

CANADA / JUDGMENT

Vancouver Fraser Port Authority v. Brett

2020 BCSC 876

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Supreme Court of British Columbia

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2020 BCSC 876 Vancouver Fraser Port Authority v. Brett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vancouver Fraser Port Authority v. Brett,

2020 BCSC 876

Date: 20200610

Docket: S205094

Registry: Vancouver

Between:

Vancouver Fraser Port Authority

Plaintiff

And

Christine Brett, also known as Chrissy Brett, John Doe, Jane Doe, and Other Unknown Persons

Defendants

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for the Plaintiff:

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M. Silongan

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B. Mackey

Place and Date of Hearing:

Vancouver, B.C.

June 4, and 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2020

Introduction

- [1] The plaintiff, Vancouver Fraser Port Authority ("VFPA"), is the port authority created by letters patent issued under the Canada Marine Act, S.C. 1998, c. 10. It is responsible for the stewardship of the lands and waters that make up the Port of Vancouver.
- [2] Part of the VFPA lands are located at 101 West Waterfront Road, more particularly described as:
- Parcel Identifier: 024-041-254
- Lot D of the Public Harbour of Burrard Inlet New Westminster District Plan LMP36518
- [3] I will refer to these lands and waters as the "VFPA lands".
- [4] The ownership of the VFPA lands is vested in The Crown in the Right of Canada c/o Vancouver Port Authority in fee simple. The plaintiff is the successor to the Vancouver Port Authority, the occupant of the VFPA lands, and the managing agent of the VFPA lands on behalf of the Federal government.
- [5] The VFPA lands have not been available for the general use of the public. Since at least 2011, the portion of these lands in issue before me has been licensed for use by a company that offers public parking from October 15 to April 15, and licensed for use by participants in the cruise ship industry for some period each year between April 15 and October 15.

- [6] The letters patent for the VFPA lands do not permit VFPA to allow residential use of the VFPA lands, and the use for which the defendants are making of the VFPA lands is prohibited by the Port Authorities Operations Regulations, SOR/2000-55 ("the Regulations"). Section 31(4) of the Regulations entitles the VFPA to remove the defendants and restore its lands.
- [7] Beginning in or around May 8, 2020, a number of individuals, including the defendant Christine Brett began to set up an encampment on a portion of the VFPA lands ("the encampment"). Whilst they refer to the encampment as the CRAB Park encampment, it is not located in CRAB Park.
- [8] Those resident at the encampment ("the residents") describe themselves as being composed of homeless residents of Vancouver's Downtown Eastside, as well as people who live in a Single Room Occupancy unit ("SRO") accessing community resources and seeking emotional supports, and community activists. The plaintiff seeks an interlocutory injunction to enjoin Ms. Brett and others from trespassing on or occupying the VFPA lands, or otherwise violating certain provisions of the Regulations.

Background

- [9] The number of homeless individuals in Vancouver has been increasing since 2005. The 2019 Vancouver Homeless Count identified 2223 individuals experiencing homelessness, of which 614 were unsheltered. Of the individuals surveyed, 495 identified themselves as Indigenous.
- [10] Beginning in or around July 2014, a number of individuals erected what ultimately became some 200 tents in Oppenheimer Park ("the Park"), one of the municipal parks in the City of Vancouver ("the City"). They did so without permission from the City or the Vancouver Parks Board.
- [11] The City sought an interlocutory injunction from this Court, requiring all persons having notice of the requested order for injunctive relief to comply with the provisions of the Vancouver Parks Control Bylaw and to cease activities in violation of the bylaw, occurring at the Park, and to remove all tents and other structures present in the Park.
- [12] On October 8, 2014, in reasons for judgment indexed at 2014 BCSC 1926, Madam Justice Duncan granted an interlocutory injunction as follows:
- The defendants, and all other persons having knowledge of the order, shall remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed or occupied by them which are located on lands legally described as Block 54 (Explanatory Plan 6556) District Lot 196 Plan 196 (the Park) by 10:00 p.m. on Wednesday, October 15, 2014.

...

- The defendants, and all other persons having knowledge of this order, shall forthwith cease constructing, placing, or maintaining structures, tents, shelters, objects and things upon the Park, without having first obtained a permit or written consent from the Park Board.
- The defendants, and all other persons having knowledge of this order, shall cease to occupy or reside in the Park between the hours of 10:00 p.m. and 6:00 a.m. from 10:00 p.m. on Wednesday, October 15, 2014.
- The defendants, and all other persons having knowledge of this order, shall forthwith comply with any and all Fire Orders issued pursuant to the City of Vancouver Fire Bylaw.
- This order shall not prohibit or limit in any way the right of the defendants, or any other persons, to lawfully assemble on the Park between 6:00 a.m. and 10:00 p.m.
- All employees or agents of the City of Vancouver are authorized to remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed or occupied by the defendants or any other persons which are located in the Park, should the defendants or any other persons with notice of the order fail to comply with this order. So to be clear, none of the removal is to occur prior to 10:00 p.m. on Wednesday, October 15, 2014.

[13] After some period of time, individuals gravitated back to the Park and created an encampment there, where they resided in tents and makeshift structures.

