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A NO HOPE GUARANTEE: THE CRUEL AND UNUSUAL TREATMENT OF VICTORIA'S BYLAW IMPOUND SCHEME

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ABSTRACT

Since the inclusion of section 12 in the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), much has been written about cruel and unusual punishment. However, relatively little attention has been paid to the issue of cruel and unusual *treatment*. As society becomes increasingly regulated and individuals interact with government through administrative bodies with broad discretion, clearer protections against cruel and unusual treatment are necessary to fully realize the intent of the *Charter* right. Over the past two decades, the City of Victoria has progressively restricted the use of public spaces by individuals experiencing homelessness. While these restrictions have been challenged under various *Charter* provisions, section 12 has rarely been considered. The 2023 amendments to the City of Victoria's public space bylaws offer a timely opportunity to consider the application of section 12 in the context of non-punitive administrative decisions that amount to government treatment. Although the test for cruel and unusual treatment requires further clarification, Victoria's bylaw scheme underscores the need for section 12 analyses to more explicitly address government treatment, or risk neglecting the *Charter*'s dignity-centred focus.

* Nicholas Olson completed his law degree at the University of Victoria in December 2024. He would like to thank the community members and people with lived and living experience whose ideas and resistance shaped the ideas in this paper.

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INTRODUCTION

In a nation-wide housing crisis that manifests in increasing levels of visible homelessness, municipal regulations have an immediate impact on individuals forced to shelter on municipally owned public property. For example, in British Columbia, the City of Victoria (the "City"), has recently intensified its regulation of public space and how it is used by the unhoused community.[1] To do so, the City has taken measures such as adding parks to the list of prohibited sheltering areas,[2] and updating bylaws that regulate personal property on City-owned land. In December 2023, Victoria City Council passed several new bylaws which attempt to clarify law enforcement's authority to seize and destroy items occupying public space (the "Bylaw Impound Scheme").[3] These amendments continue to allow for the destruction of survival-related items such as tents and sleeping bags. Research shows such actions contribute to increased risks of overdose and death among the unhoused population.[4]

Municipal decisions that disproportionately harm the unhoused community have primarily been challenged through section 7 of the *Charter*,[5] which guarantees the right to life, liberty, and security of the person. Although past litigation has invoked various other *Charter* rights,[6] section 7 has proven effective in upholding the rights of people who rely on public space.[7] However, its analysis of gross disproportionality when considering the principles of fundamental justice requires a comparison between the rights infringement and the *objective* of the law.[8] This approach pits the dignity and rights of the unhoused against the interests of

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1 When referring to "public space" or "public property," this paper is focussing on municipally owned lands such as parks and sidewalks. Other forms of public property owned by different levels of government are outside of the scope of this paper.

2 Since 2015, the number of parks that had been closed to sheltering grew from one to twenty-four. See City of Victoria, by-law No 23-070, *Parks Regulation Bylaw, Amendment Bylaw (No. 18)* (2 Nov 2023); City of Victoria, by-law No. 24-038, *Parks Regulation Bylaw, Amendment Bylaw (No. 07-059)* (4 July 2024).

3 Chad Pawson, "City of Victoria streamlines impounding rules, drawing concern from poverty advocate", *CBC News* (16 December 2023), online: www.cbc.ca/news/canada/british-columbia/impounding-city-of-victoria-homelessness-belongings-1.7061103 [perma.cc/8DFA-YGPD].

4 Jamie Suki Chang et al, "Harms of encampment abatements on the health of unhoused people" (December 2022) 2 SSM - Qualitative Research in Health, 100064 at 2667-3215, online: <doi.org/10.1016/j.ssmqr.2022.100064>; Bailey Seymour, "Outreach workers: 9 people dead in downtown Victoria in past week", *Saanich News* (19 November 2024), online: <www.saanichnews.com/local-news/outreach-workers-nine-people-dead-in-downtown-victoria-in-past-week-7656800> [perma.cc/6MZU-MHPD].

5 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 See Sarah Ferencz et al, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 McGill L J 369. For section 15 equality rights see *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz*].

7 *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams 1*]; *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams 2*]; *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 101 [*Waterloo*]; *Vandenberg v Vancouver (City) Fire and Rescue Services*, 2023 BCSC 2104 at para 155 [*Vandenberg*].

