheltering in CRAB Park;

b) those indoor spaces must be <u>available</u> to the individuals sheltering in the park; and

c) the indoor spaces must be <u>suitable</u> to those individuals.

[90] The General Manager's evidence of the advice she received from B.C. Housing is set out in her affidavit as follows:

> 10. Throughout June, July and August I was in regular conversation with BC Housing and City staff regarding outreach efforts and available indoor spaces. I was assured by B.C. Housing that there were enough indoor spaces for all the people sleeping at the Park. In addition, I was informed by B.C. Housing that approximately 5-7 people who were camping in the Park already had housing.
>
> 11. During June, July and August B.C. housing Staff regularly provided a list of indoor options to the Park Board so that the Rangers in the Park could provide those options to those people sleeping in the Park.

[91] The General Manager attaches to her affidavit a letter dated August 24, 2021 from the Director of B.C. Housing's office at Orange Hall on the Downtown Eastside stating:

> We have confirmed with our non-profit housing provider partners that, as of August 23, 2021, there are enough available spaces to bring inside anyone currently camping overnight at CRAB Park who does not otherwise have housing.

[92] This letter came some six weeks after the July 8 Order and thus does not form part of the record before the General Manager when she made that Order. All she had were the verbal assurances from B.C. Housing received in June, July, and August.

[93] That aside, even with the August 24, 2021 letter, neither it nor the verbal assurances contain any specific information about what indoor sheltering was available at the material time.

[94] Further, the General Manager has not deposed that she received the "list[s] of indoor options" that were provided to Park Rangers for distribution at the Park, and copies of these lists are not in evidence. While affidavits from Park Rangers were filed in this judicial review, none of those attach copies or even examples of the lists that were provided to campers or explain how or to whom they were provided.

[95] The General Manager explains her reliance on the advice from B.C. Housing in her affidavit:

> 12. I was completely satisfied that both BC Housing and the City had upheld their commitment to the MOU by providing sufficient and appropriate indoor options for those people camping in the Park and that I was bound to hold up the Park Board commitment to prevent the encampment continuing and expanding.

[96] In my respectful view, the General Manager did not have a reasonable factual basis for this conclusion, at least not one that is disclosed on the record. This does not mean her conclusion was necessarily wrong, but it does mean there was insufficient information before her by which she could reasonably satisfy herself of this crucial fact: *Vavilov* at para. 126. The advice she relied on from B.C. Housing

contained no particulars as to the numbers, locations, or suitability of the indoor spaces, and there is no evidence the General Manager sought out such particulars.

[97] In the circumstances, reasonableness required the General Manager to give serious consideration to both the constitutional rights of the Petitioners and the interests of the broader public. I agree with the Park Board that it is not unreasonable *per se* for the General Manager to rely on advice from B.C. Housing on matters that are particular to its area of expertise and experience, including the availability of indoor sheltering spaces. However, when making an order that engages, and potentially has significant and harsh consequences for, the constitutional rights to life, liberty, and security of a highly vulnerable population, reasonableness requires more than unquestioned reliance on conclusory statements provided by another government office. A reasonable decision in these circumstances requires the General Manager to satisfy herself that she was truly protecting the constitutional rights of the Petitioners in seeking out a proportionate balance between their rights and the right of members of the public to use the Park.

[98] The decision to close CRAB Park to overnight sheltering was made solely by the General Manager, not B.C. Housing. The constitutional rights of this vulnerable population were in her hands when she made the Orders and reasonableness in those circumstances required her to do more then accept without question the conclusory statements of B.C. Housing staff before making those Orders.

[99] Moreover, the MOU, which is expressly relied upon in making both Orders, recognizes that homelessness has “devastating consequences” for individuals and calls for a “collaborative approach to bringing unsheltered residents indoors”, not a siloed one. Something more than bare assurances from B.C. Housing is called for by the MOU.

(b) Evidence of the Available Shelter Space

[100] In addition to lacking the specific information about indoor sheltering spaces, I find it was incumbent on the General Manager to satisfy herself that the 211 Shelter and Street Help Line would be an effective way for the campers to access suitable

indoor sheltering space. The campers were directed to this line in the notices of the Orders posted in the Park. The experience of those sheltering in CRAB Park and those assisting them suggest it was not effective or easy to navigate.

[101] Kayla Woodruff is a volunteer assisting unhoused persons in Vancouver to find shelter. She has worked and volunteered in the social service field since 2009. She holds a Bachelor of Social Work and has been a member the B.C. College of Social Workers since 2015.

[102] She deposes she learned of the "211 Shelter List" in 2016 when she first started volunteering and working professionally in Vancouver. She describes it as:

> …a list of shelters in Greater Vancouver that is updated daily to provide information on the number of shelter spaces available at individual shelters, and includes information on the specific capacity and requirements of those shelters (i.e. accessibility, limits on substance use, gender).

[103] Though not stated expressly in the evidence, I gather the "211 Shelter List" is what is available to those staffing the 211 Shelter and Street Help Line that is identified in the Orders. The 211 Shelter List is also available online and updated twice daily.

[104] On September 7, 2021, at around 3:00 p.m., Ms. Woodruff accessed the 211 Shelter List on the internet and began calling shelters on this list with stated availability. She made some 25 phone calls and found only ten available spaces subject to the following restrictions: three spaces for females with no carts permitted; two further spaces for females but with no pets and no carts; one space for a female with no listed restrictions; and four spaces for males, all with no accessibility for the mobility-impaired, no pets, and no carts.

[105] Rider Cooey, another volunteer assisting unhoused persons on the Downtown Eastside, estimates there were some 50 tents in CRAB Park, many of which sheltered more than one person. Thus, the number of spaces identified as available to Ms. Woodruff when she called places on the 211 Shelter List was considerably less the number of people in CRAB Park.

[106] Lauren Brown is a community volunteer who assists unsheltered persons at CRAB Park. She is a Ph.D. student in Community and Regional Planning at U.B.C., studying housing policy. On July 14, 2021, she accessed the 211 Shelter List online and called the numbers on the list, as Ms. Woodruff did on September 7, 2021. Ms. Brown was told the shelters were either full or had only a few available beds. Specifically, she deposes there were two spaces available for men, and one for a woman, plus some possible walk-in spaces that may be available depending on demand. She further asked each shelter if they generally had beds available lately or if they had been full. She was told by most shelters that they had been full.

[107] Ms. Brown deposes that the experience of making these calls revealed to her how hard it is to find shelter. She states:

> It was confusing for me, a housed person and a Ph.D. student used to dealing with bureaucratic systems with the time to call all 27 numbers and access to Internet to get the numbers. There were not beds available and it was hard to get information. After calling all of them I did not know where to go or tell someone to go to get a bed.