Ministerial Order M128

[14] The encampment at the Park was still in existence on April 24, 2020, when the Minister of Public Safety and Solicitor General for British Columbia issued Ministerial Order M128 ("the Ministerial Order"), under s. 10 of the Emergency Program Act, R.S.B.C. 1996, c. 111 stating, in part:

WHEREAS the COVID-19 pandemic poses a significant threat to the health, safety and welfare of the residents of British Columbia, and threatens to disproportionately impact the most vulnerable segments of society;

AND WHEREAS section 10(1) of the Emergency Program Act provides that I may do all acts and implement all procedures that I consider necessary to prevent, respond to or alleviate the effects of any emergency, including causing the evacuation of persons and the removal of personal property from any area of British Columbia that is or may be affected by an emergency, and making arrangements for the adequate care and protection of those persons and personal property;

AND WHEREAS the COVID-19 pandemic has contributed to a reduction in the necessary supports available to people experiencing homelessness in encampments such as outreach, shelter, housing, food, income, access to day programs, harm reduction and health services;

AND WHEREAS the conditions in the encampments that have been established in Oppenheimer Park, Topaz Park and the Pandora Avenue corridor (the "Encampments") pose a risk to the health, safety and welfare of the persons in the Encampments;

AND WHEREAS efforts to relocate persons from the Encampments to alternative housing and to improve sanitation within the Encampments have not been sufficiently successful;

AND WHEREAS the conditions in the Encampments present health and safety risks for first responders, health care workers, and the staff and volunteers of support agencies, who must attend at the Encampments for emergency, injury or health reasons or to otherwise ensure that the complex needs of the vulnerable populations in the Encampments are met;

AND WHEREAS the Province of British Columbia has developed a comprehensive plan in consultation with the Cities of Vancouver and Victoria, associated police, fire and other agencies, non-government organizations and other stakeholders, to provide adequate alternative living arrangements and other health and social supports for persons currently residing in the Encampments, including the care of their personal property;

AND WHEREAS measures are needed to address the risks to health, safety, and welfare associated with the conditions in the Encampments;

I, Mike Farnworth, Minister of Public Safety and Solicitor General, order that the attached Encampment Health and Safety (COVID-19) Order is made.

ENCAMPMENT HEALTH AND SAFETY (COVID-19) ORDER

Evacuation of encampments

2 All persons camping in, residing in or occupying any of the areas listed in the attached Appendix must evacuate the area as soon as practicable, but no later than 12:00 p.m. (noon) on May 9, 2020.

Entry to encampments prohibited

3 A person must not enter any of the areas listed in the attached Appendix for the purpose of camping in, residing in or occupying the area.

[Emphasis added]

[15] The Ministerial Order applies for the duration of the provincial state of emergency, declared on March 18, 2020, in response to the COVID-19 pandemic.

The Residents

[16] The plaintiff is concerned that simply moving the Park encampment to the VFPA lands undermines the Ministerial Order, sterilizes the public health and safety measures embodied by the Ministerial Order, and gives rise to significant public health risks the Ministerial Order sought to mitigate.

- [17] By contrast, the residents submit that the encampment is the safest option during the COVID-19 crisis to ensure public safety. They argue that the closure of the encampment, by way of injunctive relief, would have the effect of dispersing a vulnerable population throughout the City and would directly endanger public health.
- [18] I have reviewed the evidence of a number of residents of the encampment.
- [19] Sunjeet Aulak Singh has been without a home for over five years. He did not offer evidence as to how or why he became homeless. He previously resided at the Park for some five years but left there before housing was offered and as a result says that he was not offered any housing support.
- [20] Harry Tony Pruden last worked in August 2019, and has been homeless since then. He has profound health challenges. He has used the shelter system in the past, but was ejected from his last shelter two months ago. He stated that he is not able to camp overnight in situations where he has to move his belongings during the day because of severe mobility issues.
- [21] Mr. Pruden sought to register for housing at the Park, but swore that by the time he made that decision, it was too late and accommodation was unavailable. He followed others to the encampment as he said that he had difficulty finding places to sleep overnight with friends as a result of the COVID-19 crisis, leaving him with little alternative but to find community at the encampment.
- [22] Mr. Pruden has sworn that if the encampment is closed, he will find where other people are camped and go there.
- [23] Tony Cahoose is an Indigenous individual who has been in Vancouver for some 25 years since arriving in the City when he was 17 years-old. He last had a residence some seven years ago, but has been homeless since then. He was not a resident at the Park, but was encouraged by another person at the encampment to stay at the encampment.
- [24] Mr. Cahoose gave evidence that he was offered a single residency unit, but found it unliveable. He also said that his possessions go missing at local shelters, but not at the encampment. If the encampment is closed, Mr. Cahoose says he will end up back on the streets.
- [25] Ryan McNabb is another resident at the encampment. He lived at the Park after being evicted from his residence in New Westminster. He is addicted to drugs, and feels unsafe on the streets. He declined an offer of housing as the offered residence would not permit him to take his puppy.
- [26] Malcolm George Ross and John Edwin MacInness, residents at the encampment, also deposed to having previously resided at the Park. Mr. MacInness deposed that during the eviction process he was offered housing, but the City never followed through, and that he was told by an unidentified City worker to move to the encampment.

[27] Amanda Kathleen McCracken, another resident at the encampment, deposed that she was unable to secure the assistance she required in order to access housing due to COVID-19.

Establishment and Growth of the Encampment

[28] On May 8, 2020, at approximately 8:55 a.m., a security employee of the plaintiff approached two individuals unloading a van and setting up supplies at the encampment. He pointed out that they were on private property and asked them to leave. They refused to do so. The defendant, Ms. Brett, was also asked to leave the encampment by the same security employee. After asserting that the encampment was on CRAB Park, and being informed that it was not, Ms. Brett declined to leave the area.

[29] Officers of the Vancouver Police Department arrived at the encampment shortly after 9:00 a.m. on May 8, 2020, but took no steps to remove anyone from the encampment.

[30] On May 9, 2020, employees of VFPA posted signs at the south end of the encampment advising that no unauthorized use of the area was permitted, and sought to distribute copies of a notice to vacate the area to those at the VFPA lands encampment. They were met with opposition from individuals at the encampment. Their attempts to post signs at the north end of the encampment were similarly met with opposition from those at the encampment.