8 *Canada (Attorney General) v Bedford*, 2013 SCC 72, para 123 [*Bedford*].

housed neighbours and the municipality's power to regulate public space, further entrenching conflicts between these groups. Scholars and advocates such as Dr. Yun Liew and Emily Knox have proposed alternative approaches to resolving this issue: using anti-discrimination provisions in the *Charter* or other quasi-constitutional legislation,[9] or focusing on flexible remedies to bridge these gaps.[10] However, discrimination-focused provisions, such as section 15 of the *Charter* or provincial human rights codes, are limited by the requirement to demonstrate a direct link between adverse treatment and a protected identity. Establishing this link is particularly difficult in facially neutral bylaws such as the Bylaw Impound Scheme where the bylaws are applied against all residents and corporate entities, as well as individuals who live unhoused. Further difficulties arise in jurisdictions such as British Columbia ("BC") where homelessness and poverty are not protected grounds of social condition.[11]

For these reasons, this paper focuses on Section 12 of the *Charter*, which provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Section 12 has been extensively debated in the criminal law context, particularly with regard to sentencing and *punishment*. However, it has received limited attention in the context of *treatment*, that is, state intervention outside the penal context. As it currently stands, section 12 has been criticized by Dr. Jamie Cameron as "little more than a faint hope guarantee": a narrow, stringent test applied to only a small subset of government actions.[12] Without a broader application, section 12 risks becoming a no hope guarantee.

Using the City's Bylaw Impound Scheme as an example, this paper argues for a broader application of section 12 in administrative decisions that amount to treatment. Part I outlines the regulatory framework of the Bylaw Impound Scheme and highlights its effects on individuals who rely on public space for survival. Part II compares how section 12 has been applied to *punishment* versus how it has been applied to *treatment*, using the Bylaw Impound Scheme as a test case. Applying leading section 12 principles, the Bylaw Impound Scheme is an example of a regulatory framework that violates human dignity to the point of being cruel and unusual treatment.

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9 Emily Knox, Jeanne Mayrand-Thibert & Michelle Pucci, "Ticketing Poverty: An Analysis of The Discriminatory Impacts of Public Intoxication By-Laws on People Experiencing Homelessness in Montreal" (2023) Dal J Leg Stud 157.

10 Jamie Chai Yun Liew, "Finding Common Ground: Charter Remedies and Challenges for Marginalized Persons in Public Spaces" (2012) 1:1 Cdn J of Poverty L.

11 See Knox, *supra* note 9 at 173. Social condition is a protected ground in other jurisdictions such as Manitoba, New Brunswick, Quebec, and Northwest Territories. See also Knox, *supra* note 9 at 195.

12 Jamie Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" (2008), 40 SCLR (2d) 553 at 588.

I. THE BYLAW IMPOUND SCHEME

A. The Regulatory Framework

The *Parks Regulation Bylaw*[13] ("*Parks Bylaw*") and *Streets and Traffic Bylaw*[14] ("*Streets Bylaw*") regulate the personal belongings of individuals experiencing homelessness on City-owned land. Prior to 2009, these bylaws prohibited erecting a shelter to protect a person from the elements on public property across the city.[15] In the 2009 decision in *Victoria (City) v Adams*,[16] the BC Supreme Court ("BCSC") held that when there are no indoor shelter alternatives available, this bylaw violated a person's section 7 *Charter* right to life, liberty, and security of the person. Following this decision and its affirmation by the BC Court of Appeal ("BCCA"), the *Parks Bylaw* was amended to permit overnight sheltering in designated city parks,[17] providing some protection for personal property. For example, if a "homeless person,"[18] as defined by the *Parks Bylaw*, shelters within the specified times and areas outlined in the bylaw, the City generally cannot impound their personal belongings. In contrast, the *Streets Bylaw* prohibits sheltering at any time,[19] thus allowing the City to seize property from sidewalks or storefronts. In practice, the bylaws are enforced and belongings are seized in both parks and on sidewalks during daytime hours.

