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Victoria Registry
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Victoria Registry

COURT OF APPEAL

BETWEEN:

THE CORPORATION OF THE CITY OF VICTORIA

APPELLANT
(PLAINTIFF)

AND:

NATALIE ADAMS, YANN CHARTIER, AMBER OVERALL, ALYMANDA WAWAI,
CONRAD FLETCHER, SEBASTIEN MATTE, SIMON RALPH, HEATHER TURNQUIST
and DAVID ARTHUR JOHNSTON

RESPONDENTS
(DEFENDANTS)

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

AND:

THE POVERTY AND HUMAN RIGHTS CENTRE

INTERVENOR

AND:

PIVOT LEGAL SOCIETY

INTERVENOR

AND:

UNION OF BC MUNICIPALITIES

INTERVENOR

**FACTUM OF THE INTERVENOR,
THE POVERTY AND HUMAN RIGHTS CENTRE**

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OPENING STATEMENT

The Poverty and Human Rights Centre (PHRC) intervenes in support of the position of the respondents that the impugned bylaws violate s. 7 and are not demonstrably justified as a reasonable limit. PHRC submits that the right to adequate housing is an interest that is protected by the s. 7 right to life, liberty and security of the person; that homelessness engages a broad range of government obligations, which need not be rigidly categorized as either negative or positive in nature; that bylaws that prevent homeless people from sheltering themselves are not in accordance with the principles of fundamental justice; and that homeless people have a right to seek an appropriate remedy from the courts. These propositions are supported, *inter alia*, by international human rights law.

Section 7 must be interpreted through an equality lens in order to provide effective protection to disadvantaged persons. A failure to integrate substantive equality norms in applying s. 7 will turn this *Charter* provision into a means of reinforcing inequality, rather than a remedy for it. City bylaws which, to paraphrase Anatole France, in their 'majestic equality' forbid the rich as well as the poor from sleeping under a cardboard box in the park, openly demonstrate disregard for those who are disadvantaged, contrary to all human rights principles. Equality norms require this Court to pay particular attention to the rights and conditions of homeless women.

Against the backdrop of poverty and wholly inadequate housing experienced by the respondents and other homeless persons on a daily basis, the arguments made by the City of Victoria and the Attorney General of British Columbia that it is constitutional to prohibit homeless persons from providing themselves with the most minimal shelter in a public space offend the commitment to equality and human dignity that is at the core of all human rights protections. These governmental submissions demonstrate a disregard for the most disadvantaged members of our community as well as Canada's international legal obligations.

PART 1 - STATEMENT OF FACTS

1. The Poverty and Human Rights Centre (PHRC) is a non-profit research and education organization whose goals include enhancing research and legal analysis about rights to social and economic security. The PHRC has extensive experience addressing issues of poverty and homelessness as matters of human rights, and in particular with reference to international human rights law and the *Charter*. The PHRC has a particular interest in the causes and effects of women's poverty and homelessness.
2. Homelessness in Victoria is a serious and life-threatening problem with severe consequences for the respondents and the more than 1500 people in the Capital Region who are homeless or live in unstable housing.

Reasons for judgment of Ross J. at paras. 38, 67; Affidavit of Dr. Stephen Hwang, *Panel* at 7-9 Exhibit E

3. The evidence before Madame Justice Ross showed the number of homeless women and in particular women with children had grown significantly in Victoria in recent years, and that women were more likely than men to be homeless because they had fled domestic violence or unsafe housing. A lack of adequate housing has distinct and particularly severe effects on women. In particular, homeless women face a high risk of violence including sexual assault and unwanted pregnancy, and may be forced into trading sex for shelter or into prostitution as a means of survival. Women experience an increased threat to their security both in emergency shelters and in public spaces. Homeless women who are pregnant or are already mothers face specific challenges that affect their physical and emotional well-being. The causes and the harms of homelessness are inherently gendered.

Reasons for judgment of Ross J. at paras. 59, 60; Affidavit of Reverend Al Tysick at para. 10; Affidavit of Dr. Stephen H. Hwang, Exhibit E; Affidavit of Natalie Adams at paras. 4, 9, 12

PART 2 – ISSUES

4. The central issue is the interpretation and application of s. 7 of the *Charter* in relation to the impugned bylaws that prohibit the erection of temporary shelter in public spaces.

