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Parks and Tribulation: Chartering the Territory of Homeless Camping Rights

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Case Commented On: *Abbotsford (City) v Shantz*, 2015 BCSC 1909

In *Abbotsford (City) v Shantz*, 2015 BCSC 1909 (*Abbotsford*), Chief Justice Hinkson of the British Columbia Supreme Court assessed multiple *Charter* challenges to various bylaws affecting individuals experiencing homelessness in British Columbia. *Abbotsford* continues a trend of recent Canadian decisions addressing the *Charter* rights of homeless individuals. While the Court in *Abbotsford* recognized a right for homeless individuals to camp overnight in parks when insufficient shelter space is available, that right is narrow since it can be eliminated through the expansion of homeless shelters (even though many homeless individuals legitimately prefer camping to a shelter). Further, that right rests upon an unclear foundation of legal reasoning that narrows the constitutional protections for homeless individuals without adequate justification.

BRIEF BACKGROUND

A previous ABlawg post by Ola Malik and Megan Van Huizen provides a detailed summary of the facts in *Abbotsford*, so we will only provide a brief background here.

In essence, the *Charter* challenge in *Abbotsford* arose in response to a permanent injunction sought by the City of Abbotsford against a group of homeless individuals who formed a camp in Jubilee Park. Specifically, the four key events underlying the *Abbotsford* decision were as follows:

1. City Enacts Bylaws: First, the City enacted certain bylaws contraining the legal use of public space, including parks (see paras 17-24). Specifically, the City enacted:

    a. The *Consolidated Parks Bylaw*, 1996, Bylaw No. 160-96, which prohibits sleeping or being present in any park overnight and erecting any form of shelter from the elements without permits (sections 14 and 17), and gathering and meeting in any park or obstructing any other person from the free use and enjoyment of any park (sections 10 and 13);

    b. The *Consolidated Street and Traffic Bylaw*, 2006, Bylaw No. 1536-2006, which prohibits creating any obstruction to the flow of motor vehicle, cycle or pedestrian traffic on a Highway, and prohibits any chattel or ware of any nature, or any object from being placed on a Highway (subsections 2.1(d), (h), and (j)); and

    c. The *Good Neighbour Bylaw*, 2003, Bylaw No. 1256-2003, which prohibits erecting any form of shelter from the elements in any public place (subsection

2.7(d)), and sleeping in a vehicle on any highway or other public place (subsection 2.7(e)).

2. Homeless Individuals Violate Bylaws: Second, a group of homeless individuals violated the Bylaws by forming a camp in Jubilee Park involving tents and a wooden structure (see paras 27-28).

3. City Seeks Injunction Against Bylaw Violation: Third, the City, on the basis of the Bylaws, sought a permanent injunction prohibiting the creation of the camp and mandating its removal (see paras 1 and 30).

4. DWS Constitutionally Challenges Bylaws: Fourth, the British Columbia/Yukon Association of Drug War Survivors (DWS) – a "grassroots democratic organization of drug users" – challenged the constitutionality of the Bylaws and their corresponding enforcement (see para 146).

Abbotsford is one of many recent decisions implicating the *Charter* rights of homeless individuals, including:

- *Victoria (City) v Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563, where the Court held (at trial and on appeal) that bylaws prohibiting the erection of temporary shelters unjustifiably violated the section 7 *Charter* rights of homeless individuals.

- *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410, (*Tanudjaja ONSC*) aff'd 2014 ONCA 852 (*Tanudjaja ONCA*) where the Court held (at trial and on appeal) that a *Charter* section 7/15 application could not proceed to trial because its claim – that there is a constitutional right to adequate housing – was not justiciable.

- *Henry v Canada (Attorney General)*, 2010 BCSC 610, aff'd 2014 BCCA 30, where the Court held (at trial and on appeal) that voter identification requirements violated section 3 of the *Charter* (the right to vote), but were justified under section 1; and

- *Vancouver Area Network of Drug Users v British Columbia (Human Rights Tribunal)*, 2015 BCSC 534, where the Court remitted a decision back to the BC Human Rights Tribunal because the Tribunal misapplied the test for *prima facie* discrimination when assessing the legality of a program that dissuaded homeless individuals from occupying certain public spaces.