In 2023, the Victoria City Council unanimously passed two new bylaws: the *Administration of Property in City Custody Bylaw*[20] ("*Property in Custody Bylaw*") and the *Miscellaneous Amendments Bylaw*[21] ("*Amendment Bylaw*"). The *Amendment Bylaw* modifies the *Parks Bylaw* and *Streets Bylaw*, and in conjunction with the *Property in Custody Bylaw*, has the purpose of establishing "consistent practices" and regulations regarding the removal, seizure and impounding of property in public places.[22] The City claims these changes enhance "clarity and transparency"[23] by unifying enforcement practices under a single bylaw.

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13 City of Victoria, by-law No 07-059, *Parks Regulation Bylaw* (14 December 2023) [*Parks Bylaw*].

14 City of Victoria, by-law No 09-079, *Streets and Traffic Bylaw* (14 December 2023) [*Streets Bylaw*].

15 *Adams 1*, *supra* note 7 at para 32.

16 *Adams 1*, *supra* note 7*; Adams 2*, *supra* note 7.

17 *British Columbia v Friends of Beacon Hill Park*, 2023 BCCA 83 at para 18.

18 *Parks Bylaw*, *supra* note 13, s 2.

19 *Streets Bylaw*, *supra* note 14, ss 102–103.

20 City of Victoria, by-law No 23-105, *Administration of Property in City Custody Bylaw* (7 December 2023) [*Property in Custody Bylaw*]. See Appendix A.

21 City of Victoria, by-law No 23-106, *Miscellaneous Amendments Bylaw (for Administration of Property in City Custody Bylaw)* (7 December 2023) [*Amendment Bylaw*]. See Appendix B.

22 City of Victoria, "Victoria City Council Chambers: Revised Agenda" (7 December 2023) online: <pub-victoria.escribemeetings.com/Meeting.aspx?Id=64280164-e88b-47b0-be92-7152dec0baef&Agenda=Merged&lang=English> [perma.cc/9LQB-2Z7F].

23 Shannon Perkins, "Committee of the Whole Report: Administration of Property in City Custody Bylaw" (28 November 2023) at 6, online: <pub-victoria.escribemeetings.com/filestream.ashx?DocumentId=94412> [perma.cc/6BM9-8A6H].

These bylaws, collectively referred to as the "Bylaw Impound Scheme",[24] empower City officials to remove, seize, and impound property unlawfully occupying[25] City-owned land, including parks,[26] streets, sidewalks, and other public spaces.[27] The *Property in Custody Bylaw* outlines the procedure for retrieving impounded belongings,[28] associated fees,[29] and conditions under which the City can dispose of impounded property.[30] While the Bylaw Impound Scheme includes mandatory compliance agreements, ticketing offences, and possible police involvement, this paper focuses on the City's authority to seize, impound, and destroy personal property, and the associated fees.

B. Effects of the Bylaw Impound Scheme

Impacts of the Bylaw Impound Scheme, both before and after the recent amendments, are evident in legal cases and reports. In *Victoria (City) v Adams*,[31] the BCSC and the BCCA recognized that the bylaws in force at the time which prevented individuals from erecting shelter and permitted City employees to impound belongings, exposed homeless individuals to a "risk of serious harm, including death from hypothermia."[32] Similarly, in *British Columbia v Adamson*,[33] the BCSC acknowledged that losing possessions to bylaw enforcement was a common experience among Victoria's unhoused population. The court quoted an encampment resident saying:

> On many occasions, I had my belongings thrown out by bylaw enforcement. This would happen when the bylaw officers found my camps during the day time. When this happened, I would have to start again from zero, find new clothes and buy or steal new hygiene products.

More recently, shortly following the enactment of the *Property in Custody Bylaw*, reports emerged of bylaw enforcement repeatedly seizing individuals' "last remaining personal belongings," including "clothes, tents, blankets, bike tires, and then the bike itself."[34]

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24 *Property in Custody Bylaw, supra* note 20; *Amendment Bylaw, supra* note 21; *Parks Bylaw, supra* note 13; *Streets Bylaw, supra no*te 14.

25 *Amendment Bylaw*, *supra* note 21, ss 4(a), 5(e).

26 *Parks Bylaw*, *supra* note 13, s 19.

27 *Streets Bylaw*, *supra* note 14, s 102(3).

28 *Property in Custody Bylaw*, *supra* note 20, s 5.

29 *Ibid*, s 6.

30 *Ibid*, ss 4, 5(2), 5(3).