PART 3 – ARGUMENT

Summary of Argument

5. PHRC submits that this Court should recognize that access to adequate housing is an interest that is protected by the s. 7 right to life, liberty and security of the person and that homeless people have a right to seek an appropriate remedy from the courts when, as in this case, their rights have been violated.

6. Section 7 must be interpreted and applied in a manner that is consistent with equality rights norms, including s. 28 of the *Charter* which requires this Court to pay particular attention to the situation of homeless women.

7. In addition, s. 7 must be interpreted and applied in a manner consistent with the broad range of government obligations related to the right to adequate housing under international law. *Charter* adjudication is the primary vehicle for giving effect to these obligations. Effective and meaningful rights protection also depends upon an interpretation of s. 7 that recognizes that there is no bright line distinguishing negative and positive rights.

8. The removal of the homeless respondents from the tent city amounted to a forced eviction under international law. The City of Victoria's actions violated the homeless respondents' s.7 right to life, liberty and security of the person and do not comport with principles of fundamental justice which incorporate the substantive international legal standards concerning forced evictions. At a minimum these standards require the City to demonstrate that the eviction was unavoidable and that it had taken measures to ensure that adequate housing would be provided to the homeless persons affected by the eviction, with attention to the needs of homeless women.

***Charter* Adjudication is the Primary Vehicle for Giving Effect to Canada's International Human Rights Obligations**

9. The Supreme Court of Canada has consistently held that international human rights law is a relevant and persuasive source for the interpretation of *Charter* provisions, and that the *Charter* is the primary vehicle through which Canada's obligations under international human rights instruments are given domestic effect.

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391 at paras. 69-79 (QL)

United States v. Burns, [2001] 1 S.C.R. 283 at para. 80 (QL)

Slaight Communications v. Davidson [1989] 1 S.C.R. 1038 at 1056-57 (per Dickson, C.J.)

Baker v. Canada, [1999] 2 S.C.R. 817 at para. 70 (per L'Heureux-Dubé J.) (QL)

R v. Ewanchuk, [1999] 1 S.C.R. 330 at para. 73 (per L'Heureux-Dubé J.) (QL)

Reasons for judgment of Ross J. at paras. 85-100.

10. All levels of government are bound by international human rights instruments to which Canada is a signatory, including the *International Covenant on Economic Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Rights of the Child*. By ratifying these instruments Canada has agreed to ensure to everyone the enjoyment of the right to adequate housing without discrimination, and committed itself to provide equal and effective access to tribunals and courts to ensure that individuals can seek effective remedies for violations of the right to housing.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force for Canada Mar. 23, 1976 ("ICCPR"), art. 26

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc.

A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 ("ICESCR"), art. 2(2), 3, 11(1)

Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 ("CEDAW"), art. 14(2)(h)

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969 ("CERD"), art. 2, 5(e) (iii), 6

Convention on the Rights of the Child, G.A. res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990 ("CRC"), art. 2, 3(1), 27(3)

General Comment No. 4, UN ESCOR, 1991, UN Doc. E/CN.4/1991/4 at para. 16, 17

General Comment No 7, UN ESCOR, 1997, UN Doc. E/C.12/1997/4 at paras. 13 – 16

General Comment No. 9, UN ESCOR, 1998, UN Doc. E/C.12/1998/24 at paras. 7, 9, 10, 14, 15

11. The positions advanced by the City of Victoria ("the City") and the Attorney General of British Columbia ("AGBC") belie this promise by arguing that homeless people should not be able to seek a remedy from the courts. The UN Committee on Economic Social and Cultural Rights (CESCR) has repeatedly criticized this approach and has expressed concern that "provincial governments have urged upon their courts ... an interpretation of the *Charter* which would deny any protection of Covenant rights and ... leave the complainants without the basic necessities of life and without any legal remedy." Similar concerns were raised by the United Nations Special Rapporteur on the Right to Adequate Housing in his Report on his recent visit to Canada. To adopt these positions is to perpetuate a situation in which the rights of poor people can be violated with impunity because there is no real avenue for legal protection and redress.