[31] I find that by May 13, 2020, the encampment had grown to approximately 26 tents, canopies, and other structures and had one lit fire pit, another un-lit fire pit, piles of wood, three piles of scraps and garbage and various other items including tarps, carts and pallets. I further find that by May 13, 2020, there were approximately 15 individuals living in the encampment.

[32] Efforts by a contractor employed by the plaintiff to install concrete barriers along the roadside of the encampment were interfered with by one of the residents at the encampment.

[33] On May 15, 2020, the plaintiff's land security manager, Anita Gill, met with a woman who identified herself as a representative of the residents of the encampment. The self-professed representative stated that:

- a) She planned to extend the encampment site to include the nearby gravel lot (also forming part of the VFPA Lands) and will take down fencing in order to do that.
- b) That she expected 2,500 people to attend the site over the coming summer months.
- c) That she would not allow anyone to control access to the lot and would not take direction from VFPA security guards.
- d) That she did not believe Ms. Gill was her equal and would not listen to what she has to say, and
- e) That she did not accept the VFPA had any right to exert control over Lot 5.

[34] The encampment continues to grow. By May 19, 2020, the plaintiff had received 36 complaints respecting the encampment, including:

- a) Lack of social distancing within the encampment;
- b) Near continuous burning of an open flame bonfire, and smoke entering the apartments;
- c) Trash within the encampment, and a steep increase in garbage and needles in the area;
- d) People urinating and defecating in both the bushes and the ocean;
- e) Loud music and noise coming from the encampment;
- f) Vehicles coming and going from the park, including late at night;
- g) Residents no longer feeling safe in using the neighbouring Crab Park.

[35] Residents at the encampment have been asked to vacate the encampment by employees of VFPA, but have not done so. I am satisfied that some residents have responded to requests to leave the encampment with verbal aggression, physical obstruction, and an assertion that the plaintiff has no authority over the area of the encampment.

Injunctive Relief

[36] The plaintiff asserts that once a property owner establishes a prima facie case of wrongful interference with his or her property rights by another party, an injunction should issue.

[37] The plaintiff does not rely on the provisions of the Trespass Act, R.S.B.C. 2018, c. 3 to support its application. Instead it asserts the common law of trespass as the basis for a part of its submissions.

[38] In *Patel v. W.H. Smith (Eziot) Ltd.*, [1987] 1 W.L.R. 853 (C.A.) at 858, Lord Justice Balcombe commented:

It seems to me that, prima facie a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him.

[39] Balcombe L.J. did qualify the statement to which I have referred at page 859, where he wrote:

The two recent cases to which I have referred *Woollerton and Wilson Ltd. v. Richard Costain Ltd.* and *John Trenberth Ltd. v. National Westminster Bank Ltd.*, 39 P. & C.R. 104 are also authority that the same principle, namely prima facie a landowner whose title is not in issue is entitled to an injunction to restrain trespass, applies where the claim is for an interlocutory injunction. However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass

[40] In *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355, Mr. Justice Butler wrote:

- [59] First, where a prima facie case of trespass is made out, the natural remedy is an injunction. This is because an act of trespass is actionable per se and does not require proof of damages. Hydro relies on the decision in *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v. Van Osch et al*, 2004 BCSC 1827. The court granted an injunction to restrain the defendants from occupying a school which the plaintiff decided to close. The court concluded at para. 14:
- [14] In the present case the School Board has established that it possesses title to the lands comprising the School and that title is not in issue. It has a strong prima facie case in trespass against the defendants. None of the defendants have advanced an arguable case that their continuing possession of the School is as of right and, given their failure to do so, questions of balance of convenience or irreparable harm do not arise.
- [41] The plaintiff also relies, in the alternative, on the violation of provisions of the Regulations by some of those now resident at the encampment as a basis for its application. It says that these violations entitle it to injunctive relief without the necessity of the application of the test for interim injunctions set out in the well known decision in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311.
- [42] In the further alternative, and in the event that the RJR-MacDonald test applies, then the plaintiff submits the test has been met.
- [43] The test enunciated in *RJR-MacDonald* is:
1. Has the applicant demonstrated there is a fair question to be tried?
 2. Will the applicant suffer irreparable harm if an injunction is not granted?
 3. Does the balance of convenience favour the granting of an injunction?

Discussion

Is injunctive relief warranted pursuant to the common law of trespass?

- [44] The preamble to the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11, includes that our country is founded upon principles that recognize the rule of law.
- [45] In *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70, the Supreme Court of Canada explained the complex principle known as the rule of law, describing it as "a highly textured expression, importing many things for example, a sense of orderliness, of subjection to known legal rules" that "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."
- [46] In *Vancouver (City) v. Maurice*, 2002 BCSC 1421, at para. 22, Mr. Justice Lowry observed that:

Poverty and the consequences of poverty are serious social and political issues with which this, and other large cities in particular, must struggle. They are not however, legal issues in the sense that they could constitute justification for the unlawful conduct of large numbers of people. The laws of this province and this city are to be obeyed by all. The personal hardship that may be suffered by those affected by the injunction being sought is, on the authorities that govern the exercise of this court's narrow discretion, outweighed by the public's interest in having the law enforced. There are no circumstances here that are sufficiently exceptional to justify the court's refusal to grant an injunction in favour of permitting the unlawful conduct of as many as 200 people, and perhaps more to come, to continue unabated.

[47] On the appeal from the decision of Lowry J., as he then was, indexed at 2005 BCCA 37 at para. 34 Madam Justice Rowles wrote:

where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.), and *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2000), 187 D.L.R. (4th) 664 (B.C.C.A.).