While we were disappointed that the Supreme Court did not grant leave in *Tanudjaja ONCA*, as more cases involving the *Charter* rights of homeless individuals arise, the "public importance" of the nexus between homeless individuals and the *Charter* will hopefully justify judicial consideration by the Supreme Court (see Rule 25(1)(c)(i), *Rules of the Supreme Court of Canada*, SOR/2002-156; section 40(1), *Supreme Court Act*, RSC 1985, c S-26).

ISSUES

This post focuses on the *Charter* arguments raised in *Abbotsford*, namely, that the Bylaws and their corresponding enforcement violate:

1. section 2 of the *Charter* (fundamental freedoms), specifically:

a. section 2(c) (freedom of peaceful assembly), and

b. section 2(d) (freedom of association);

2. section 7 of the *Charter* (life, liberty, and security of the person); and

3. section 15 of the *Charter* (equality).

The focus of Ola and Megan's previous ABlawg post on *Abbotsford* mirrored the Court's greater focus on section 7. In contrast, this post will focus on summarizing and critiquing the Court's analysis of sections 2 and 15.

SUMMARY AND CRITIQUE OF DECISION

Violation of Rights to Liberty and Security of the Person (Section 7)

The Court held that the Bylaws and their corresponding enforcement violated section 7 of the *Charter*. Specifically, the Court held that:

1. the Bylaws deprived the liberty (at para 188) and security (at paras 206-09) of homeless individuals;

2. this deprivation was contrary to the principles of fundamental justice because the Bylaws were:

    a. overbroad (*i.e.* the Bylaws deprived the liberty and security of certain homeless individuals without furthering the Bylaws' objectives; at paras 202-03), and

    b. grossly disproportionate (*i.e.* the impact of the Bylaws on the liberty and security of homeless individuals was grossly disproportionate to the Bylaws' objectives; at para 224); and

3. this deprivation could not be justified under section 1 of the *Charter* because they were not:

    a. minimally impairing (*i.e.* there were less harmful means of achieving the Bylaws' objectives; at paras 242-47), or

    b. proportionate (*i.e.* the harmful effects of the Bylaws on homeless individuals outweighed the beneficial effects to the public; at para 247).

The Court repeatedly qualified that the Bylaws deprived homeless individuals' liberty and security only if there is insufficient shelter space to accommodate the homeless population (see *e.g.* paras 188 and 222). Further, the Court held that "there is insufficient accessible shelter space in the City to house all of the City's homeless persons" (at para 82). In consequence, the constitutional right established under section 7 in *Abbotsford* is narrowed to a right to camp overnight in parks only if a municipality does not have sufficient accessible shelter space to accommodate them. We describe this constitutional right as narrow because it may, in effect, be overruled when cities respond to camping by homeless individuals with pledges expanding

shelter space (a response which fails to take into account the various reasons why homeless individuals may legitimately prefer to sleep outside rather than in a shelter).

While the Court held that the Bylaws violated section 7 of the *Charter*, it held that the Bylaws and their corresponding enforcement did not violate the fundamental freedoms (section 2) or equality rights (section 15) of homeless individuals.

No Violation of Fundamental Freedoms (Section 2)

Insights from Free Expression Jurisprudence (Section 2(b))

While freedom of expression was not itself at issue in *Abbotsford*, the Court considered the free expression jurisprudence instructive to its analysis of other fundamental freedoms in the *Charter*, namely, free assembly and free association (see para 153). Undoubtedly, the Court's observation that there is, apparently, "almost no case law on the nature or scope of the freedom of peaceful assembly in Canada" (at para 158) was part of its motivation for cross-pollinating the various freedoms in its analysis.

Specifically, the Court relies on the following three-part test for finding a violation of freedom of expression in its analysis of free assembly and free association:

1. Protection: whether the conduct limited by law has expressive content, thereby bringing it within s 2(b) protection?

2. Exemption: whether the method or location of this expression removes that protection? And

3. Infringement: whether the By-law infringes that protection, either in purpose or effect? (The "Freedom Test"; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 56).

Clearly, the Freedom Test is situated within the context of freedom of expression. However, the Court borrows from the established principles underlying this test in its effort to explore the nature of other less jurisprudentially developed freedoms under section 2 of the *Charter*.

No Violation of Free Assembly (Section 2(c))

The Court held that the Bylaws did not violate the freedom of homeless individuals to peacefully assemble.

Initially, the Court appeared to signal that the Bylaws may violate free assembly. The Court begins by stating that free assembly guarantees "access to and use of public spaces" (at para 158). Further, the Court is clear that public parks (the public space at issue here) are such a public space (at para 158). Accordingly, the Court appears to signal, at the outset, that free assembly may guarantee access to and use of Jubilee Park.