Concluding Observations of the Committee on Economic, Social and Cultural Rights, CANADA, E/C.12/1/Add.31, 1 December 1998 at paras. 14-15 [*CESCR Concluding Observations 1999*]

Concluding Observations of the Committee on Economic, Social and Cultural Rights, CANADA, E/C.12/CAN/CO/5, 19 May 2006 at para. 11 [CESCR Concluding Observations 2006]

Report of the UN Special Rapporteur on the Right to Adequate Housing 2009 Addendum, Visit to Canada, A/HRC/10/7/Add.3, (17 February 2009) paras. 8-9, 28-32 [UN Special Rapporteur Report]

The Role of the Right to Adequate Housing in this Case

12. The remedies sought in the Court below concerned only the limited right of the homeless respondents to erect shelter without government interference. However, it is agreed by all parties that homelessness is the result of diverse causes and various government measures. AGBC argues that the remedy sought by the respondents in this case would reduce the right to adequate housing to “a lower level than has ever been the case in Canada” (at para. 102).

13. The broader issues of whether there is a *Charter* right to adequate housing, the nature of state obligations which emerge from this right, and the role of courts in ensuring compliance with all aspects of the right to adequate housing are thus of great significance in this appeal. Further, in the lifetime of the *Charter*, few cases concerning the constitutional rights of poor people have reached an appellate court. Given the crisis of homelessness in Canada, and considering the fact that poor people have very limited access to justice, PHRC submits that this Court should affirm that s. 7 includes a right to adequate housing.

14. The Supreme Court of Canada has explicitly left open the possibility that s. 7 can be construed as incorporating “broad substantive and procedural guarantees” especially given that this provision expresses some of the basic values of the *Charter*. The Court has also recognized that ss. 7 and 15 are the central mechanisms for promoting and protecting the internationally-guaranteed rights of Canadians, including social and economic rights.

Gosselin v. Quebec (A.G.), 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 82 (QL)

R. v. Ewanchuk, [1999] 1 S.C.R. 330 at para.73 (QL)

15. In reporting to the CESCR, the federal government has given assurances that violations of the ICESCR can be remedied through ss. 7 and 15 of the *Charter*. In 1993, the federal government, in response to Committee questions, indicated that s. 7 of the *Charter* “ensured that persons were not deprived of the basic necessities of life.” Canada reconfirmed this position in 1998, noting that the decisions in *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 and *Irwin Toy v. A.-G. Quebec* [1989] 1 S.C.R. 927 confirm that the *Charter* may be interpreted to protect covenant rights and that s. 7 guarantees that people are not to be deprived of basic necessities.

CESCR, *Summary Record of the 5th Meeting: Canada*, UN Doc. E/C.12/1993/SR.5, 25 May 1993 at para. 21

Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HR/CESCR/NONE/98/8/, November 1998 at para. 53

16. There are no doctrinal barriers to this Court recognizing that s. 7 encompasses a right to adequate housing, consistent with the recognition by Canada of this right under international human rights law, and the right to effective remedies for violations of the right to adequate housing under domestic law. Social and economic rights are protected on the same footing as civil and political rights.

Gosselin, supra at para. 82-83; *Irwin Toy v. Quebec (A.G.)* 1989 1 SCR 927 at 1003-1004

Louise Arbour, “Freedom from Want’ – From Charity to Entitlement”, LaFontaine-Baldwin Lecture, Quebec City (2005) at 6, 7

Gwen Brodsky and Shelagh Day, “Beyond the Economic and Social Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14 C.J.W.L. 184 at 197-204

Canada’s International Legal Obligations and The Right to Adequate Housing

17. Internationally, adequate housing is recognized as one of the most basic and central human rights. Without adequate housing, individuals and families cannot protect their life or health, cannot enjoy security, privacy, or family life, and cannot meet their most basic needs to wash, prepare food, or rest.

Office of the High Commissioner for Human Rights, *Fact Sheet No. 21, The Human Right to Adequate Housing* (Geneva: UN, undated) [*Fact Sheet No. 21*]

18. The right of every person to adequate housing is recognized as a fundamental right in Article 25 of the *Universal Declaration of Human Rights* adopted in 1948 (G.A. res. 217A (III), U.N. Doc A/810 at 71). Different dimensions of the right are addressed in a variety of international instruments and texts, as well as in the national constitutions of 50 countries. (Office of the High Commissioner for Human Rights, *Fact Sheet No. 25, Forced Evictions and Human Rights* (Geneva: UN, 1996) at 20). The right to adequate housing has its most significant legal foundation in Article 11.1 of the *ICESCR* which states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions....”