[48] In *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, the Supreme Court of Canada dealt with an application by the City of Vancouver for an injunction with respect to the activities of Canadian Pacific Railway Company ("CPR") on a corridor of land located within the City often referred to as the "Arbutus Corridor". There, the City argued that because CPR abandoned the use of the Arbutus Spur as a railway, that portion of CPR's operations no longer fell under federal jurisdiction under either ss. 92(10)(a) or (c) of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[49] At para. 33 of her reasons for judgment, Chief Justice McLachlin commented:

CPR argues that, by passing the ODP By-law, the City acquired a de facto park, relying on the observation of Southin J.A. that "the bylaw in issue now can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use" (para. 117). Southin J.A. went on to say: "The shareholders of ... CPR ought not to be expected to make a charitable gift to the inhabitants" (para. 118). Yet, as Southin J.A. acknowledged, those who now casually use the corridor are trespassers. The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]".

[Emphasis added]

[50] Like the users of the Arbutus Corridor referred to by Chief Justice McLachlin, I find that the residents of the encampment are trespassers on the VFPA lands.

Is injunctive relief warranted on the basis of breach of the Regulations?

[51] While the letters patent creating the plaintiff permit some residential use of lands near the Fraser River, they expressly disallow residential use of the VFPA lands.

[52] In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, six of the seven members of the Court recognised the principle that the mere ownership of property by the government is not determinative of the question of whether all persons should have access to it, or that by restricting access or activities by certain individuals, there is necessarily an infringement on any Charter right (in that case, freedoms under section 2). The seventh member, Madam Justice L'Heureux-Dube, would have taken the property's purpose into account under a section 1 analysis. Under either approach, the Court must look to the intended purpose of the government owned property.

[53] The plaintiff is authorized under the Canada Marine Act and the Regulations to take appropriate measures for the safety of persons and property at the VFPA lands. Sections 5 and 7 - 9 of the Regulations provide in part that:

5 Unless otherwise authorized under these Regulations, no person shall, by act or omission, do anything or permit anything to be done in a port that has or is likely to have any of the following results:

- (a) to jeopardize the safety or health of persons in the port;
- (c) to obstruct or threaten any part of the port;
- (f) to cause a nuisance;
- (g) to cause damage to ships or other property;
- (h) to adversely affect soil, air or water quality;

7 No person shall access any area managed, held or occupied by a port authority unless

- (a) the person accesses the area to conduct legitimate business in the port;
- (b) the person is authorized by the port authority to access the area; or
- (c) access is not restricted by a sign, a device or in some other way such as by a fence.

8 A port authority may have signs posted or devices installed for the purpose of ensuring the safety of persons and property in a port, the environmental protection of the port or the management of the marine infrastructure and services of the port in a commercial manner.

9(1) Every person in a port must comply with the instructions on signs posted and with devices installed under the authority of the port authority unless the person is authorized by the port authority to do otherwise.

[54] Section 28 of the Regulations provides, in part that:

28(1) No person shall, in a port, conduct an activity set out in column 1 of the activity list if an "X" is set out in column 3 unless the person

- (a) obtains an authorization under section 27 or is covered by an authorization given under that section; and
- (b) complies with the conditions, if any, of the authorization.

[55] Part 17 of Schedule 1 to the Regulations includes the following prohibited activities for the Vancouver Fraser Port:

- 6. Releasing or transshipping refuse or other similar material or substance;
- 13. Building, placing, rebuilding, repairing, altering, moving or removing any structure or work on, in, over, under, through or across land;
- 16. Causing a fire

[56] I find that some of the residents have violated the Regulations by engaging in the activities I have listed in the paragraph above.

Injunctive Relief

[57] I am prepared to grant some of the terms of the injunction sought by the plaintiff on the basis of the common law of trespass and the breach of the Regulations, but will also consider the plaintiff's application under the RJR-MacDonald test.

Is injunctive relief warranted pursuant to the RJR-MacDonald test?

The Defendants' Section 7 Charter Rights

[58] The residents submit that this Court's analysis for injunctive relief must be informed by the exceptional challenges posed by the COVID-19 crisis and the particular way in which, if the injunction were to be granted, they would be deprived of their s. 7 rights under the Charter of Rights and Freedoms.

[59] In *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at para. 174, I found that there is no right to housing under the Charter.

[60] The deadline to evacuate the Park in the Ministerial Order was May 9, 2020. I find that beginning in the morning of May 8, 2020, Ms. Brett and others, using U-Haul trucks and other vehicles, transported tents and supplies to the VFPA lands, and set up the encampment.

- [61] The residents contend that many of them have been homeless for several years with neither a fixed address nor a predictable safe residence to return to on a daily basis, apart from what they describe as the oasis that they have created for themselves. They say they are persons who are not only displaced but many also suffer from grave emotional and mental health issues. The residents contend that addiction is rampant amongst their number and that it is a self-fulfilling prophecy that keeps people in the spiral of poverty and homelessness.
- [62] They say that they are painfully familiar with the less than sustainable options of shelters and SRO's that exist.
- [63] The residents argue that people experiencing homelessness are more likely to already suffer from compounded health conditions relative to the general population. They assert that as an at-risk population during the COVID-19 pandemic, homeless people intrinsically face an increased susceptibility to community spread of COVID-19. They contend that organized outdoor encampments provide an opportunity to distance themselves and to self-isolate, in contrast to those dependent on structures such as public bus shelters or building entranceways, as well as those in indoor facilities. They contend that due to the COVID-19 crisis, in the absence of appropriate housing for them, their encampment is the safest option, and to remove them from the encampment would result in the dispersal of a vulnerable population throughout the City.
- [64] The residents assert that their centralized and established structure attracts local service providers and allow them to benefit from an increased ability to access services where they are, in a safe and familiar space. They contend that encampments also provide physical safety for both residents and their belongings including identity documents, medications, and the means for shelter such as tents and sleeping bags, and personal belongings which anchor themselves to their humanity.
- [65] It is clear from the evidence of residents at the encampment including Sunjeet Singh, Tony Cahoose, Charlotte Hannah, Kerry Landry, Ryan McNabb, Kathleen McCracken, Theresa Gray, Raymond MacPherson, James Low III, and Michael Slaunwhite that intravenous drug use is widespread at the encampment.
- [66] While there are apparently boxes for the deposit of sharp objects such as used needles, it is apparent that those at the encampment are not making consistent use of the boxes.
- [67] I was advised that one of the residents of the encampment unfortunately passed away, and that others have experienced drug overdoses.
- [68] Dr. John Stanley Millar and Ms. Bernadette Pauly both deposed that encampments provide important psychological and mental health benefits to residents.
- [69] Without alternatives to suitable housing, it is Dr. Millar's view that the encampment represents a level of stability and security for residents and their belongings that can help:
- (a) Reduce stress;