[108] The Petitioners did not tender Ms. Woodruff's and Ms. Brown's evidence to prove as a fact there was insufficient indoor shelter space. Rather, their evidence demonstrates the experience persons who tried to use the resources available through the 211 Shelter and Street Help Line. This evidence suggests the 211 Street and Shelter Help Line was not an effective means for those sheltering in the Park to find indoor shelter spaces or at least demonstrates the challenges they would face in trying to access shelter that way. Apart from the fact that each shelter needed to be contacted individually, which would likely be a challenge for those sheltering in the Park, the number of spaces apparently available was inadequate and did not correspond with the stated availability in the 211 Shelter List.

[109] All of this illustrates why it was incumbent on the General Manager to satisfy herself that the 211 Shelter and Street Help Line would be an effective tool to shelter the CRAB Park campers before issuing an Order affecting their s. 7 *Charter* rights. There is no evidence that the General Manager took steps of her own to ascertain the effectiveness of the Shelter Line.

[110] The experiences of those sheltering in CRAB Park also demonstrate the challenges with finding indoor sheltering space. Jason Hebert, one of the Petitioners, deposes he packed up his belongings and relocated to another outdoor location after the September 9, 2021 Order was posted on his tent. He states he was not offered housing when he moved or while he was sheltering in the Park.

[111] Kerry Bamberger, the other Petitioner, deposes that since she moved to the Park in May or June, she has talked to people from Carnegie Outreach about four or five times and with people from B.C. Housing three or four times. She states they have asked her about her housing needs, which she explained are safety and cleanliness: a locked door and no bugs or rats. Ms. Bamberger deposes she does not want to sleep outside, which she describes as “terrible”. However, as a survivor of domestic violence and a person who has experienced threats from another resident while living in a Single Room Occupancy (“SRO”) accommodation, she does not feel safe moving into a place with no secure lock on the door.

[112] Ms. Bamberger has been told that Carnegie Outreach is looking for a space for her but has never come back with anything. She deposed that sometime after the July 8, 2021 Order, a Carnegie Outreach worker came to her tent and told her they had something important from B.C. Housing to give her. She thought it was going to be a housing offer, but it was a form letter providing some very general information about how to get on a list for shelter space.

[113] Allan Brandson moved to Vancouver from Edmonton earlier this year to be close to his two sons. Since arriving in Vancouver, he has lived at CRAB Park, which is close to his sons who live with their mother. He has attempted to secure accommodation in an SRO through the Carnegie Outreach Program. He states he has been provided with a list of housing options but “nothing materialized out of that list.” He states the outreach workers at Carnegie Centre tell him to keep coming back in an effort to find housing. To date, he has not been able to secure any indoor housing options. He states that shelter spaces are not ideal for him because he has too many belongings, and he worries about them being stolen if left in a shelter.

Mr. Brandson deposes that in August, B.C. Housing set up a table in CRAB Park and collected his name and the names of persons seeking housing. He was told they would be working on finding him housing, but he has not heard anything since. He says the general information B.C. Housing provided him was not helpful. He deposes that if he had been offered housing, he "would have jumped on it."

[114] Arnold Manitopyes is a 67-year-old man from the Muskowekwan First Nation in Saskatchewan and is a residential school survivor. He has been living in Vancouver since 1994 and has not had a stable home since 2000. Prior to that, he worked in the mining and forestry industries and later in construction but was unable to maintain this. In 2000, he began collecting social assistance and selling his art. He recently tried living in Saskatchewan again with his sister, but that did not work out, so he returned to Vancouver. He stayed for a few weeks with a friend in an SRO but says it was "filled with bedbugs", which he could not stand. He left without having anywhere else to go and came to live in CRAB Park.

[115] Mr. Manitopyes deposes he has spoken with people from Carnegie Outreach about an indoor space about once a week since he returned to Vancouver. He has told them he cannot live anywhere with bedbugs. Nor can he live in a place where he must sign in and out, as that reminds him of discrimination his grandparents experienced having to sign in and out of their reserve. "Generations later," he says, "I do not want that for me." He states that at one point someone spoke to him about moving into an auditorium and sleeping in a cot. However, he says that after facing decades of discrimination as an Indigenous person and having experienced residential school, he does not trust that he will be safe in that kind of environment.

[116] Clint Randen is a 46-year-old man who has been living in Vancouver for 15 years. He battles drug addiction and is currently homeless, living with his partner, Ms. Bamberger, in CRAB Park. He deposes he last spoke to B.C. Housing six or eight months ago, after Ms. Bamberger was threatened at an SRO. He states he told B.C. Housing he needed a proper home, and it was unsafe where they were. He was told to fill out an application, and they would get back to him. He deposes that

he has spoken to B.C. Housing every couple of years, and every time they say he needs to fill out an application for housing. He states he has filled out an application six times now.

[117] Narces Mike Dechaghadjian is a 70-year-old man without housing. He is from Beirut, Lebanon but has been living in Vancouver for the last 36 years. He has been homeless for about a year. Prior to becoming homeless he lived in an SRO at the Astoria Hotel on Hastings Street. He decided he could no longer stay there due to bedbug and cockroach infestations. He lived at the Belkin House shelter but eventually was told he had been there too long and needed to leave for two months before returning. He then began sheltering in CRAB Park.

[118] Mr. Dechaghadjian deposes that CRAB Park is safer and more convenient than staying in shelters because he does not need to deal with theft, bedbugs, or cockroaches. He is also close to his wife, who has breast cancer and is staying at a women's shelter on Powell Street. He does not need to be concerned about coming and going from a shelter when his wife needs something urgently. He deposes he has attended at B.C. Housing and Carnegie Outreach for the past five months to try to find housing. He has been told that he needs to get his birth certificate from Lebanon to get government identification and access public housing. He has also been refused private accommodation because of a lack of identification. Five months ago, he made an application for his birth certificate through the Lebanese embassy in Ontario but has not yet received it.

[119] Shane Andrew Bailey is a 49-year-old man from Maple Ridge who has been living in Vancouver for four months. He has been homeless for three and a half years. He was injured in a work accident 10 years ago and has been unable to work since then. In 2021, he came to Vancouver to help his (now) ex-girlfriend with her drug addiction and mental health challenges. They were staying in a tent in Stanley Park throughout the summer of 2021, but he left there when his girlfriend left him, taking most of his money. He tried to get a space in the Army and Navy shelter and spent three days sleeping outside that shelter waiting for a space. He managed to

spend four days inside the shelter, waiting in the lounge area for a “cubbyhole” room, which is a small room without a door or a lock. He deposes that he had a lot of stuff stolen while staying in the Army and Navy shelter, including his tent. This made him feel unsafe, and he felt he could not stay at the shelter for long. After that experience, he did not want to stay in another shelter. He said it was “the worst place I could have gone.” He tried some other shelters that he heard were better, such as the Salvation Army shelter, but they were full. He eventually ended up at CRAB Park.