31 See *Adams 1*, *supra* note 7*; Adams 2*, *supra* note 7.

32 *Adams 1*, *supr*a note 7 at para 142. See also *Adams 2*, *supra* note 7 at para 102.

33 *British Columbia v Adamson,* 2016 BCSC 584 at para 152. For other examples from this case, including City authorities seizing the entirety of a person's belongings including their personal identification documents, see Nicholas Olson & Bernie Pauly, "'Forced to Become a Community': Encampment Residents' Perspectives on Systemic Failures, Precarity, and Constrained Choice" (2022) 3:2 Intl J on Homelessness at 124 at 130.

34 Kori Sidaway, "Victoria council's new impound rules will make unhoused people suffer further, say outreach workers", *Chek News* (14 December 2023), online: <cheknews.ca/victoria-councils-new-impound-rules-will-make-unhoused-people-further-suffer-say-outreach-workers-1181157/> [perma.cc/Y4M7-4AXZ].

Despite recent changes to the Bylaw Impound Scheme, its core purpose and effects remain largely the same.[35] A report written by the Director of Bylaw Services, which recommended the adoption of the new bylaw scheme, suggested that the changes made to the scheme are modest and do not "expand impound authority."[36] Instead, the new iteration of the scheme claims to better address the well-being of those sheltering outside. For example, the *Property in Custody Bylaw* exempts "life-supporting items" from retrieval fees[37] in an attempt to "ensure that persons experiencing homelessness are not placed at undue risk as a result of impoundment."[38] However, the scheme still permits the seizure and destruction of life-supporting items,[39] along with the immediate destruction of certain items such as food and controlled substances.[40] Additionally, the new amendments result in an increasingly onerous retrieval process through a reduced impound duration from thirty to fourteen days.[41] The well-documented and ongoing harmful effects of the Bylaw Impound Scheme, juxtaposed with the City's supposed efforts to reduce "undue risk,"[42] underscore the value in exploring an analysis of the scheme's compliance with the *Charter*.

II. SECTION 12 – APPLICATION AND ANALYSIS

The concept of cruel and unusual punishment has been a core foundation of modern international and domestic rights frameworks for centuries. The concept has roots in the *Canadian Bill of Rights*;[43] international instruments, such as the *Universal Declaration of Human Rights*[44] and the *International Convention of Civil and Political Rights*;[45] and, even further back, "firmly grounded in the original English Bill of Rights of 1688."[46] However, a scan of Canadian jurisprudence and academic consideration of the language embodied in section 12 of the *Charter* demonstrates that most discussions and implementation of the section have been in relation to criminal charges and punishment, with a particular focus on mandatory minimum sentences.[47] Markedly less time or research has gone into the treatment aspect of section 12. This may be related to the "high bar"[48] and "stringent and demanding"[49]

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35 *Interpretation Act*, RSBC 1996, c 238, s 37(2).
36 Perkins, *supra* note 23 at 2.
37 *Property in Custody Bylaw*, *supra* note 20, s 6(3).
38 Perkins, *supra* note 23 at 5.
39 *Property in Custody Bylaw, supra* note 20, s 5(2).
40 *Ibid*, ss 2, 4.
41 Perkins, *supra* note 23 at 6.
42 *Ibid* at 5.
43 *Canadian Bill of Rights,* SC 1960, c 44, s 2(b).
44 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 5.
45 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976, accession by Canada 19 May 1976).
46 Michael Jackson, "Cruel and Unusual Treatment or Punishment" (1982) UBC L Rev 189.
47 *Quebec (Attorney General) v 9147-0732 Quebec Inc*, 2020 SCC 32 at para 63 [*9147-0732 Quebec*].
48 *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at para 9 cited in *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 530.
49 *Steele v Mountain Institution,* 1990 CanLII 50 (SCC) at 1417.

requirements of finding cruel and unusual punishment, a principle put into place so as not to "trivialize the Charter."[50]