- (b) Provide important routines like regular nutritional meals;
 - (c) Enable healthy sleep patterns;
 - (d) Mitigate some of the mental health challenges faced by so many people living in the City of Vancouver;
 - (e) Overcome challenges of addiction; and
 - (f) Put their life on a better track to improve their overall health and well being.
- [70] He expressed his opinion that residents of the encampment who use drugs will be at greater risk if an injunction is imposed and they are forcibly displaced. He expressed his opinion that residents of homeless encampments are part of an established community and routinely save each other's lives by engaging in effective harm reduction practices, and that if an injunction were to issue, people who are secluded, as the residents of the encampment could be if they were forcibly removed, are more likely to die from an overdose.
- [71] Dr. Millar is clearly passionate about the plight of homeless individuals, but much of what was contained in his affidavit amounted more to argument than the assistance expected of an expert witness pursuant to Rule 11-2(1) of the Supreme Court Civil Rules. Notably, he did not certify his understanding of his role as required by Rule 11-2(2).
- [72] I do not accept the sweeping pronouncements of Dr. Millar. He did not indicate in his affidavit that he has even been to the encampment, and I have no evidence that he assessed any of the residents of the encampment to determine if their residence there has reduced their level of stress or enabled them to enjoy healthy sleep patterns. Given the 73 noise and other complaints by 36 of the neighbours to the encampment, I find that these assertions by Dr. Millar are not credible.
- [73] I have no evidence that would allow me to believe that the residents of the encampment have been provided important routines like regular nutritional meals. Dr. Millar offers no basis for his views that living at the encampment mitigates the unspecified mental health issues of the residents.
- [74] There is simply no basis in the evidence before me for Dr. Millar's assertions that living at the encampment assists anyone there in overcoming the challenges of addiction or putting their lives on a better track to improve their overall health and well being.
- [75] Ms. Pauly is similarly passionate about the plight of the homeless, and offered her opinion that encampments should not be disrupted during the COVID-19 crisis. However, like Dr. Millar, she has not visited the encampment, nor apparently spoken to any of its residents, and much of what was contained in her affidavit amounted more to argument than the assistance expected of an expert witness pursuant to Rule 11-2(1) of the Supreme Court Civil Rules. Notably, she did not certify her understanding of his role as required by Rule 11-2(2).

- [76] The area where the encampment is presently located is an unfenced paved area adjacent to a small undeveloped green space. It has no public facilities or running water and only two small garbage receptacles. The public facilities in the neighbouring CRAB Park, are shut down, leaving only two portable toilets there for public use. While CRAB Park is managed by the plaintiff, it is presently under a long term lease to the City of Vancouver.
- [77] The residents at the encampment have acquired portable toilets, but the encampment still has no running water.
- [78] Despite the evidence of some of the encampment residents, and the submissions of counsel for them, I find that the residents of the encampment are not adhering to the social distancing prescribed by the Public Health Officer.
- [79] I find that the fire that is being maintained in the encampment has caused smoke to enter the occupied apartments adjacent to it.
- [80] I find that the residents of the encampment have littered the encampment area with garbage and hypodermic needles, urinated and defecated in the bushes on and near the VFPA lands, and into the ocean near the encampment.

Authorities dealing with Injunctions in respect of Encampments

- [81] In opposing the plaintiff's application the residents rely on what they assert to be their rights pursuant to s. 7 of the Charter as in cases such as:
- a) Fraser Health Authority v. Evans, 2016 BCSC 1708 [Fraser Health Authority], respecting s. 2(b) Charter rights;
 - b) Victoria (City) v. Adams, 2008 BCSC 1363, var'd on other grounds, 2009 BCCA 563 [Adams];
 - c) Abbotsford (City) v. Shantz, 2015 BCSC 1909; and,
 - d) British Columbia v. Adamson, 2016 BCSC 1245.

[82] In Adams, Madam Justice Ross found at paras. 78 - 79:

78 It should be noted that the traditional approach [to a s. 7 claim] embodies a conception that s. 7 of the Charter contains negative rights of non-interference and cannot be invoked absent a specific government action. There is also a school of thought, as exemplified in the dissent of Justice Arbour in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 [Gosselin] that properly construed, s. 7 includes a positive dimension that may in certain circumstances impose positive obligations upon government. However, I have concluded, as discussed below, that this case does involve an issue of interference by state action. Accordingly, the analysis adopted in the present case is the traditional analysis.

79 Pursuant to this traditional analysis, a claimant must therefore first establish that there has been or could be a deprivation of life, liberty or security of the person. With respect to this first step, the Defendants submit that the prohibition on erecting shelter in public spaces, in

circumstances in which there are insufficient alternative shelter opportunities for the City's homeless, interferes with s. 7 interests in several ways. First, interfering with the ability to erect shelter interferes with the provision of the basic necessities of life. Second, preventing homeless persons from creating shelter for themselves in public spaces interferes with their liberty interests. Third, preventing homeless persons from erecting shelter for themselves interferes with their basic bodily integrity, and thus constitutes interference with security of the person.