19. In addition, the right to housing has been recognized by the UN Human Rights Committee as necessary to compliance with the right to life contained in Article 6 of the ICCPR, as illustrated by the Concluding Observations of the UN Human Rights Committee, following the 1999 periodic review of Canada.

Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105. 7, April 1999, at para. 12

20. Under international human rights law, the right to adequate housing is integrally linked to the inherent dignity and equality of the human person, which underlies all human rights. In its *General Comment No. 4*, the CESCR stated that “... the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised”. Thus ‘the inherent dignity of the human person’ from which the rights in the Covenant are said to derive requires that the term ‘housing’ be interpreted so “... that the right to housing... [is] ensured to all persons irrespective of income or access to economic resources...” and without discrimination in any form (at paras. 6 and 7). Particular consideration should be given to “those social groups living in unfavourable conditions.” (at para. 11).

21. The CESCR has also noted: “that the reference in article 11.1 to housing must be read as referring not just to housing but to adequate housing” since not just any form of a “roof over one’s head” will protect the inherent dignity of the human person.

General Comment No. 4, supra at para. 7

22. The link between the right to adequate housing and the central values of human rights and constitutional democracy was eloquently affirmed by the Constitutional Court of South Africa when it adjudicated the constitutional claim of a community of persons camped out under plastic on a public sports field, in circumstances similar to the respondents in the present case:

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity.

Government of the Republic of South Africa v. Grootboom, [2000] 11 B. Const. L.R. 1169 (S. Afr. Const. Ct.) at para. 83 (QL)

23. The PHRC submits that s. 7 of the *Charter* imposes obligations on governments to ensure everyone has access to adequate housing. The obligations may be satisfied in a variety of ways, including providing adequate social assistance, providing rent subsidies, building affordable housing, and ensuring that permits and zoning laws facilitate the construction of affordable housing. The AGBC agrees that international human rights law is a key source for interpreting the scope of governments’ obligations under s. 7 to realize the right to adequate housing, but then mischaracterizes those obligations as set out in international law at para. 85 of its factum as not requiring States “to provide the content or means to satisfy the need”.

24. The right to adequate housing under international human rights law imposes a spectrum of obligations on governments. These obligations, which flow from every human right, are articulated in official United Nations comments on international instruments as three distinct obligations to: respect, protect and fulfill the right.

25. The obligation to respect the right to adequate housing means governments must refrain from any action which prevents people from enjoying the right to adequate housing. Governments should facilitate self-help measures. In particular, governments have the responsibility not to carry out or advocate the forced or arbitrary eviction of persons and groups.

Fact Sheet No. 21, supra; see also General Comment No. 19, UN ESCOR, 2008, UN Doc. E/C.12/GC/19 at paras. 43 and ff

26. The obligation to protect requires governments to prevent third parties, such as landlords or property developers, from violating the right to adequate housing. Governments are obliged to adopt effective legislative and other measures to prevent violations of the right to adequate housing and to ensure that there is access to legal remedies when the right is infringed. Governments should take steps to confer legal security of tenure upon persons and households who lack it, and to protect residents from discrimination, harassment, withdrawal of services or other threats.

Fact Sheet No. 21, supra ; see also General Comment No. 19, supra at paras. 43 and ff.; General Comment No. 4, supra and General Comment No. 7, supra also both refer to forced evictions

27. The obligation to fulfil requires governments to adopt measures that will move towards the full realization of the right. This will include public expenditure on housing through incentives, direct housing construction, rent supplements or subsidization, as well as other strategies to ensure that the right is fully realized.