However, the Court then holds that free assembly is not "engaged" by the presence of homeless individuals in parks. The Court's explanation on this point is lacking. The Court alludes to various concerns with interpreting homeless camping as a form of free assembly, namely:

1. the potential that the use of parks by homeless individuals "could conflict" with the use of parks by others (at para 160);

2. the fact that the Bylaws affect all of the City's citizens equally (at para 161); and

3. the fact that public parks are not "generally intended" for residential purposes (at paras 160 and 162).

But the Court fails to explain how these concerns relate to its holding that the Bylaws do not engage free assembly. Without more explanation, we are left guessing at the Court's logic.

That said, when the Court's "concerns" (the three points, above) are read in conjunction with the Court's stated intent to borrow from the Freedom Test, the Court's logic can be somewhat ascertained. Presumably, by saying that free assembly is not "engaged" in this case, the Court is saying that the conduct limited by the Bylaws (*i.e.* camping overnight in parks) fails the first part of the Freedom Test. Put differently, the Court is likely saying that camping overnight in parks is not protected because it is not the sort of free assembly intended to fall within the scope of section 2(c).

For example, when the Court states that public parks are not "generally intended" for residential purposes (the third "concern" listed above), the Court may be stating that the homeless individuals in this case are not protected by section 2(c) because their free assembly (camping) does not align with the historical and actual use of the location of that assembly (public parks). Indeed, many passages of the Court's reasons suggest that the Court placed significant reliance on the fact that parks are not historically used for residential purposes in dismissing the free assembly claim:

1. The Court notes that the test for freedom of expression considers the "historical or actual function of the place" where the expression at issue occurred (at para 155).

2. The Court notes that public parks "are not lands that have historically been used for people to pursue the necessities of life or reside, nor are they generally designed for camping uses" (at para 156).

3. The Court describes the use of peaceful assembly in this context to be an "unreasonable distortion" (at para 162).

4. The Court states that the "right of assembly" of homeless individuals is not "in issue" in this case, "but rather their right to the use of public space for a purpose for which it was not generally intended" (at para 162).

These various passages suggest that the Court held that overnight camping in parks fails the first part of the Freedom Test because it is not the intended use of a public park and therefore not a constitutionally protected form of free assembly. However, the Court fails to articulate this clearly. It could be argued that relying on free assembly (under section 2(c)) to seek the basic necessities of life (which may fit best under a section 7 analysis) causes unnecessary overlap and confusion in *Charter* jurisprudence and fails to purposively interpret the *Charter* provisions at issue. But, again, the Court does not elaborate on these points.

In any event, the Court's reliance on the "historical" uses of parks also fails to take account of how parks are now quite frequently used for residential purposes. Indeed, the Bylaws expressly permit individuals to stay overnight in parks with a permit (albeit with required fees and insurance inaccessible to homeless individuals; see *Abbotsford*, at para 22) and many recent cases demonstrate that homeless camping in parks is a growing phenomenon. If a precondition to free assembly rights is the intended purpose of the space in which a claimant seeks to assemble, courts will need to pay greater attention to how the intended use of different spaces evolves over time. This will be particularly important given that governments will presumably be more likely to resist the exercise of free assembly rights when individuals use spaces counter to their historically intended purpose (as this case illustrates).

In any event, the Court's other concerns are even less clearly linked to the Freedom Test. For example, it is unclear how the Court's concern that the Bylaws affect all citizens equally relates to free assembly. Indeed, a Federal law "equally" banning all citizens from ever protesting near Parliament would, at a minimum, "engage" section 2(c), even though that law applied to all citizens. In our view, the equal impact of the Bylaws more intuitively relates to discrimination under section 15 of the *Charter* than free assembly under section 2(c). Further, the fact that everyone's right to free assembly has been infringed, if anything, amplifies the scope of infringement under section 2(c), rather than diminishing it. Accordingly, the other "concerns" the Court relies on to dismiss the free assembly claim cry out for elaboration (and, at first glance, appear flawed).

No Violation of Free Association (Section 2(d))

The Court's freedom of association reasoning is much clearer.