[83] It was in that context that Ross J. held at para. 145:

In the present case, I conclude that the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision "life". The uncontradicted expert evidence establishes that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life threatening conditions, most notably hypothermia. The Bylaws and the operational policy prohibit the erection of the overhead protection that is necessary to protect the individual from this risk. I conclude that the Bylaws and the operational policy of the City engages the right to life.

[84] The plaintiff contends that in order for s. 7 to be engaged, there must be an underlying right that is being interfered with, and that as the residents have no right to occupy the encampment in the first place, there can be no violation of s. 7.

[85] The residents concede that the VFPA lands in question fall into that category of lands that are publicly owned but used for private commercial purposes, but argue that the line between private and public when it comes to publicly owned lands is a spectrum. For example, an airport security area would have less public access than an empty parking lot, with no fence or boundaries indicating exclusion of the public.

[86] They frame their argument in terms that, on the one hand, there is the plaintiff's assertion of property rights and, on the other, the actual life experience of displaced persons without homes whose lives, that are already hard, will be thrown into further peril in the midst of a public health crisis.

[87] Counsel for the residents asserts that the City and the Vancouver Park Board continue to have "no camping" bylaws in place during the COVID-19 pandemic. They assert that as a consequence, there is no location within the City where a homeless person can shelter in place on a more than overnight basis in order to follow public health guidelines to self-isolate and social distance.

[88] The residents contend that in the circumstances, the federally owned parking lot where the encampment is located adjoins a public park, has no fence or boundary, and is unused presently. They contend that the result is qualitatively different than a piece of public land that has been leased out to a third commercial party.

[89] This submission ignores the decision of the Alberta Court of Appeal in *R. v. S.A.*, 2014 ABCA 191, leave to SCC refused, [2014] S.C.C.A. No. 373. In that case, s. 7 Charter rights were at issue. Mr. Justice Cote, J.A, writing for the majority, dismissed the notion that, absent Charter considerations, members of the public had any right to access government-owned property intended for non-public use.

[90] At para. 96 Cote J.A. wrote:

If the government buys or expropriates a gravel pit or storage yard from a private person, that does not open it to access by the public. Members of the public have no right to enter (or loiter in) a parking lot used to house dump trucks or buses, whether the owner is the Crown, a municipal government, or a private person or company. Nor did any of the Supreme Court of Canada panel suggest that all government property is open to the public, nor that all parts of an airport must be so open. Most parts of an airport are off limits to all of the public, even those with boarding passes. The public cannot roam the runways, nor the grass next to them.

[91] I adopt the reasoning of Cote J.A. to which I have referred.

[92] In *Fraser Health Authority*, in July of 2014, a number of individuals set up an encampment and occupied lands owned by the Fraser Health Authority at the site of the former Matsqui-Sumas-Abbotsford Hospital that closed in 2009.

[93] I found that the defendants in that case had engaged in occupancy of land which they were aware was owned by the plaintiff, after receiving notice from the landowner that such activity was prohibited. I rejected the defendants' argument that an injunction should not be issued because they had a color of right to use the land as public lands, entitling the public to use them as though they were akin to parklands, airports, or Parliament Hill.

[94] In rejecting that argument I relied upon the decision of the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 and that of the Federal Court of Appeal in *Weisfeld v. Canada*, [1995] 1 F.C. 68.

[95] In her concurring reasons for judgment in *Committee for the Commonwealth of Canada*, Madam Justice L'Heureux-Dubé held at 199-200:

On the other hand, the Charter's framers did not intend internal government offices, air traffic control towers, prison cells and Judges' Chambers to be made available for leafletting or demonstrations. It is evident that the right to freedom of expression under s. 2(b) of the Charter does not provide a right of access to all property whether public or private. Such a wholesale transformation of all government property is not necessary to fulfil the Charter's purposes, or to avoid a stifling of free expression. As this Court held in *R. v. Big M Drug Mart*, *supra*, at p. 344, while the Charter should be given a broad and generous interpretation, "it is important not to overshoot the actual purpose of the right or freedom in question".

The logical compromise then is to recognize that some, but not all, government-owned property is constitutionally open to the public for engaging in expressive activity. Restrictions on expression in particular places will be harder to defend than in others. In some places the justifiability of the restrictions is immediately apparent. As Dickson C.J. explained in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138:

I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

Certain criteria, while not themselves dispositive, can assist in determining what locations are appropriately open for public expression, and bear the earmarks of "public arenas". The status of airports can then be determined in light of these standards.

[96] In *Weisfeld*, Mr. Justice Linden, writing for the Federal Court of Appeal, stated at para. 3 that:

... I am of the view that the establishment of the Peace Camp on Parliament Hill did convey, or attempt to convey, a message. Therefore, the appellant's activities in placing the Peace Camp on the Hill amounted to "expression" within the protection afforded by paragraph 2(b) of the Charter. I further hold that, in removing the physical objects associated with the protest and in preventing the appellant from restoring them, the respondent *prima facie* infringed the appellant's freedom of expression. As will be explained below, however, the actions of the respondent can be justified under section 1.

[97] The residents also submit that unlike Fraser Health Authority and the Committee for the Commonwealth of Canada, this is a matter where the impugned right is a right to security of the person and life and their Charter rights create a live issue so that the appropriate test is the *RJR-MacDonald* test.

[98] I reject the analogy of the VFPA lands to areas of parklands, airports, or Parliament Hill. The VFPA lands are private property and not intended for public use, other than by licence, and the use being made of them by the residents is not permitted under the Regulations.