Fact Sheet No. 21; supra; see also General Comment No. 19, supra at paras. 43 and ff

28. The CESCR has explained that the following factors, *inter alia*, should be taken into account when determining whether any particular form of housing can be regarded as adequate: (a) legal security of tenure; (b) availability of services, [including]...safe

drinking water, energy for cooking, heating and lighting, sanitation and washing facilities...; and (d) habitability in the form of adequate space, protection from cold, damp, heat, rain, wind or other threats to health...and threats to the physical safety of occupants. A box or tent or tarp over one's head satisfies none of these factors and is a minimal protection against risk of death.

General Comment No. 4, supra at para 8

29. The obligation of governments in Canada is to move as expeditiously and effectively as possible towards the full realization of the right to adequate housing. There is an emerging consensus among the United Nations treaty bodies, which review Canada's compliance with its international human rights obligations, that Canada's record shows serious failures by governments to respect, protect and fulfill the right to adequate housing. The fact that governments are in this Court arguing that s. 7 does not protect the right of homeless persons to shelter themselves with cardboard boxes or tarps demonstrates the legitimacy of the international treaty bodies' concerns.

CESCR Concluding Observations 1999, supra at paras. 14, 17, 24, 28, 36

CESCR Concluding Observations 2006, supra at paras. 24, 26, 28

Section 7 Protects the Right to Adequate Housing

30. The PHRC submits that the right to adequate housing as understood by international law is protected by s. 7 of the *Charter*. As indicated by the record in this case, a lack of adequate housing, particularly homelessness, endangers not only an individual's psychological security, dignity, and autonomy, but his or her mental and physical health, and even life itself. The extension of the s. 7 guarantee of security of the person to circumstances involving the inability to access basic necessities, including adequate housing, is crucial. Adequate housing is a *sine qua non* requirement of physical and mental integrity.

Reasons for judgment of Ross J. at paras. 67-69, 135-142

31. Homelessness also engages the s. 7 right to liberty. Homelessness means living in extremely constrained circumstances, in which people are forced to choose between an untenably narrow range of options just to survive. Where state action or inaction deprives a person of the ability to make fundamental personal choices, the liberty interest is engaged. Homeless persons' ability to make choices about sheltering themselves from risks to their life and security could not be more fundamental.

32. Section 7 of the *Charter*, like all human rights protections, is rooted in the value of respect for the inherent dignity of the person.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 164-66, *per* Wilson J.

R. v. Oakes, [1986] 1 S.C.R. 103, at 136

33. Inherent dignity cannot be taken away, but it can be dishonoured in various ways. Some material conditions are essential to dignity, as, in the words of Denise Réaume, minimum conditions for a dignified life. Adequate food, housing, and clothing are among these essential conditions.

Denise Réaume, "Dignity, Equality, and Second Generation Rights," in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) at 282, 289, 292

34. Adequate housing is a minimum condition for a dignified life. Living without adequate housing often means living on the streets, or in squats, sometimes in emergency shelters, cars, or couch surfing. Homeless people often become urban nomads, constantly moving from place to place to find food, avoid police, and stay out of the weather. They cannot guard even those possessions that are vital to their sense of identity and personhood from theft or loss. They cannot keep themselves safe or protect themselves from disease, health risks, assault, sexual assault, harassment, the apprehension of their children, or early death. Homeless people are excluded from most social activities, and precluded from forming a meaningful life plan. Homeless people are, as Denise Réaume has written about people living in poverty "driven by necessity":

The impairment of autonomy is comprehensive and extreme. The additional psychological toll of living such a life, including constantly dealing with the misunderstanding and prejudice of others, is staggering. The need created by poverty [and homelessness] ...is urgent; its alleviation is ... integral to human dignity.

Réaume, *supra* at 292

35. Where the minimum conditions for a life of dignity are not available, because of government action or inaction, there is a deprivation of life, liberty and security of the person under s. 7.

Section 7 Must Be Construed and Applied in a Manner that is Consistent with Equality Norms

36. Applying an equality lens to s. 7 analysis supports an interpretation of s. 7 as including a right to adequate housing and assists in the proper application of s.7 in this case. A failure to integrate substantive equality norms in applying s. 7 will turn this *Charter* provision into a means of reinforcing inequality, rather than a remedy for it.