Similar to its analysis of free assembly, the Court begins by describing free association in broad terms suggesting that it may be violated by the Bylaws. Specifically, the Court notes that free association "protects the choice to join with others, in spaces both public and private, recognizing the empowerment that comes from joining together in community and in pursuit of common goals" (at para 163). Further, the homeless individuals in Jubilee Park were making that very choice – joining one another in public space and in pursuit of common goals, including access to survival shelter, rest and sleep, community and family, and a safer living space (at para 25). Accordingly, the Court appears to signal, at the outset, that free association may protect the camp at Jubilee Park.

However, the Court then narrows the scope of free association to three discrete activities, namely, joining with others to:

1. form associations;

2. pursue other constitutional rights; and

3. achieve parity in terms of power and strength with other groups or entities.

   (*Abbotsford* at para 167, citing *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 66).

Based on this narrow scope, the Court denies the free association claim in this case because the Jubilee Park camp (allegedly) does not fall within any of the three forms of constitutionally

protected association listed above (see para 168). Rephrased, the Court appears to hold that camping overnight in Jubilee Park fails the first part of the Freedom Test because such camping is not a form of constitutionally protected association.

The Court's framework is analytically clear. But the Court appears to misapply that framework in its reasoning. The Court holds that associations formed in pursuit of other constitutional rights are protected by free association, and the Jubilee Park "association" was, arguably, such an association. The Jubilee Park camp was formed to access shelter, rest and sleep, community and family, and safety (at para 25), all arguably linked to life, liberty, and security of the person under section 7. Indeed, the Court held that the Bylaws violated the section 7 rights of homeless individuals. It follows that the Jubilee Park camp was, in effect, an association arguably formed in pursuit of other constitutional rights, and yet, the Court held to the contrary in dismissing the free association claim.

In addition, the Court erroneously reasons that there is no violation of freedom of association if individuals are able to freely associate in one permissible avenue of association, whether or not the government prohibits other legitimate avenues of association. Specifically, the Court holds that there is no violation of free association at Jubilee Park because those homeless individuals were able to freely associate in Court pursuant to their membership in DWS (at para 168). Surely a violation of free association cannot be cured simply because other associations more palatable to the government are capable of being formed. Indeed, extrapolating on this logic suggests that a claim of violated free association is automatically defeated once it is filed since its mere filing reflects the extent to which the individuals involved were still able to "freely associate" in advancing their legal rights. At the very least, the Court's view that the capacity to associate in other forums precludes a violation of free association warranted more analysis.

Similar to its reasoning for freedom of assembly, the Court dismisses the freedom of association claim, in part, because public parks were not historically intended to be used as campsites (see paras 162 and 168). Presumably, the Court was of the view that all fundamental freedoms (expression, assembly, and association) are only protected when they are being exercised in a location where such exercise was historically anticipated to occur. But we can still only guess as the Court was not explicit on this point. And, as explained earlier, the Court failed to consider how the historical use of parks may not align with their current uses, particularly for homeless individuals.

In sum, the Court's analysis of fundamental freedoms in *Abbotsford* was lacking, and amounts to a missed opportunity to develop the jurisprudence regarding fundamental freedoms in the *Charter* and to explore the constitutional rights of homeless individuals.

To be clear, our view is not that the fundamental freedoms should necessarily provide a right for homeless individuals to camp overnight in public parks. Rather, our concern is that the lack of analytical clarity in the Court's reasoning deprives homeless individuals of that right without adequate justification. Section 7 may very well be the *Charter* provision most appropriate to addressing the concerns raised in *Abbotsford*. But section 2 may also apply, and its concurrent application with section 7 is material because section 7 only provides a right to camp when there is insufficient shelter space available – a limitation that may not apply to a violation of section 2.

No Violation of Equality (Section 15)

Lastly, the Court held that the Bylaws did not violate the equality rights of homeless individuals under section 15 of the *Charter*.

Three grounds of discrimination were alleged by DWS: two enumerated grounds (disability and race (*i.e.* Aboriginality)); and one analogous ground (homelessness).

The Court identified the two part framework for discrimination as follows:

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

   (*R v Kapp*, 2008 SCC 41 at para 17).

Arguably, the second step was modified in cases subsequent to *Kapp*, and now looks more broadly at whether the distinction perpetuates prejudice, stereotyping or historical disadvantage (see *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras 18-21). In any event, the Court erred in its analysis of part 1 of the equality framework. Specifically, the Court erred in its analysis regarding whether the Bylaws discriminated based on an enumerated or analogous ground; and whether the Bylaws created a "distinction".