[120] Mr. Bailey deposes that he was told by Carnegie Outreach workers that if he went to the Carnegie Centre and mentioned he was from CRAB Park, he would be given priority for housing. However, when he did this, he was told it would take up to six months before they could get him housing. Given his experience with the Army and Navy shelter, he did not wish to stay in another shelter and risk having his possessions stolen again.

[121] I accept that not all persons sheltering in the Park face the same challenges as these affiants. Bob Moss, an Outreach Coordinator with Carnegie Outreach Centre whose affidavit was filed by the Park Board, deposes that at least 10 people sheltering in the Park had also been sheltering in Strathcona Park and had been provided with accommodation when that encampment was shut down. He also deposes that outreach workers engaged daily with those sheltering in the Park to assist them locating sheltering beds that were immediately available. However, his affidavit speaks only in general terms and does not address the specific circumstances outlined by the individuals whose evidence I have just summarized. Nor does he speak to the suitability of specific sheltering options for individuals. Further, he does not indicate whether the information he relays is in his direct knowledge or if it is (hearsay) information relayed to him by outreach workers. Some of his evidence is clearly hearsay and relayed to him by unnamed sources. It is not sufficient to identify “Outreach Staff” as the source of information and belief for facts asserted in an affidavit.

[122] I accept that indoor spaces are likely available for at least some persons sheltering in the Park and that Carnegie Outreach staff are regularly engaged with the campers in trying to match them with indoor spaces. However, the very general nature of Mr. Moss' affidavit does not assist in responding to the specific issues faced by the individuals whose evidence I have just summarized.

(c) The Suitability of Available Shelter Spaces

[123] There is no evidence to suggest the General Manager turned her mind to the specific needs of those sheltering in the Park or whether the available shelter spaces were suitable to their needs. As recognized by the jurisprudence since *Adams*, the suitability of available shelter spaces, in addition to the number of available spaces, is relevant to the constitutional right of sheltering in a public park: *Adamson* at para. 82; *Stewart* at paras. 65, 67–68, 74.

[124] The experiences of those sheltering at CRAB Park illustrate some of the specific needs of the individuals and the challenges they have faced while trying to find suitable indoor accommodation.

[125] Ms. Bamberger became homeless about 15 years ago after losing her job with an equestrian centre and escaping a violent and abusive relationship. She lived for a time in two different women's shelters, which she said were "okay places", although her room was a shared space with no lock on the door, and she had to share the room with a new person every night or so. She also said there were a lot of rules, and the environment was restrictive and controlling. She was evicted from one shelter for missing her curfew and from another when a man, who was acquainted with her former (abusive) partner, followed her back to the shelter.

[126] Even if these shelters were suitable for her, Ms. Bamberger no longer qualifies for them because she is in a new relationship with Mr. Randen, who would not be permitted to visit her at either of the women's shelters.

[127] Ms. Bamberger lived for a time in some SROs but states they were infested with pests, including bedbugs, rats, mice, and cockroaches, and they were "too

violent" for her. She states people were being assaulted on a frequent basis, and there are always guns or other weapons in the building.

[128] In one SRO, Ms. Bamberger was threatened with violence by a guest of another tenant, who shared the same floor as her. Ms. Bamberger called 911, and the police arrested the guest but soon released her. That guest later became a tenant in the same building, and Ms. Bamberger felt threated by this. Since there was no functional lock on her door, she felt she could not keep herself safe and decided to leave. She does not feel safe staying in a shelter unless she has a private space with a secure, functioning lock on the door.

[129] Mr. Hebert deposes that some shelter space can be dangerous. He also states there is not enough privacy or secure storage available to protect his belongings. He has been robbed repeatedly when he has stayed at shelters, and he has had his possessions stolen when left outside the shelter. He requires a shelter space that would allow him to securely store his belongings. He also struggles with addiction and deposes that many shelter spaces are unsuitable for him as a result. He has been kicked out of several shelters for drug use.

[130] Ms. Bamberger's partner, Clint Randen, deposes that in early October, Carnegie Outreach offered him housing in the shelter, but Ms. Bamberger would not be able to come with him. He states Carnegie Outreach could not tell him about a shelter where they could stay without being separated.

[131] Mr. Bailey deposes that in mid-September, B.C. Housing brought bins and a truck to move people out of CRAB Park. He packed up all his things and was dropped off at a storage unit on Marine Drive in South Vancouver. However, no storage unit was rented, and he was stuck near Marine Drive with all his things. He found a bridge nearby, under which he set up his tent, but found it was a poor place to stay. There was nothing but empty lots and industrial parks in that part of town, and there were no services, restaurants, coffee shops, or anywhere inside to get warm and dry. He did not feel safe there, as no one was around to watch his possessions or otherwise look out for him. The area where he was sheltering was

windy and stormy, and one day he lost his tent when the wind blew it into the Fraser River. After that experience, he moved back to CRAB Park.

(d) Post-Decision Evidence from B.C. Housing

[132] The Park Board has led evidence in this judicial review from (Will) Jesus Valenciano, Senior Manager of Coordinate Access and Assessment with B.C. Housing. Mr. Valenciano supervises eight Coordinated Access staff, two of whom are assigned to CRAB Park, and oversee the tenanting process for B.C. Housing from its office at Orange Hall on the Downtown Eastside. This evidence was not before the General Manager when she made the Orders.

[133] In his affidavit, affirmed October 1, 2021, Mr. Valenciano deposes that B.C. Housing maintains and regularly updates data about available shelter and housing stock in Vancouver. It shares this information with "partners" as part of its service delivery. He deposes that over the past two months (August and September, 2021), B.C. Housing has been sharing "point-in-time" indoor housing vacancies, as requested by the Parks Board and the City of Vancouver, and daily indoor housing vacancy data with the Park Board since beginning of September. He provides a table showing the total indoor housing and shelter vacancies from September 10 through September 30, 2021. The table indicates daily vacancies ranging from a low of approximately 61–66 vacancies (on September 29 and 30) to a high of 82–87 vacancies (on September 18 and 19).