In 2020, Justice Brown (as he then was) and Justice Rowe of the Supreme Court of Canada ("SCC") explained the purpose of section 12 as protecting human dignity by "prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment."[51] Two years later, Chief Justice Wagner of the SCC expanded on what human dignity is, making it clear that "the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect" and that "[t]his respect is owed to every individual, irrespective of their actions."[52] Although these quotes were taken from punishment-centred decisions, the recent focus on dignity in SCC jurisprudence provides a critical backdrop when applying section 12 to administrative decisions, such as the Bylaw Impound Scheme. The BCCA has specifically addressed the impact of such schemes on dignity, stating that preventing homeless individuals from using basic forms of overhead protection is a "significant interference with their dignity and independence."[53] However, much of the discussion around dignity in the context of bylaws impacting unhoused populations has centred around section 7 analyses.[54] Sections 7 and 12 have been understood to be closely connected based on their mutual consideration of human dignity, the ways that punishment is often linked to security of the person and liberty considerations, and the consideration of fault in the analysis.[55] This suggests that bylaws which violate human dignity under section 7 are likely to violate human dignity under section 12 as well.

Broadly, the test for applying section 12 requires two steps: (1) determining whether the government action constitutes punishment or treatment,[56] and (2) determining whether that punishment or treatment is either (i) cruel and unusual by nature, or (ii) grossly disproportionate.[57] A review of the existing tests for cruel and unusual treatment or punishment in relation to the Bylaw Impound Scheme reveals a lack of coherence and applicability to government action that amounts to treatment. This lack of clarity highlights the need for a reconsideration of how the rights protected by section 12 should be interpreted and protected.

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50 *Ibid*. For consideration of how the constitutional right to be free from cruel and unusual punishment has been applied in US courts in the context of municipal bylaws prohibiting life-sustaining activities and use of bedding in public space, see, respectively, *Pottinger v Miami*, 810 F Supp 1551 (SD Fla 1992); *Johnson v City of Grants Pass,* 50 F4th 787, 813 at 4, 40 (9th Cir 2022).

51 *9147-0732 Quebec*, *supra* note 47 at para 51, unanimous on this point.

52 *R v Bissonnette*, 2022 SCC 23 at para 59 [*Bissonnette*].

53 *Adams 2, supra* note 7 at para 109 [emphasis added].

54 *Shantz, supra* note 6 at para 246. See also *R v Morgentaler*, 1988 CanLII 90 at 166 (SCC).

55 Cameron, *supra* note 12 at 558.

56 *Rodriguez v British Columbia (Attorney General)*, 1993 CanLII 75 at 608–609 (SCC) [*Rodriguez*].

57 *Bissonnette*, *supra* note 52 at paras 61, 64, 69.

A. Punishment and Treatment

i. Punishment

The SCC established the legal test to determine whether government action is "punishment" in 2016.[58] First, the action must be "a consequence of conviction" and part of the available sanctions for a particular offense.[59] Second, the action must either be "imposed in furtherance of the purpose and principles of sentencing" or "significantly impact" an offender's "liberty or security interests."[60]

Regarding the first step, the language of "conviction" connotes a "deliberated *judicial* decision"[61] leading to a determination of guilt,[62] which suggests a penal or at least quasi-penal setting. Although fines have recently been confirmed as a form of punishment,[63] one of the purposes of the *Property in Custody Bylaw* is to "allow for the City to *recover* costs associated"[64] with impoundments. This suggests that the fees associated with the scheme are not intended to penalize non-compliance. Further, the fact that fees are not judicially determined suggests that they are not intended to be punitive in nature. As a result, the concept of punishment would not apply to the Bylaw Impound Scheme which lacks any form of judicially determined conviction.[65] Additionally, the SCC has stated that *treatment* within the context of section 12 "*may* include"[66] contexts outside a penal or quasi-penal nature, suggesting that the concept of punishment is almost certainly understood to apply exclusively to a penal context. Given these considerations, along with the fact that "punishment" has been prioritized in past discussions regarding section 12 rights, this paper focuses on how the Bylaw Impound Scheme is more likely to be considered under the concept of "treatment" and the limitations that exist in this application.

ii. Treatment

Although the concept of "treatment" has been found to encompass a broad range of government actions such as deportation,[67] immigration detention for non-punitive reasons,[68]

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58 *R v KRJ*, 2016 SCC 31 at para 41.

59 *Ibid*.

60 *Ibid*.

61 Steve Coughlan, John A Yogis & Catherine Cotter, *Barron's Canadian Law Dictionary,* (Hauppage, NY: Barron's Educational Series Inc, 2013) sub verbo "adjudication" at 11 [emphasis added].