Misinterpretation of Analogous Grounds

The Court's analysis of analogous grounds is inadequate because of its erroneous reliance on *Tanudjaja ONSC*.

The Court rejects the allegation of discrimination based on the analogous ground of homelessness because it rejects that homelessness qualifies as an analogous ground. It does so by relying entirely on the reasoning of Justice Lederer in *Tanudjaja ONSC* (*Abbotsford* at para 231), who held that homelessness cannot be an analogous ground because its members are a heterogeneous group. It is unfortunate to see other courts relying on Justice Lederer's reasoning. As Joshua explained previously on ABlawg, Justice Lederer's rejection of homelessness as an analogous ground was flawed because it:

1. implied a requirement for analogous grounds – which Joshua labelled "definability" – based on an erroneous reading of the jurisprudence;

2. conflated this false definability requirement with a legitimate factor relating to the identification of analogous grounds, namely, status as a discrete and insular minority; and

3. misunderstood the proper approach to identifying analogous grounds which weighs multiple factors rather than considering those factors as each independently required for a ground to be analogous.

A consideration of those factors discussed in the jurisprudence, in our view, should result in the characterization of homelessness as an analogous ground. In particular, as explained in Joshua's earlier post, homelessness should be considered an analogous ground because of the difficulty in

changing one's status as homeless and the vulnerability and historical disadvantage the community has been subjected to and continues to be subject to.

In addition, the Court's reliance on *Tanudjaja ONSC* in rejecting homelessness as an analogous ground in *Abbotsford* is also troubling because the definition for "homelessness" arguably differs in the two cases:

1. In *Tanudjaja ONSC*, the "homelessness" considered was those without homes; adequate housing; accessible housing; or affordable housing (at para 125).

2. In *Abbotsford*, the "homelessness" considered was those with "neither a fixed address nor a predictable safe residence to return to on a daily basis" (at para 41).

In effect, while *Tanudjaja ONSC* rejected homelessness as an analogous ground, the "homelessness" it rejected differed materially from the homelessness considered in *Abbotsford*. In consequence, it was likely inappropriate for the Court to simply rely on *Tanudjaja ONSC*, particularly given that *Tanudjaja ONSC*'s rejection of homelessness as an analogous ground turned on how the broader definition of homelessness it dealt with was too difficult to define (at paras 129 and 134).

Misinterpretation of Laws Creating "Distinctions"

The Court's analysis of whether the Bylaws create a "distinction" is also inadequate because it fails to take "adverse effects discrimination" into account.

An understanding of four concepts is required to appreciate the errors made by the Court in its (lack of) analysis regarding adverse effects discrimination:

1. Formal equality: treating those who are similarly situated the same way.

2. Substantive equality: ensuring that how we treat everyone does not adversely affect certain groups, which may require treating some groups differently to achieve equality of results.

3. Direct discrimination: targeted treatment that expressly singles out specific groups for differential treatment.

4. Adverse effects discrimination: neutral treatment that negatively and disproportionately impacts a specific group.

   (See Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" at pp 4-8 ("Adverse Impact")).

An example from Adverse Impact clarifies the above concepts. Consider an office where all workers are required to work on Saturday, and which employs Seventh Day Adventists who, due to their religious beliefs, cannot work on Saturdays:

1. Formal equality is satisfied – all similarly situated people (workers) are treated the same.

2. But substantive equality is not satisfied – requiring all workers to work on Saturday fails to recognize that this rule impacts Seventh Day Adventists differently.

3. Direct discrimination is not occurring here – the rule of working on Saturday does not single out any specific group.

4. But adverse effects discrimination is occurring here – the rule of working on Saturday (applied to all workers equally) only negatively and disproportionately impacts Seventh Day Adventists who must violate their religious beliefs to satisfy the rule.

   (See *Ontario Human Rights Commission & O'Malley v Simpsons Sears Ltd*, [1985] 2 SCR 536).

As the above example illustrates, the existence of adverse effects discrimination demands a more nuanced approach to anti-discrimination than merely ensuring that people are treated "equally" since treating people the same does not always promote substantive equality. The Supreme Court made this very point in its first section 15 decision where it held that "identical treatment may frequently produce serious inequality" (see *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164).