[134] However, these raw numbers do not provide information as to the nature of the vacancies and whether they are suitable to the needs of those sheltering at CRAB Park. Nor does Mr. Valenciano's evidence indicate whether the numbers are any more reliable than the 211 Shelter List which, based on Ms. Woodruff's and Ms. Brown's evidence, does not necessarily translate into actual availability.

[135] The General Manager attaches as exhibits to her affidavit two emails from Mr. Valenciano dated September 9 and 10, which identify various types of sheltering spaces that were available on each of those two days. However, this information was not before her when she made the Orders, and the emails are not part of a

public record. In fact, Mr. Valenciano states they are “confidential and not for external use”. In *Vavilov* at para. 95, the Court cautioned against upholding a decision that is based on “internal records that were not available to [the affected] party.”

[136] Regardless, like the numbers in Mr. Valenciano’s affidavit, there is no evidence that the numbers provided in these emails are any more reliable than the 211 Shelter List. Mr. Valenciano describes the list in his email as “a more fulsome list of vacant spaces in Vancouver” that is “in replace of the daily morning shelter number report”. He does not explain what this means or why the list is “more fulsome”.

[137] I note as well, for the purposes of the injunction application discussed below, there is no evidence as to whether the number of spaces identified in Mr. Valenciano’s affidavit or his September emails are still available now. That information was almost three months old by the time of hearing.

[138] Mr. Valenciano also deposes, based on his ongoing supervision of B.C. Housing staff and his work with the Carnegie Outreach team, all individuals known to be sheltering at CRAB Park have been “engaged by Carnegie Outreach and have been offered indoor spaces.” Apart from this evidence being hearsay, it also does not speak to the suitability of the vacancies or the needs of the individuals sheltering at CRAB Park.

(e) Sheltering in Other Parks

[139] The Parks Board argues that even if there was no suitable indoor sheltering space, the Petitioners’ *Charter* rights were not unreasonably impacted because they can shelter at any number of other parks in the city. The Board argues that persons experiencing homelessness do not have a right to shelter in a specific park.

[140] While the right as found in *Adams* does not extend to specific parks, the effect of the Orders in this case is to shut down a third major park in the Downtown Eastside for overnight sheltering. Closing CRAB Park after the closures of

Oppenheimer Park and Strathcona Park leaves MacLean Park and Thornton Park as the only options within close distance to the Downtown Eastside. MacLean Park is located in a residential area of Strathcona, and Thornton Park is a small area at Main Street and Terminal Avenue. I will discuss the limitations and unsuitability of MacLean Park and Thornton Park for sheltering when I address the Board's injunction application in the next part of these reasons.

[141] Mr. Hebert deposed as to the importance of being near the Downtown Eastside, as many of the services that homeless persons rely on, such as showers, social assistance offices, and other community services, are located in the area. Mr. Hebert relocated to another outdoor location after the September 9 Order and says his new location is further away from the services he needs. He deposed (on September 20, 2021) that he had not showered since leaving CRAB Park on September 9.

[142] Mr. Randen deposes he is closer to amenities when living in CRAB Park. He can get food and clothing to survive.

[143] David Maclam is an intravenous drug user who finds it safe living in CRAB Park, where there are always naloxone kits available and a community of people to help him if needed. He states that CRAB Park is also located very close to a number of services that he accesses, including Coastal Mental Health for counselling.

[144] The Park Board argues the Petitioners' evidence of their need to be close to the Downtown Eastside to access services is insufficient. However, in addition to the affidavits of Mr. Hebert, Mr. Randen, and Mr. Maclam, the evidence shows that important services, such as Carnegie Outreach and B.C. Housing's Office at Orange Hall, are located on the Downtown Eastside.

[145] Regardless, it is well known, at least in the City of Vancouver, that large numbers of persons experiencing homelessness cluster in and around the Downtown Eastside and that many services directed at assisting that vulnerable population are located in the area.

[146] I agree with counsel for the Petitioners that most residents of Vancouver, properly informed of the s. 7 *Charter* right to shelter in public parks, would be surprised and concerned if the Park Board decided to close all parks in or near the Downtown Eastside to overnight sheltering for persons experiencing homelessness. It is no less palatable when the same result is effected over the course of several decisions. Simply assuming that those sheltering in CRAB Park can find "another place to go" fails to accord the necessary priority to their s. 7 rights and ensure minimal impairment of those rights.

[147] In my view, it was incumbent on the General Manager to satisfy herself that closing the last major public park in or near the Downtown Eastside to overnight sheltering would not adversely affect the Petitioners' ability to access the services and other facilities they need to survive. There is nothing in the record to show that she turned her mind to this question or that she reasonably addressed it.

(f) Conclusion on Reasonableness

[148] In my respectful view, the General Manager's decision cannot be reasonably justified in light of the facts she had before her.

[149] The evidence shows that the General Manager's assumption, based only on unverified conclusory advice from B.C. Housing staff, is an insufficient evidentiary basis on which to reasonably conclude that there are "sufficient and appropriate indoor spaces" to shelter those in CRAB Park. This conclusion was central to her decision. It satisfied her that she could order those camping in the Park to leave without affecting their *Charter* rights. However, given the demonstrated vulnerability of the persons who would be affected by the Orders and the particularly harsh consequences of the Orders, it is my view that the General Manager had a "heightened responsibility … to ensure that [her] reasons demonstrate that [she has] considered the consequences of a decision and that those consequences are justified in light of the facts and law": *Vavilov* at para. 135.

[150] The Orders also fail to achieve a proportionate balance between the Petitioners' *Charter* rights and the stated objectives of the Orders. A reasonable

decision that accords with the *Charter* requires proportionality: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 80. Without a proper factual foundation, the General Manager could not possibly determine the scope and extent to which the Petitioners' *Charter* rights may be affected or minimally impaired by the Orders.

[151] None of what I have said is intended as criticism of the staff and volunteers with B.C. Housing or the Carnegie Outreach Program or the work that they do. As stated in the MOU, homelessness is a "humanitarian crisis which continues to grow in Vancouver and across the region." I have no doubt that Mr. Valenciano and his colleagues work tirelessly to shelter and house the homeless population of Vancouver. The ever-growing nature of the problem must be a frustration to them and make it particularly challenging to stay on top of the work and get ahead of the problem. However, as I have said, the decision to close CRAB Park to sheltering was the General Manager's decision and it was incumbent on her to ensure the information she received from these individuals was accurate. The advice she received may well have been correct, but the evidence before her (and now before the Court) was insufficient in detail and precision to permit her to reasonably determine there was an adequate number of suitable sheltering spaces.