[99] I see no basis to distinguish an alleged s. 7 Charter right to occupy non-public areas from an alleged s. 2(b) Charter right to do so.

Fair Question to be Tried

[100] The plaintiff is seeking injunctive relief. As the party seeking an injunction, it has the burden under the *RJR-MacDonald* test to satisfy me that there is a fair question to be tried.

[101] The threshold at this stage is a low one. The plaintiff brought an action under the common law tort of trespass. Trespass is actionable *per se*; it does not require proof of intent. On that basis, there is a fair question to be tried as to whether the residents are trespassing.

Irreparable Harm

- [102] The residents argue that the benefits of leaving the encampment are numerous and include improved physical and mental health, improved access to services, physical safety and safety of possessions. They further submit that a sense of community, in the absence of appropriate alternatives, should not be disturbed. These considerations are especially critical in light of the current public health crisis. An injunction here would mean the displacement of the residents who would then fan out throughout the community as there are no alternative housing places for them at this time.
- [103] Due to the suspension of the cruise ship season as a result of the COVID-19 pandemic, I find that the speculative prospect of the alternative uses raised by the plaintiff is an insufficient basis for a finding of irreparable harm.
- [104] While the VFPA lands were said to be sterile prior to their occupation by the residents, the evidence before me is that that sterilization has already been disturbed. I accept that the continuation of the occupation of the lands could worsen this effect, but the evidence does not establish that that will necessarily occur.
- [105] I accept that the health and safety concerns that persuaded the Minister of Public Safety and Solicitor General to issue the Ministerial Order have simply been transplanted from the Park to the VFPA lands by the migration of individuals from the Park to the VFPA lands, and that the encampment there will result in inconvenience to others lawfully resident in the neighbourhood and in cleanup expenses to the plaintiff.
- [106] If the encampment were permitted to continue, the plaintiff will be required to provide some level of management over those in the encampment, pursuant to s. 3 of the Occupiers Liability Act, R.S.B.C. 1996, c. 337.
- [107] But most importantly, as discussed above, the plaintiff is entitled to the use of its land. The residents have no apparent means of indemnifying the plaintiff for any restoration, maintenance, or supervisory costs associated with the property. In my view this amounts to irreparable harm.

Balance of Convenience

- [108] The lands in question are not and have not been available for unlicensed public use.
- [109] The authorities to which I have referred above that have addressed the use of public parks by the homeless do not afford the homeless a licence to choose wherever they wish to set up an encampment, nor permit encampments which are unsafe.
- [110] The Ministerial Order asserts, in part, that in consultation with the City of Vancouver, the Province has developed a comprehensive plan to provide adequate alternative living arrangements and other health and social supports for persons previously residing in the Park encampment, including the care of their personal property.

- [111] I find that the movement of some individuals from the Park encampment to the VFPA lands defeats the intention of the Ministerial Order and gives rise to the same public health and safety concerns and risks that the Order was intended to address.
- [112] As part of the evacuation of the Park, the Province took steps to ensure adequate accommodation and support was made available to those people evacuated. The evidence of Mr. Dominic Flanagan, Executive Director of Strategic Initiatives on Homelessness at BC Housing, is that of the approximately 300 individuals experiencing homelessness around the Park, more than 270 accepted offers of accommodation and moved into indoor spaces including hotels, hostels and supportive housing. About a dozen of the campers declined offers of accommodation or were ineligible because they have housing.
- [113] Mr. Flanagan swore that currently there is emergency accommodation available, and outreach services to make connections with the homeless amongst the residents to facilitate access to housing options and a wide range of services.
- [114] As alternate housing can and is being made available to those at the VFPA lands who have migrated there from the Park, the need for them to be at the VFPA lands has not been established.
- [115] I find that the balance of convenience weighs in favour of granting an injunction, that the RJR-MacDonald test has thus been met, and that an injunction should issue on that basis as well.

Terms of the Proposed Order

[116] The form of order proposed by the plaintiff is:

1. The defendants and any person having notice of this Order shall, within 3 days of the date of this Order shall:
 - a) Vacate and cease occupation of that part of the property located at 101 West Waterfront Road, Vancouver, B.C. legally described as:

Parcel Identifier: 024-041-254

Lot D of the Public Harbour of Burrard Inlet New Westminster District Plan LMP36518

being that area outlined in red on Schedule "A" to this Order (the "Occupied Area");

- b) Remove all tents, shelters, personal chattels, rubbish, and other things in the "Occupied Area";
- c) Refrain from re-entering the Occupied Area except as authorized by the VFPA.

2. Upon the expiry of three days from the date of this order, the VFPA, through its employees, agents or contractors, shall be authorized to remove, store, or dispose of all tents, shelters, personal chattels, rubbish, and any other things remaining on the VFPA Lands in contravention of this Order.
 3. The Vancouver Police Department, or the appropriate police authority in the jurisdiction in question (collectively the "Police"), are hereby authorized to arrest and remove from the Occupied Area any person who has knowledge of this order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of this order or is interfering with or obstructing, or is attempting to interfere or obstruct, any employee or agent of the VFPA who is seeking to remove any structures, tents, shelters, objects and things owned and constructed, maintained, placed or occupied by the defendants in the Occupied Area in accordance with this order.
 4. It is further ordered that:
 - a) the Police retain discretion as to the timing and manner of enforcement of this order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to this Order;
 - b) the Police retain discretion to detain and release any person without arrest who the Police have reasonable and probable grounds to believe is contravening or has contravened any provisions of this order, upon that person agreeing in writing to abide by this order and/or requiring that person to appear before this Court at Vancouver, British Columbia or such other place as may be directed by this Court, on a date to be fixed by this Court;
 - c) the Police retain discretion to arrest or detain any person who the Police have reasonable and probable grounds to believe is contravening or has contravened any provisions of this order and detain that person in custody until such time as it is possible to bring that person before this Court; and/or, otherwise take steps in accordance with Form 11.1 of the Criminal Code, R.S.C. 1985, c. C-46.
 5. This order shall remain in effect until the trial or other disposition of this action or until further order of this Court.
 6. The requirement that the defendants approve of the form of this order is dispensed with.
- [117] I am prepared to grant an interlocutory injunction in the terms set out in terms 1, 2 and 6 of the draft order.
- [118] Insofar as term 5 is concerned, the order shall remain in effect for 15 days from today's date. The plaintiff may apply to further extend that order within those 15 days, upon proof that legitimate attempts have been made to enforce my order.
- [119] Terms 3 and 4 of the draft order are, in effect, orders requiring members of the Vancouver Police Department to enforce the order that I am granting.