37. The Supreme Court of Canada has stated that the equality guarantee in the *Charter* informs the content of all other *Charter* rights. In *Andrews*, Justice McIntyre stated that "[t]he section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*." The right to equality is also at the heart of the international human rights protections.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 185

R. v. Keegstra, [1990] 3 S.C.R. 697 at 754-55

38. As L'Heureux Dubé J. explained in *G. (J.)*, writing for herself and McLachlin C.J., it is important to apply an equality lens to s. 7 analysis to ensure that *Charter* interpretation responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. This is especially important if poor women and men are to benefit equally from s. 7 of the *Charter*.

New Brunswick v. G. (J.), [1999] 3 S.C.R. 46 at para. 115 (QL)

39. Section 7 must not be construed in a way that is indifferent to the real conditions of different groups in society, so that, in effect, it protects life, liberty and security for

relatively privileged groups, but not for the most disadvantaged. Section 7 must not be construed, for example, so that it protects a government employee from having to make his home in a particular location as was held in *Godbout*, but does not protect a person living in poverty from homelessness, and, if homeless, from having no form of shelter.

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 (QL)

40. The record clearly demonstrates that homelessness exaggerates and intensifies the insecurity of members of already disadvantaged groups. Disadvantaged groups, including Aboriginal people, and people with mental health problems or addictions, are disproportionately represented among the homeless.

Reasons for judgment of Ross J at paras. 44, 59-61

41. Further, the record demonstrates that women have particular needs for adequate housing to ensure protection of their life, liberty and security of the person given the additional risks of sexual assault and violence that they face both in emergency shelters and in other public spaces. This evidence is confirmed in research reports on women and homelessness. Section 28 of the *Charter* confirms that women are entitled to benefit equally from all the *Charter's* guarantees. An interpretation of s. 7 that excludes the right to adequate housing would be contrary to the value of equality for women, given the realities of women's lives and the importance of access to adequate housing to women's actual enjoyment of life, liberty and security of the person.

Rusty Neal, *Voices: Women, Poverty and Homelessness in Canada* (National Anti-Poverty Organization, 2004) online: [Intraspec.ca <http://intraspec.ca/WomenPovertyAndHomelessnessInCanada.pdf>](http://intraspec.ca/WomenPovertyAndHomelessnessInCanada.pdf)

Leslie Tutty, Cindy Ogden, and Gillian Weaver-Dunlop, *An Environmental Scan of Strategies to Safely House Abused Women: Final Report to the Calgary Poverty Reduction Coalition* (Calgary, AB: RESOLVE Alberta, 2008) at 6-27

Montréal Principles on Women's Economic, Social and Cultural Rights (December 2002), online: International Federation for Human Rights <<http://www.fidh.org/IMG/pdf/ca0110a.pdf>>

Section 7 Does Not Require a Bright Line Distinction Between Negative and Positive Rights

42. A significant issue between the parties is whether the claim of the homeless respondents is a negative rights claim or a positive rights claim, and whether the remedy ordered improperly grants a positive benefit. The PHRC submits that it is not necessary to categorize the claim in this case as either negative or positive and that s. 7 does not require that a bright line be drawn to distinguish negative and positive rights.

43. The City argues that the homeless respondents have made an impermissible positive rights claim. The faulty premise of the appellant's argument is that s. 7 is only a negative rights guarantee. The better view is that s. 7 like all *Charter* rights has a positive dimension, and that it is neither necessary nor helpful to categorize the claim as clearly either negative or positive.

The City Factum at paras. 51-55

44. A conception of the *Charter* as fundamentally a negative rights instrument is a throw-back to a different time and place. Under 19th century American constitutionalism, the task of constitutional rights was understood to be restraining government from interfering with individual liberty. Government was viewed primarily as a threat to individual freedom, and never as a promoter of it.

Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 4, 19

45. The sources of the *Charter* are different from that of the United States Constitution, and include international human rights law, which is founded on a modern conception of rights as requiring governments to ensure, through legislation and other means, that rights are actually realized. International human rights law and the *Charter* were born out of a recognition that the realization of rights is dependent on government action.