C. Conclusion on Judicial Review

[152] For the reasons set out above, I would allow the application for Judicial Review, set aside the Orders of July 8, 2021 and September 7, 2021, and remit the matter back to the General Manager or the Park Board for reconsideration.

[153] In remitting this matter back for reconsideration, I am not deciding that the General Manager has jurisdiction under s. 24 of the *Bylaw* to make the Orders. As I have said earlier, I have reservations about that. Since the point was not argued, though, I would simply send the matter back to the General Manager or the Park Board for reconsideration.

VII. THE INJUNCTION APPLICATION

A. Introduction

[154] The second petition before the Court is the Park Board's application for a statutory injunction under s. 334 of the *Vancouver Charter*, S.B.C. 1953, c. 55, compelling the Injunction Respondents (who are the Petitioners in the judicial review plus others having notice of the injunction order) to comply with the September 7, 2021 Order and forthwith remove all shelters and possessions from CRAB Park. The Board also seeks an injunction enjoining persons with knowledge of the court order from contravening the daytime sheltering restriction in the *Bylaw* and authorizing the Board's employees or agents to remove tents and materials from the park (presumably by 8:00 a.m. pursuant to the *Bylaw*).

[155] Having regard to Hinkson C.J.S.C.'s remarks about police enforcement orders in *Stewart* at paras. 120–124, the Park Board abandoned relief for an order authorizing the Vancouver Police Department to enforce any injunction.

[156] Since I allowed the application for judicial review and remitted the September 7 Order back for reconsideration, I will not make the order compelling the Injunction Respondents to comply with that Order. However, I must still consider the Board's application for an order enforcing the prohibition against daytime sheltering.

B. The Parties' Positions

[157] The Board argues there is an ongoing breach of the *Bylaw* by those sheltering in Crab Park who fail or refuse to remove their shelters by 8:00 a.m. each morning. The *Bylaw* does not permit daytime sheltering in parks, and the scope of the right to shelter under s. 7 of the *Charter* is limited to overnight sheltering. The Board says in the absence of a constitutional challenge to the *Bylaw* by the Injunction Respondents, I must accept the scope of the s. 7 right as it has been defined in the jurisprudence.

[158] The Board says the Court must apply the test for a statutory injunction as a final order to enforce the provisions of the unchallenged *Bylaw*. This test provides for

a narrower discretion on the part of the court to refuse an injunction than does an application for an interlocutory injunction. The Board argues the *Vancouver Charter* expressly provides for the Park Board to apply to the court for an injunction as a statutory remedy to enforce its bylaws. The Board also argues that other enforcement mechanisms within the *Bylaw* are inadequate and ineffective to enforce the prohibition on daytime sheltering.

[159] The Board argues there are no exceptional circumstances in this case that warrant overriding the public interest in seeing the *Bylaw* enforced, and thus the Court should grant the injunction.

[160] The Injunction Respondents argue the Park Board has not established that an injunction is appropriate in this case. They argue that, despite the narrow scope for discretion on an application for a statutory injunction, courts should still exercise caution in granting injunctions. They point to *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 34, where the Court of Appeal stated that courts should not grant statutory injunctive relief where "there is a clear method of enforcement set out in the statute".

[161] The Injunction Respondents argue the Park Board has made a choice not to use the other enforcement mechanisms provided in the *Bylaw* because it pursues a policy of "respectful" engagement with those experiencing homelessness and sheltering in parks. They point to the affidavit of Amit Gandha, the Director of Parks, who deposes:

> 4. It is the Park Board's policy to engage respectfully with those people who are experiencing homelessness and sheltering overnight in Vancouver parks and to encourage them to comply with the Parks Control By-law. Park Board staff do not forcibly remove structures that are erected in parks, even if contrary to the Parks Control By-law, nor do they remove persons experiencing homelessness if they are acting in contravention of the Parks Control By-law.

[162] The Injunction Respondents argue that if the Park Board is unwilling to use the enforcement mechanisms available to it in the *Bylaw* due to this policy of respectful engagement, it should not thrust the Court into "the front lines of [the]

dispute" as that undermines the legitimacy and effectiveness of the Court: *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1903 at para. 43.

[163] The Injunction Respondents acknowledge they have not challenged the constitutionality of the daytime sheltering restriction in the *Bylaw*. However, they argue that as the Park Board is the party coming to court to seek an injunction, it is incumbent on it to satisfy the Court that the injunction is constitutional. They argue that the requirement to remove shelters each morning effectively deprives the Injunction Respondents of their ability to exercise their right to shelter in the Park overnight, as it is practically impossible to remove and carry their shelters and possessions with them throughout the day. Without the ability to store their shelters and other possessions in a safe place, these items are prone to being lost or stolen, leaving them with no ability to shelter at night. In this regard, the Injunction Respondents argue their *Charter* rights are engaged, and the Park Board, pursuant to its duty to exercise discretionary authority in a *Charter*-compliant manner, must satisfy the Court that the injunction it seeks will not impair the Injunction Respondents' right to shelter at night.

[164] Finally, the Injunction Respondents argue, as an alternative, that the Park Board's Petition should be converted to an action to allow the constitutional issue to be pleaded and tried, and the injunction should be denied pending the outcome of that proceeding.

C. Analysis

1. *The Constitutional Issue*

[165] Addressing the constitutional issue first, I find that the Park Board does not have the onus of proving the constitutionality of the *Bylaw* before its statutory injunction application may be granted.

[166] As noted, the Injunction Respondents have not challenged the constitutionality of the *Bylaw* which, pursuant to s. 11B(b) and (c), restricts sheltering

to overnight hours “unless in an area designated by the General Manager as acceptable for temporary daytime shelter.”

[167] I am not able to accept the Injunction Respondents’ argument that places the onus on the Park Board to demonstrate the constitutionality of the *Bylaw*. The onus to prove a *Charter* breach is on those who allege it. To date, despite the result in *Adamson No. 1* and *Stewart,* the jurisprudence concerning the *Charter* right to shelter has not extended beyond overnight hours.

[168] I appreciate the Injunction Respondents face severe practical and financial barriers to challenging the constitutionality of restrictions on daytime sheltering. However, this does not shift the burden to government to pre-emptively satisfy a court that the law it seeks to enforce is *Charter* compliant.

2. *Statutory Injunction*

[169] As this is an application for a statutory injunction that does not involve a constitutional challenge to a law, the Park Board argues the test in *Maple Ridge (District of) v. Thornhill Aggregates Ltd.* (1998), 54 B.C.L.R. (3d) 155 (C.A.) [*Thornhill*] applies and not the test for an interlocutory injunction as set out in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR - MacDonald*].