[120] While police enforcement orders are sometimes granted in the civil and family law context, some judges have taken the view that such enforcement orders are unnecessary because the police already have a duty to uphold orders. Mr. Justice Vickers, in dealing with an application for an injunction, held in *Finning Ltd. v. U.M.W.*, (1992) 10 C.P.C. (3d) 17 (B.C.S.C.), at para. 2:

I want to say for the record that orders of this court should be enforced without an enforcement order. The police authorities have a public duty, as well as a duty to this court, to enforce its orders without any further direction I repeat, I remain of the view that court orders should not have enforcement provisions because it is the duty of the police to enforce them without any further direction.

[121] In *Ochiichagwe'babigo'ining First Nation Council v. Beardy*, (1996) 1 C.P.C. (4th) 276 (Ont. Gen. Div.) at para. 21, Mr. Justice Stach wrote:

It is a fundamental proposition that a court order in the nature of an injunction is immediately enforceable and that the order must be obeyed until it is varied by the court which made it or on appeal. [per Esson C.J. as cited in *Canada Post Corp. v. C.U.P.W.* (1991), 6 C.P.C. (3d) 105, by B.D. Macdonald J. at 117 (B.C. S.C.)]. Police authorities already have a public duty as well as a duty to this court to enforce the court's orders without an enforcement order and without any extraordinary direction. [*Finning Ltd. v. U.M.W.* (1992), 10 C.P.C. (3d) 17 (B.C. S.C.), per Vickers J. at 18].

[122] Counsel for the plaintiff provided me with a number of authorities addressing what have come to be referred to as enforcement orders. He differentiated between older authorities such as *British Columbia (Attorney General) v. Mount Currie Indian Band*, [1990] B.C.J. No. 2279, where at para. 41, Chief Justice Esson declined to include such a clause in an injunction order on the basis that it might be seen as assuming that the order would not otherwise be complied with. When the matter was further considered by Chief Justice Esson ([1990] B.C.J. No. 2901), he accepted that such clauses appeared to have become "common" but that such a clause should not be considered a "usual" term.

[123] A similar view was expressed by Mr. Justice Macdonald in *Canada Post Corp. v. Canadian Union of Postal Workers (CUPW)*, [1991] B.C.J. No. 3444.

[124] In *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, at para. 41, Madam Justice McLachlin, as she then was, commented that:

The appellant Valerie Langer has questioned the appropriateness of including a provision authorizing the police to arrest and detain persons breaching the injunction. She argues that no authorization or direction from the court is necessary to enable the police to act. The respondent accepts that the authorization is superfluous, and states that it is included only because the police have requested such wording. No objection to this term was made before Hall J. and it is not suggested that it vitiates the order. In these circumstances, this Court need not consider it further. I observe only that the inclusion of police authorization appears to follow the Canadian

practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

[Emphasis added]

[125] In *West Fraser Mills v. Members of Lax Kw'Alaams*, 2004 BCSC 815, Madam Justice Gerow included a police enforcement order in her interim injunction, reasoning at para. 26 that:

Although enforcement orders such as the one sought here are not automatically granted I have considered the large number of potential participants in a roadblock, the remoteness of the area, identification difficulties and the position of the RCMP that they will not act without an order directing them to do so and have concluded that such an order is appropriate. *Canada Post Corp. v. Canadian Union of Postal Workers (CUPW)*, [1991] B.C.J. No. 3444 (S.C.).

[126] Similar reasoning was applied by Mr. Justice Blair in the context of the occupation of an elementary school in *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v. Van Osch et al*, 2004 BCSC 1827.

[127] In *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629, Mr. Justice Skolrood declined to include a police enforcement term in his order granting an interlocutory injunction to enjoin the continuation of a protest camp on property located at the petitioner's City Hall. When the matter came back before him for a final order, he wrote at para. 139:

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

[128] Some of the factors that persuaded Gerow J. to include an enforcement order in her injunction in *West Fraser Mills Ltd.* exist to some extent in the case before me.

[129] The encampment here is in an urban area. I have evidence of a relatively modest number of individuals at the encampment, but some suggest that the numbers could swell. Identification of those at the encampment will be challenging, but given my injunction, all can be dealt with at the encampment.

[130] I have difficulty with the notion that any police officer in any police force would advise a Court that its members would not act to enforce an order of the Court without an order directing them to do so. Counsel for Chief Constable Palmer advised me that the Chief Constable is not such an officer, and that the Vancouver Police Department do not say that they will not enforce any injunction I issue without a term for the enforcement of the injunction.

[131] Thus, while I accept that this Court has the power to grant a police enforcement order if the circumstances require, it is my view that enforcement orders ought to be made only in extraordinary circumstances. Such an order in this case is unnecessary because of the advice of the Chief Constable of the Vancouver Police Department. I will therefore decline to include such a term in my order.

"The Honourable Chief Justice Hinkson"

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