Brodsky and Day, "Beyond the Economic and Social Rights Debate,"
supra at 205-206

Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Review 257 at 261-62

46. The recognition that rights require government action is explicit in the *Charter*. The rights to vote (s. 3), the right to procedural safeguards in criminal proceedings (s. 11), and the right to minority language education (s. 23) are clear examples. There is no sense in which these can be considered "negative" rights and not "positive", since they can only be enjoyed through the implementation, by the government itself, of specific mechanisms that give them effect. These are mechanisms that require action. The government does not have a "policy choice" to make about whether they design the institutions and take the steps necessary to ensure that these rights are upheld.

47. Courts have recognized that various *Charter* rights have both negative and positive components. They may be negative in the sense that the government cannot interfere with their enjoyment, but, at the same time, they are also positive in the sense that in some cases the government must take steps to ensure that everyone can enjoy them. The distinction between government action and inaction is inherently problematic.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 53 (QL)

48. The Supreme Court of Canada has found: that the right to association requires not only freedom from interference but also the enactment of a legal regime that ensures effective means of association for everyone; that freedom of speech may also require positive steps; and that the right to equality in some cases requires the government to refrain from acting in certain ways, and in other cases may require that the government take steps to ensure that equality is obtained.

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016 (QL)

Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627

Schachter v. Canada, [1992] 2 S.C.R. 679

49. A binary distinction between negative rights and positive rights depends on a false dichotomy. All rights are positive to varying degrees because all rights, one way or another depend on positive action by governments for their enforcement. As Holmes

and Sunstein discuss, even so-called “negative rights” must be supervised and maintained by tax-funded institutions, such as courts and police. As such, all rights are “creatures of government”, and entail government expenditures.

Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999) at 16-20, 51-52.

50. Paragraph 56 of the City's factum misstates or mischaracterises the reasons of the Supreme Court of Canada in *Gosselin*. The Court did not, as suggested by the City's factum, “[reject] a positive obligation aspect of s. 7.” On the contrary, the majority explicitly recognized that, “One day s. 7 may be interpreted to include positive obligations.”

Gosselin, supra at para. 82

51. Furthermore, the purported distinction between a negative constraint on a government to not interfere with the life, liberty and security of the person and a positive obligation on government to act to ensure the right is fulfilled is illusory. Viewed one way a claim can be seen as negative. Viewed another it can be seen as positive. For example, in *New Brunswick v. G. (J.)*, *supra*, the Supreme Court found that in the circumstances of the case, state-funded legal counsel was required to ensure the claimant's s. 7 rights and referred to this as a positive obligation (at para. 107). However, the government's s. 7 obligation could have been discharged by either not interfering with the s. 7 interests by staying the proceedings, or through the proactive measure of actually providing counsel.

52. In the same vein, the claim of the homeless respondents can be viewed as either a restraint on the City's ability to prohibit people from taking shelter in a park, or a positive requirement on the City to take the needs of homeless people into account when regulating the use of public space. This two-sided character of a constitutional rights claim is neither unusual nor fatal.

53. The AGBC's factum makes a closely related argument to the effect that the s. 7 “deprivation” must be caused directly and exclusively by impugned state action (at paras. 8, 14-33). However, even on a conventional one right approach to s. 7 of the

Charter, the “deprivation” aspect of the provision cannot be said to confine this particular right to only restraining government from acting. A deprivation of life, liberty and security of the person may occur not just through action but also through inaction, including by failure to take positive steps to ensure protection. Any failure to protect the right to adequate housing is the potential subject of the fundamental justice analysis.

54. A government choice not to act can cause a deprivation of rights equivalent to a government choice to take something away. In *Eldridge*, the Supreme Court of Canada concluded that deaf persons were deprived of equal health care because the government did not provide interpreter services. Similarly in *Vriend*, the failure to protect against discrimination was a deprivation of protection. A purposive, large, and liberal interpretation of the word deprivation, which is required under the *Charter*, includes not just the notion of actively taking away but also the notion of withholding, of unavailability or absence.

Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624 (QL)

Vriend v. Alberta, *supra*

55. A view of s. 7 as purely negative cannot be reconciled with international human rights law concerning the right to housing, nor with governmental obligations in relation to the right. International human rights law on the right to housing establishes a variety of obligations on the part of government. Some restrain government from taking particular steps, and others require positive acts by government.