[170] According to the *Thornhill* test, once the applicant has established a clear breach of a statute or municipal bylaw, the court will grant the injunction, unless exceptional circumstances justify the use of a narrow discretion to deny the injunction: *Thornhill* at para. 9; *Vancouver (City) v. O’Flynn-Magee*, 2011 BCSC 1647 at paras. 26–28; *Vancouver (City) v. Maurice*, 2002 BCSC 1421, aff’d 2005 BCCA 37. The rationale for this approach is grounded in the public interest in having the law obeyed: *Thornhill* at para. 9.

[171] In *Maurice* at para. 20, Lowry J. (as he then was) cited examples of exceptional circumstances allowing for exercise of court discretion:

> [20] … Exceptional circumstances might be found in instances where there was a right that pre-existed the enactment contravened, where there is a clear and unequivocal expression that the unlawful conduct will not continue, where there is such uncertainty that it can be said that the breach is not being flouted, or where the events do not give rise to the mischief the enactment was intended to preclude.

As these are examples, the list is obviously not exhaustive, a point the Park Board acknowledges.

[172] Some cases have specified what do not constitute exceptional circumstances. In *Maurice*, for example, the court found that poverty and the consequences of poverty are not exceptional circumstances for the purposes of the *Thornhill* test. In *British Columbia (Minister of Forests) v. Okanagan Indian Band* [1999] B.C.J. No. 2545, 92 A.C.W.S. (3d) 855 at para. 60 (S.C), Sigurdson J. found that unemployment, poverty, and the need for timber for housing and community purposes within an Indigenous community were not exceptional circumstances justifying the refusal to grant a statutory injunction.

[173] Despite there being no constitutional challenge, as of yet, to the *Bylaw*, there is authority to suggest the injunction application should be considered under the *RJR – MacDondald* test. In *Courtoreille*, the City of Nanaimo brought a petition seeking a statutory injunction to enforce a bylaw that would prohibit a group of persons experiencing homelessness from camping at a prominent spot on Nanaimo's waterfront. Like the Injunction Respondents' alternative argument here, the respondents in *Courtoreille* argued Nanaimo's petition raised complex *Charter* issues and should be referred to the trial list for determination. Justice Skolrood agreed, despite finding at para. 51 that "the constitutional issues are not clearly framed in the response to petition". Skolrood J. ordered that the Petition be referred to the trial list and applied the *RJR – MacDonald* test for an interlocutory injunction rather than the *Thornhill* test. He granted the injunction, largely on the basis that the area in question was not a public area, and the City had designated other parks for overnight sheltering.

[174] Here, the constitutional issues relating to daytime sheltering are clearly framed, though in a summary fashion. On the basis of *Courtoreille*, this is more than sufficient to refer this matter to the trial list, and address the injunction application under *RJR – MacDonald*.

[175] However, for the reasons that follow, I prefer to address the injunction application on a different basis, one that takes into account the result of the applications for judicial review. Specifically, I have concluded I should adjourn the Park Board's injunction application pending reconsideration of the July 8 and September 7 Orders. This will allow that reconsideration process to run its course before a court is asked to decide whether an injunction is appropriate.

[176] In reaching this conclusion, I rely on a constellation of factors that I consider uniquely exceptional to this case. Those are: the recent history of encampments in and around the Downtown Eastside; the specific location of CRAB Park encampment; the closure of other parks in and around the Downtown Eastside to sheltering; and the absence (at this point) of any significant threat to life or safety of persons posed by the encampment. I elaborate on these considerations and my conclusion in the remainder of these reasons.

3. *Exceptional Circumstances*

(a) The Recent History of Encampments and Utility of the Injunction

[177] The CRAB Park encampment is the latest in a sequence of encampments established by unhoused persons in parks in and around the Downtown Eastside. The experience of the past two years suggests there is a substantial risk that granting an injunction now will simply move the encampment to another neighbourhood in the city, which would not be in the public interest.

[178] In the summer of 2014, tents began to appear in Oppenheimer Park, located in the Downtown Eastside. At the time, the *Bylaw* prohibited all overnight camping in Vancouver parks without the consent of the General Manager. The encampment

grew, and the Park Board applied to the court for an injunction to bring an end to the encampment. Justice Duncan granted that injunction: *Williams* at para. 62.

[179] The evidence in *Williams* established numerous problems with the Oppenheimer Park encampment, including: fire hazards from candles inside tents and open flames near combustible material; violence amongst the campers; weapons; urine and feces in tents; and rats in and around the tents. The Vancouver Police Department observed and documented incidents of criminal behaviour in the park, which escalated over time. Justice Duncan also found the encampment interfered with regular community events in the park. None of these conditions presently exist in CRAB Park, at least to the same degree.

[180] The evidence in *Williams* also showed that the number of shelter beds available in Vancouver at the time was roughly commensurate with the number of people living at Oppenheimer Park. On this basis, and having regard to the dangers in the encampment and the fact that other members of the public were denied access to the park because of the camp, Duncan J. granted the injunction.

[181] Six years later, in 2020, another encampment was established in Oppenheimer Park. This one was dismantled pursuant to Ministerial Order M128 made by the Minister of Public Safety and Solicitor General for British Columbia, pursuant to emergency powers granted to the Minister under s. 10 of the *Emergency Program Act*, R.S.B.C. 1996, c. 111: *Brett* at paras. 14–15. The emergency powers had been granted to manage the COVID-19 pandemic. The Minister's order was enforced under those emergency measures and without a court injunction. Following the enforcement of that order, Openheimer Park was closed for remediation. It has not reopened to overnight sheltering since.

[182] On May 8, 2020, very shortly after the 2020 closure of Oppenheimer Park, another camp was established on land belonging to the Vancouver Port Authority adjacent to CRAB Park: *Brett*. The land is owned by the federal Crown but is held in the name of the Vancouver Fraser Port Authority. The Port's injunction application came before Hinkson C.J.S.C. who noted the campers were trespassing on what

amounts to private property. After weighing a number of factors in the balance, he concluded the most compelling was the Port was entitled to the use of its land and granted the injunction: *Brett* at para. 107.

[183] Following (or perhaps commensurate with) *Brett*, another camp was established at Strathcona Park in Vancouver's Strathcona neighbourhood, southeast of the Downtown Eastside. This camp grew and remained in place until March 2021, when it was dismantled under a ministerial order. The park was closed for remediation, and, while I understand it has re-opened to the public, overnight camping by persons experiencing homelessness is not permitted.

[184] On the heels of the Strathcona Park camp closing, the present camp at CRAB Park was established.