62 *Ibid* sub verbo "conviction" at 78.

63 See *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

64 *Property in Custody Bylaw*, *supra* note 20, Preamble [emphasis added].

65 Regarding the second step of the punishment test, the purpose of deterrence of the Bylaw Impound Scheme is discussed in Perkins, *supra* note 23 at 5. For caselaw regarding security interests being engaged through displacement of encampments and subsequent loss of belongings, see *Waterloo*, *supra* note 7 at paras 96–97; *Vandenberg, supra* note 7 at paras 145–55; *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 194 [*Bamberger*].

66 *Rodriguez*, *supra* note 56 at 611 [emphasis added].

67 *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 at 735 (SCC) [*Chiarelli*].

68 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 95–98.

and DNA sampling,[69] the SCC has not laid out a general legal definition of the term in connection to section 12 of the *Charter*.[70]

In *Rodriguez v British Columbia (Attorney General)* ("*Rodriguez*"),[71] the SCC considered section 241(b) of the *Criminal Code* which precluded a terminally ill person from accessing medical assistance in dying. Here, the Court found the provision did not qualify as "treatment."[72] *Rodriguez* determined that while treatment may apply outside of a penal or quasi-penal context,[73] for government action to amount to treatment, it must involve "enforcing a state administrative structure."[74] Additionally, there must be some "active state process in operation, involving an exercise of state control over the individual."[75]

The *Rodriguez* framework suggests that, on its face, the Bylaw Impound Scheme would likely align with the Court's concept of treatment. *Rodriguez* stands for the proposition that a prohibition "without more"[76] may not amount to treatment. While the Bylaw Impound Scheme includes a prohibition on leaving property on City land, the City's ability to seize, impound, and destroy people's personal belongings, with provisions that restrict retrieval with fees and signing a mandatory "compliance agreement,"[77] should be understood to meet the *Rodriguez* "something more" requirement.

Moreover, in *R v Montague* ("*Montague*"),[78] the forfeiture of weapons was determined to be a form of treatment, even though it was intended as deterrence.[79] This suggests that a seizure of belongings, which the head of Bylaw Services claimed is a form of deterrence,[80] would similarly be considered treatment. Likewise, in *Canadian Doctors for Refugee Care v Canada (Attorney General)* ("*Canadian Doctors*"),[81] an administrative immigration regime was found to be treatment by restricting the rights of refugee claimants.[82] Impounding belongings similarly has implications on one's rights and opportunities in ways that align with the administrative scheme in *Canadian Doctors*. By enacting powers granted to it under the *Community Charter*,[83] the Bylaw Impound Scheme enforces an administrative structure likely rising to the point of being considered "state control over [an] individual."[84]

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69 *R v Rodgers*, 2006 SCC 15 at para 63.

70 Department of Justice Canada, "Section 12 – Cruel and unusual treatment or punishment" (13 August 2024), online: <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html> [perma.cc/HZ97-YKJL].

71 *Rodriguez*, *supra* note 56.

72 *Ibid* at 612.

73 *Ibid* at 611.

74 *Ibid* at 610.

75 *Ibid* at 610–12.

76 *Ibid* at 611.

77 *Property in Custody Bylaw*, *supra* note 20, s 6(5).

78 *R v Montague,* 2014 ONCA 439 at para 38 [*Montague*].

79 *Ibid* at para 52.

80 Perkins, *supra* note 23 at 1, 4, 5.

81 *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 [*Canadian Doctors*].

82 *Ibid* at para 585.

83 *Community Charter,* SBC 2003, c 26, s 8(3)(b).

84 *Rodriguez*, *supra* note 56 at 612.