Application of Section 7 Right to Adequate Housing in this Case

56. These proceedings arose from an injunction that forced the homeless respondents and others to abandon the tent city in Cridge Park. The City's actions in this regard amount to a forced eviction, which is prohibited by international human rights law. The CESCR has explained in *General Comment No. 4* that forced evictions are a *prima facie* violation of the right to adequate housing and can only be justified in the most exceptional circumstances.

57. A forced eviction is defined as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”. This does not mean that every eviction is contrary to international human rights norms, or that there is a general right to squat.

General Comment No. 4, supra at paras. 3, 11

58. Where evictions are unavoidable, they must take place in strict compliance with relevant provisions of international human rights law, and:

should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources to ensure that adequate alternative housing, [or] resettlement...is available.

General Comment No. 7, supra at paras. 14, 16

UN Special Rapporteur Report, supra at Annex I (Basic principles and guidelines on development-based evictions and displacement)

59. The principle that those who, because of circumstances of homelessness or destitution, resort to setting up temporary or informal housing on public or private land must not be evicted or have their shelter demolished without reasonable measures to find alternative, adequate housing has been accepted widely in other jurisdictions. The PHRC submits that principles of fundamental justice under s. 7 encompass this substantive international legal standard.

European Roma Rights Centre v. Greece. Cited as Complaint No. 15/2003, European Committee on Social Rights, December 8, 2004

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others, [2008] B. Const. L.R. 475 (S. Afr. Const. Ct.) (QL)

Port Elizabeth Municipality v. Various Occupiers, [2004] B. Const. L.R. 1268 (S. Afr. Const. Ct.) (QL)

Connors v. United Kingdom, no. 66746/01, [2004] XVI E.C.H.R. 639

Sandra Liebenberg, "Towards A Right to Alternative Accommodation? South Africa's Constitutional Jurisprudence on Evictions" (2005), 2(3) Housing and ESC Rights Law Quarterly, 1 at 1-5

60. The tent city in Cridge Park did not provide adequate housing, since the residents did not have security of tenure, availability of services, or habitability. Although the tent city was certainly not adequate housing, the prohibition of the tent city, and the requirement that its residents take down their tents and overhead tarps put these already homeless and vulnerable people at further risk. Already homeless they were, in effect, evicted from the tent city into a worse state of homelessness. They lost even the minimal protection to their s. 7 right to life, liberty and security of the person afforded by their tents and tarps, and by being together in a community.

61. Pursuant to international human rights law as incorporated into the principles of fundamental justice under s. 7, the City should have, at minimum, been required to demonstrate that the eviction was unavoidable, and that it had taken measures to ensure that adequate housing would be provided to the homeless persons affected by the eviction, as a precondition of being permitted to evict homeless people from Cridge Park. Additionally, the specific needs of affected homeless women, and in particular their additional exposure to violence and sexual exploitation, should have to have been taken into account.

62. Bylaws, such as impugned bylaws in this Appeal, that prevent homeless people from sheltering themselves in a park, when they have nowhere else to go are not in accordance with the principles of fundamental justice under s.7 because they fail to conform with the requirements of international human rights commitments that are binding on Canada, in particular obligations with regard to forced evictions.

63. It may not be the City alone that is responsible for ensuring access to adequate housing. Which level or levels of government are responsible for ensuring that everyone has adequate housing is a question of constitutional division of powers, and intergovernmental agreements. But permitting homeless people to live in a tent city in a public park when they have nowhere else to go amounts to a small sliver of the governmental obligation to ensure that everyone has access to adequate housing. Allowing homeless people to take basic steps to provide themselves with temporary,

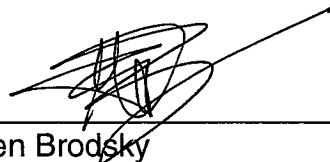
minimal shelter is a necessary but insufficient step that is protected by s.7 of the *Charter*.

64. In the context of the instant claim, only the limited relief of declaring the impugned bylaws unconstitutional is sought by the homeless respondents. However, s. 7 protection of the right to adequate housing could give rise to more effective and meaningful remedies consistent with international human rights law in this case, or in another appropriate case.

PART 4 - NATURE OF ORDER SOUGHT

65. PHRC supports the respondents' request for an order dismissing the appeal and supporting the relief granted to the homeless respondents by the Chambers Judge.


ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of May, 2009.



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