[185] This recent history demonstrates a continuous pattern of encampments in the Downtown Eastside. Ministerial orders and court injunctions effectively clear out a camp from one location but have not been effective in preventing the re-establishment of camps in another location. In this respect, Chief Justice Hinkson's observations in *Adamson No. 1* speak to a certain futility in making orders in these circumstances:

> [185] Further, I am not satisfied on the evidence before me that many of the problems alleged by the plaintiffs are the unique result of the existence of the Encampment, and are not simply part of the reality of homelessness. If I were to issue the injunction at this point, I am concerned that the problems would simply migrate to other areas in the City of Victoria.
>
> [Emphasis added.]

[186] The Park Board argues that it cannot be known that this pattern will continue if an injunction is granted, but recent history suggests otherwise.

[187] I am not persuaded that granting an injunction to the Park Board now will fix the problem of persistent non-compliance, or inability to comply, with the restriction against daytime sheltering.

[188] The next closest parks to the Downtown Eastside are Thornton Park, which is in a busy part of town on Main Street near Terminal Avenue, and MacLean Park, which is in a quiet residential section of the Strathcona neighbourhood. CRAB Park, on the other hand, is comparatively (though not completely) distant from other residences. It is separated from any residential towers by the Canadian Pacific Railway tracks that run along the south side of Burrard Inlet and by Waterfront Road. There is also a hill in the Park itself that provides some barrier.

[189] It is difficult to see how the public interest is served by risking the relocation of the camp to an area that will more directly impact surrounding residents.

[190] In my view, before the Court considers granting a statutory injunction, the General Manager or the Park Board should, through the reconsideration of the Orders, contemplate whether there is a more effective approach to breaking the chain of persistent non-compliance.

(b) General Manager's Discretion for Daytime Sheltering

[191] Based on the evidence and the arguments presented by the Injunction Respondents, the daytime needs of at least some of those sheltering in the Park is a serious issue. The evidence shows that for some, daytime sheltering is a necessity or, at least decamping every morning and carrying their possessions throughout the day is a substantial hardship. For example:

a) Ms. Bamberger acknowledges she is supposed to pack up her tent and her belongings every day but estimates that, between her tent and personal possessions, she would have to carry at least 500 pounds of gear throughout the day. She deposes she cannot afford to rent a storage locker and her tent is too large and heavy to carry around. If she leaves her tent set-up at CRAB Park, it does not get touched, and she feels her belongings in the tent are safe under the watch of others in the camp.

b) Mr. Manitopyes deposes that although he does not have many possessions, he cannot risk losing what he has. These include a warm

double-layer shelter that is necessary for his safety as the weather gets cold. He states this shelter is too bulky to move to a storage locker during the day. Mr. Manitopyes is an artist who sells his art to earn some money. He is unable to carry his sculptures and carving supplies with him and is concerned they will get stolen if left somewhere unattended.

c) Mr. Randen has lived in many places on the streets and alleys of downtown Vancouver. He has moved around often and had to pack up his things every morning. He states it is exhausting and time-consuming to take down his tent every day and set it up again in a new place that evening.

d) Mr. Dechaghadjian is 70-years-old. Prior to living in CRAB Park, and after unsuccessfully staying in an SRO and shelters, he was setting up and taking down his tent every day. With the arrival of fall, this became too much for him at his age. To protect his belongings from the rain, he needs to keep tarps up, and it is too physically demanding for him to set this up and take it down daily.

[192] The experience of these deponents is not true of all those sheltering in CRAB Park. Others are evidently not so challenged in decamping in the morning. Andrew Don, the Lead Park Ranger for the Parks Board, deposes he attended at the Park on seven occasions in July and August. One of his Park Ranger SR Slips (essentially a written report of his attendance) records at least one person, whom he describes as a “model camper”, had packed up her tent and was “mobile”. Mr. Don states in his Slip “if everyone in the park was as punctual as her with packing up, and as neat and tidy as she was, there would be no issues.” Mr. Don recorded others who were also packing up tents. Other Rangers report fairly successful efforts, prior to the end of June, in having campers pack up their tents in the morning.

[193] The evidence also suggests some persons sheltering in the Park have access to suitable indoor living or sheltering spaces but are either showing support for those

in the camp or prefer to be in the Park. Thus, while there is evidence of true hardship for some in complying with the daytime prohibition, it is not universal.

[194] Despite these exceptions, I am satisfied the requirement to decamp each morning poses a substantial hardship on some of those sheltering in CRAB Park. An injunction compelling everyone to decamp each morning would truly be a "blunt instrument" that will capture those for whom a more nuanced approach might be called for.

[195] As I have discussed, under subsections 11B(b) and (c) of the *Bylaw*, the General Manager has the discretion to designate areas within a park for daytime sheltering. In reconsidering the July 8 and September 7 Orders, the General Manager should be open to considering all aspects of her discretion to deal with the CRAB Park encampment "in a positive and compassionate way" as contemplated by the MOU. The General Manager may well find it appropriate or necessary to invoke this provision to accommodate those CRAB Park campers who face true hardship in decamping each morning. I am not saying she is required to exercise this discretion or to exercise it in a particular way, but to date she appears not to have considered it as a potential tool to break the chain of non-compliance with the *Bylaw*.

[196] The Park Board does not have a constitutional duty to provide storage facilities for daytime use by those experiencing homelessness. Nor does the constitutional law, at least to date, compel the Board to permit daytime sheltering. However, the Park Board, through its *Bylaw*, has seen fit to give the General Manager a tool to allow daytime sheltering, presumably to accommodate genuine needs where they might exist. Granting the Park Board an injunction at this stage, before the General Manager reconsiders the Orders, may imply that a daytime sheltering option need not be seriously contemplated as part of that reconsideration.

[197] Clearly there is a persistent issue with ongoing use of public parks for daytime sheltering. The affidavits in this case suggest some reasons for why this might be the case. Perhaps at the end of the day an injunction will be the only way or the best way to address the issue. However, at this stage, I am not persuaded it is in the

public interest to risk the relocation of the encampment to another park where it will present a greater disturbance to the larger community, at least before the General Manager or the Park Board has considered the full range of options under the *Bylaw* to address the issue.

(c) Little Evidence of Harm

[198] A third factor that makes this case exceptional is the lack of evidence that the encampment poses a serious health or safety risk or harm to the public. There is no (admissible) evidence of significant complaints from members of the public about the CRAB Park camp and no substantial concern about serious risks to the lives or the safety of persons in and around this camp.