Framing treatment solely around prohibitions and positive or negative state action risks unduly narrowing the section 12 right and its dignity-focused purpose. *Rodriguez* contemplates that even "positive action"[85] may not amount to treatment without a "more active state process"[86]; a test nearly impossible to meet. An alternate concept of treatment was considered by the Federal Court in *Canadian Doctors* where treatment could be based on whether the government "could be held responsible for the applicant's suffering, rather than on whether the conduct in issue constituted positive or negative state action."[87] Similarly, in *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)* ("*Prairies Tubulars*"), the Federal Court suggested that government actions which implicate "personal freedoms fundamentally connected to the concept of human dignity" are more likely to rise to the level of treatment.[88] Such an approach that acknowledges the suffering and impact on dignity by state action, distinguishes treatment sufficiently from a conviction-centered notion of punishment. Accordingly, this interpretation aligns with the SCC's stated purpose of section 12 which is to prevent the state from "inflicting physical or mental pain and suffering."[89] Additionally, this interpretation of section 12 removes overwrought analysis of negative actions, positive actions, and prohibitions. In the context of the Bylaw Impound Scheme, this alternate framework would ensure that the scheme is considered treatment, even if it does not meet the more restrictive tests based on negative state action or determinations of quasi-judicial decisions.

iii. Laws of General Application

Laws of general application are typically excluded from the scope of "treatment" under section 12, even if they have an adverse differential impact on specific individuals or groups.[90] In the municipal context, the BCSC has stated that a municipal bylaw does not need to be "absolutely universal" [91] to be considered a law of general application. Bylaws fall outside this category of general application only if they have "a degree of specificity, limited application, and exception."[92] The Bylaw Impound Scheme, and particularly the *Property in Custody Bylaw*, could be considered a law of general application as it applies to any person and their belongings on City property, and not exclusively to people experiencing homelessness. This is also demonstrated by the Bylaw's explicit regulation of commercial property.[93]

Determining whether the bylaws within the Bylaw Impound Scheme could be considered laws of general application is an important step in the current approach to treatment in section 12. However, this approach to section 12 leads to inherent limitations for three key reasons.

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85 *Ibid.*

86 *Ibid.*

87 *Adam, R (on the application of) v Secretary of State for the Home Department*, [2005] UKHL 66, cited in *Canadian Doctors*, *supra* note 81 at para 602.

88 *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2021 FC 36 at para 82 [*Prairies Tubulars*].

89 *9147-0732 Quebec*, *supra* note 47 at para 51.

90 *Rodriguez*, *supra* note 56 at 611; *Canadian Doctors*, *supra* note 81 at para 586.

91 *Martin Corp v West Vancouver (District)*, 85 BCLR (2d) 305 at para 37, 1993 CanLII 1390 (BCSC) [*Martin Corp*].

92 *Ibid.*

93 See *Property in Custody Bylaw*, *supra* note 20, s 6(4).

First, although a law of general application can be universal and general in form, by nature it may disproportionately impact a certain population. For example, the Bylaw Impound Scheme is inevitably more regularly enforced against individuals experiencing homelessness who rely on City-owned property for survival and have nowhere else to store their belongings, including essential survival-related items. In *Cheung v Canada (Minister of Employment and Immigration)*,[94] the Federal Court of Appeal ("FCA") stated that "[c]loaking persecution with a veneer of legality does not render it less persecutory."[95] Similarly, if a government entity could immunize itself from section 12 scrutiny by merely framing a law as general, even if it disproportionately targets marginalized groups, it would undermine the dignity-focused purpose of section 12 and the *Charter*.[96]

Second, laws of general application could *implicitly* have a limited application, both through the contents of the bylaw and the historical context in which it is drafted. For example, the *Property in Custody Bylaw* includes several provisions and definitions that suggest the bylaw will be predominately enforced against certain populations. Terms such as "homeless person," "shelter," "bulky item" (which includes shelter), and "life-supporting item[s]" are explicitly defined and used throughout the bylaw.[97] Yet, while the bylaw also regulates "commercial property,"[98] it offers no definition or explanation as to what this term might include. This drafting style, coupled with the historical context of City concerns regarding the amount of property seized from people experiencing homelessness,[99] suggests that bylaws can explicitly be general, while implicitly having "specificity [or] limited application."[100]

Finally, in *Prairies Tubulars*,[101] the Federal Court stated that laws of general application, including those imposing positive obligations such as paying outstanding fees, do not amount to treatment. However, this interpretation stems from *Rodriguez*, a case which was explicitly referring to laws of general *prohibition*, citing examples of the *Criminal Code* and the since-repealed *Narcotics Control Act*.[102] Laws of general application that amount to positive state actions such as a tax or seizing belongings, were not contemplated in *Rodriguez,* and thus a blanket interpretation that all laws of general application are not treatment cannot be applied.