The recognition of adverse effects discrimination is crucial to the realization of substantive equality (Adverse Impact at p 1). Indeed, the Court in *Abbotsford* acknowledged that the "past focus" on formal equality detracted from the focus of section 15, which is "the pursuit of substantive equality" (at para 227). Yet, despite this acknowledgment, the Court seems unaware of the adverse effects discrimination apparent in *Abbotsford*.

The Court's two paragraphs devoted to analyzing whether the Bylaws create a distinction contrary to section 15 are a textbook example of a Court only considering formal equality (at paras 235-36, emphasis added):

> The Impugned Bylaws are regulatory prohibitions, subject to exemptions, and are neutral on their face. While there has been historic mistreatment of Aboriginal people and the disabled, it does not follow that they, as compared to other groups, have been prejudiced in some manner that is connected to the Impugned Bylaws. Nor is the enforcement of the Impugned Bylaws against the homeless treatment that differs from the enforcement of the Impugned Bylaws against anyone else. While the effect of the Impugned Bylaws may have a greater impact on those who are homeless, that is not because they are being treated any differently than those who are not homeless, disabled or due to their racial backgrounds. DWS has not established that the Impugned Bylaws have the effect of perpetuating disadvantage or prejudice. I am not persuaded that an infringement of any of DWS' members' s. 15 Charter rights has been made out on the evidence before me.

Beyond a passing reference to the Bylaws not "perpetuating disadvantage or prejudice", the above paragraphs repeatedly state the same basic point: the Bylaws apply equally to all citizens (*i.e.* the Bylaws satisfy formal equality). To be frank, how the Bylaws were enforced casts doubt on even formal equality being met in this case. In particular, it is unlikely that the "disgraceful" displacement tactics employed by the City against homeless individuals (which included the use of bear/pepper spray, damaging tents and personal property, and spreading chicken manure on a

homeless camp; see paras 100, 105, and 115) would have been employed against other less marginalized populations. In any event, the neutral language of the Bylaws, at best, only shows that they meet the requirements of formal equality and do not directly discriminate against homeless individuals. This analysis, which disregards substantive equality, is therefore incomplete.

That the Court's equality analysis is incomplete is reinforced by the Court's factual findings that undeniably raise concerns about the Bylaws adversely impacting homeless individuals. In the Court's own words:

> Although it is strictly speaking correct that the Impugned Bylaws are not directed at group encampments as compared to individual encampments, the effect of their application affects the homeless far more than it affects others (*Abbotsford*, at para 223, emphasis added).

The disproportionate effect of the Bylaws on homeless individuals should come as no surprise. Parks are used by the general public for infrequent recreational purposes. In contrast, parks may be used by homeless individuals for daily shelter, community, safety, and even survival.

The Court affirmed (1) the centrality of substantive equality to section 15 and (2) the disproportionate impact of the Bylaws on one of the most marginalized communities in Canadian society. Yet the Court completely disregarded the presence (or even the possibility) of adverse effects discrimination. As a consequence, *Abbotsford* continues an unfortunate trend in *Charter* jurisprudence of:

1. failing to follow through on a commitment to substantive equality;

2. alluding to substantive equality without "truly embrac[ing] that notion"; and

3. allocating minimal attention to section 15 *Charter* claims by simply citing *Kapp* and giving section 15 "short shrift".

   (See Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at pp 21 and 49).

CONCLUSION

Abbotsford presents a limited victory for homeless individuals in British Columbia under section 7 of the *Charter*: the right to camp overnight in parks when there is insufficient shelter space available. But the Court's summary dismissal of the claims based on sections 2 and 15 of the *Charter* is deeply troubling. In effect, once more shelter space is made available, homeless individuals will likely have no constitutional protection to camp in public parks. Given the many legitimate reasons why homeless individuals may prefer camping in parks to staying in a shelter, recent pledges to expand shelter space may, ironically, be a burden to homeless individuals whose constitutional right to camp in parks will be eliminated.

The Court's judgment in *Abbotsford* is also troubling from a jurisprudential standpoint. The Court's narrow (and, at times, analytically confusing) approach to sections 2 and 15 fails to

provide greater clarity to these underdeveloped *Charter* rights. As neither side elected to appeal the decision in *Abbotsford*, appellate intervention is no longer possible. However, when the *Charter* rights of homeless individuals make their way back into the courts (which is likely, as disputes between municipalities and homeless individuals are ongoing), we sincerely hope a clearer and more expansive interpretation of the *Charter* will prevail. Until then, Canada's constitutional promise of freedom and equality for homeless individuals will remain un-kept.

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