[199] The General Manager deposes:

> 18. In July and August members of the community around the Park contacted me, both in writing and verbally, to inform me that they felt unsafe attending the Park due to numerous sightings of weapons and attendances by the Vancouver Police Department. I was informed by the community that due to fires in the Park, the sheer number of tents and fights that were breaking out on the west and south side of the Park that many community members felt unsafe using the Park. Community members informed me that they could not use the children's playground or the off leash dog park without being intimidated or verbally accosted by people who were sleeping in the Park. Community members also reported to me that they were unable to use the pier as there were tents surrounding it and often there was a fire obstructing their access.

[200] This is hearsay and is inadmissible for the purposes of seeking a final order under the petition for a statutory injunction. Apart from that, the General Manager provides no particulars about matters such as who these "members of the community" are, what it means that they are "around the Park", how many complaints she received, or from how many different people.

[201] I accept that members of the public are precluded from using that portion of the Park where the shelters are located, but even if the General Manager's evidence on this point was admissible, I find it to be unclear and unconvincing that the encampment is causing any serious disruption to "members of the community."

[202] In fact, the Injunction Respondents' evidence suggests otherwise. They have tendered an affidavit of Heather Lamoureux, an arts organizer and resident of Vancouver. She is the Artistic Director for an annual outdoor arts festival called the Vines Art Festival, which holds events in public parks in the city. For the past four years, including this year, the festival has held events in CRAB Park. This year, an event called "Our Stories, Our Home" was held in CRAB Park on August 13, 2021.

[203] Ms. Lamoureux estimates there were 50 people sheltering in the Park when the event was held. She states that approximately 150 people attended the event, including children of various ages who played in the playground during the festival. She deposes there were people walking their dogs in the Park and at the beach at the time. People who were sheltering in the Park also joined the festival audience. She says there were no negative interactions with anyone sheltering in the Park, and she received no complaint from any of the festival staff, audience members, or performers about those sheltering in the Park.

[204] She also deposes that between July 30 and August 13, 2021, the festival set up an art installation in the Park, which she visited approximately five times during that period. She did not experience any threats or disruption while she was doing so and received no complaints of persons feeling unsafe due to the camp.

[205] Nor does the evidence indicate the encampment poses a serious health or safety risk to the campers or the public. There is no evidence on this application from the Vancouver Fire Department or the Vancouver Police Department. The Board conceded in oral argument that there is presently no serious concern for life or safety at the encampment. There is nothing in the record to suggest the conditions in the encampment presently come close those in Oppenheimer Park in 2014 when Duncan J. granted the injunction in *Williams.*

[206] A Park Ranger gave evidence about a camper overdosing or potentially overdosing and the need to call paramedics to assist him, but it cannot be said that this is a result of the encampment. In fact, persons sheltering in the Park who are

dealing with addiction state they feel safer in the company of others in the Park who will come to their aid if they need medical help.

[207] The General Manager gave evidence of trash around the encampment and she observed needles, feces, and debris in the Park in August and September. However, she does not state this poses a serious threat to the life or safety of the occupants. The Injunction Respondents' evidence is that several persons sheltering in the Park are making efforts to regularly clean up garbage and debris.

[208] As discussed below, if these circumstances change significantly, the Park Board will have liberty to pursue the injunction even if the reconsideration of the Orders has not yet run its course. At the moment though, the evidence does not suggest a significant issue of public health or nuisance.

(d) Effect of Not Granting the Injunction

[209] Admittedly, declining to grant an injunction at this stage raises the question of whether the Court is accommodating the flouting of the *Bylaw* by those sheltering in CRAB Park. The Park Board argues that it does, and if the Court exercises its discretion not to grant an injunction it would effectively be saying the *Bylaw* is not valid. I disagree.

[210] First, as noted, the *Bylaw* itself contemplates the potential necessity of persons experiencing homelessness sheltering in a park during daytime hours. There is no evidence the General Manager has considered this as a tool to manage the ongoing series of encampments.

[211] Second, and related to the first point, I am not refusing to grant the injunction but only adjourning the Park Board's application at this stage to allow the administrative reconsideration process to take its course. This will ensure the General Manager considers the full range of options open to her to manage the encampment, including the potential to accommodate some persons with a daytime sheltering arrangement, as she is permitted to under the *Bylaw*.

[212] Third, as I have said earlier, the evidence of at least some of the Injunction Respondents demonstrates a genuine challenge for them to manage their daytime sheltering or storage needs. This affects their ability to shelter at night since they either need to carry or safely store their sheltering equipment during the day. Their evidence does not suggest they are "flouting" the *Bylaw*, as that term was defined in *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 36 O.R. (3d) 367 (Ct. J. (Gen. Div.)) at paras. 34–35 (and quoted in *Adamson No. 1* at para. 39). These deponents do not show disdain, contempt, or mockery of the *Bylaw*. Their evidence is of real hardship in complying with it. This may well explain why these campsites persist and are quickly re-established in one location after they are closed in another.

[213] Finally, I am adjourning the injunction application because of the unique constellation of factors discussed above. If any of those circumstances should change significantly, the Board will have liberty to reapply for an injunction, even if the reconsideration of the Orders has not yet completed.

[214] Additionally, the Board remains free to exercise its powers of enforcement under the *Bylaw* or the *Vancouver Charter*. Nothing in these reasons enjoins the Board from doing so, and the Board may well wish to exercise that authority to keep the camp from growing or to enforce the restriction on daytime sheltering on those who are reasonably able to comply with the *Bylaw*.

4. *Conclusion on the Injunction*

[215] For these reasons, I am adjourning the Park Board's injunction application pending the General Manager's or the Park Board's reconsideration of the July 8 and September 7 Orders. The Board is at liberty to reapply for the injunction following the outcome of that process. The Board is also at liberty to reapply for the injunction before the reconsideration process completes if there is a significant change in circumstances at the encampment, including if dangerous or life-threating circumstances should develop, if the encampment grows larger and substantially more challenging to manage, or for significant reasons of health, safety, or public

nuisance should they develop prior to the completion of the reconsideration of the Orders.

VIII. CONCLUSION

[216] The Petitioners' application for judicial review is granted. The July 8, 2021 Order and the September 7, 2021 Order of the General Manager are set aside and remitted back to the General Manager or the Park Board for reconsideration. The Park Board's application for an injunction is adjourned pending the outcome of that reconsideration or sooner if there is a significant change in the circumstances of the encampment relating to matters of health, safety, or public nuisance.

[217] Given the result, the Petitioners (Injunction Respondents) should have their costs of these applications, but if the parties wish to address the issue with the Court, they may request an opportunity to do so through the registry.

[218] I wish to thank counsel for their thorough and helpful submissions and their effective presentation of this case.

"Kirchner J."