The Bylaw Impound Scheme exemplifies the limitations of applying current case law to the treatment portion of the section 12 assessment. In a complex society increasingly regulated by administrative decision makers, a broad and undefined definition of treatment and an overbroad and restrictive reliance on laws of general application fences section 12 into an exclusively punitive application. This risks missing both the purpose of the section, and the

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94 *Cheung v Canada (Minister of Employment and Immigration)*, 1993 CanLII 2946 (FCA).

95 *Ibid* at 323i.

96 See *Bissonnette*, *supra* note 52.

97 *Property in Custody Bylaw*, *supra* note 20, ss 2, 6(3).

98 *Ibid*, s 6(4).

99 Katie Derosa, "Victoria police investigating suspected 'chop shop' in Beacon Hill Park", *Times Colonist* (14 July 2020), online: <timescolonist.com/local-news/victoria-police-investigating-suspected-chop-shop-in-beacon-hill-park-4682702> [perma.cc/2WWR-B8QJ]

100 See *Martin Corp*, *supra* note 91.

101 *Prairies Tubulars*, *supra* note 88 at para 80.

102 *Rodriguez*, *supra* note 56 at 611.

broader purpose of the *Charter*. If law enforcement interactions that result in seizure and destruction of personal belongings on a regular basis are not considered state control over an individual because they apply universally, then the test for treatment loses its relevance.

B. The Two Prongs of Cruel and Unusual

Cruel and unusual treatment or punishment can be assessed under two prongs: (i) cruel by nature, or (ii) grossly disproportionate.[103] Although there are subtle differences between the two, both prongs consider whether the treatment is "incompatible with human dignity" or an "outrage to standards of decency."[104] While much of the legal framework for section 12 was developed by the SCC in the context of mandatory minimum sentencing,[105] appellate-level courts have adapted these principles to assess gross disproportionality in non-punitive government actions. Under this approach, the Bylaw Impound Scheme should be considered cruel and unusual.

If a *Charter* right is violated, the analysis would then move to section 1 of the *Charter* to determine if that right is subject to "reasonable limits."[106] Recent SCC decisions suggest that it would be difficult to justify a violation of section 12 under section 1.[107] As such, this portion of the analysis will not be addressed in this paper.

i. Cruel by Nature

Punishment or treatment is intrinsically cruel, or cruel by its very nature, if the "particular *form*"[108] of treatment is contrary to human dignity. In *R v Bissonnette*, the SCC relates this analysis to the "Canadian criminal context"[109] making it somewhat unclear whether this prong is reserved only for a "narrow class of *punishments*."[110] However, the Court similarly lists both punishments *and* treatments that have been found cruel by nature, including corporal punishment, lobotomization, castration, and torture.[111]

What is considered cruel and unusual by nature is contextual and evolves in line with societal changes. This is consistent with the principle that the Constitution is a "living tree capable of growth and expansion…to meet the new social…realities of the modern world."[112] For instance, in 1965, the Manitoba Court of Appeal in *R v Dick*[113] decided that corporal

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103 *Bissonnette*, *supra* note 52 at para 60.

104 Lisa Kerr & Benjamin Berger, "Methods and Severity: The Two Tracks of Section 12" (2020), 94 SCLR (2d) 235 at 239–40.

105 Although the caselaw is not explicit as to whether these prongs both apply to both punishment *and* treatment, the academic source in which the caselaw is rooted suggests that it applies to both (see Kerr and Berger, *ibid* at 235–36).

106 *Charter*, *supra* note 5, s 1.

107 *Bissonnette*, *supra* note 52 at para 121; *R v Nur*, 2015 SCC 15 at para 111 [*Nur*].

108 Kerr and Berger, *supra* note 104 at 239 [emphasis added].

109 *Bissonnette*, *supra* note 52 at para 67.

110 *Ibid* at para 64 [emphasis added].

111 *Ibid* at para 66.

112 *Ibid* at para 65 citing *Edwards v Attorney General for Canada*, 1929 CanLII 438 (UK JCPC).

113 *R v Dick, Penner and Finnigan*, 1964 CanLII 693 (MBCA).

punishment was not unusual punishment.[114] However, by 1982, the SCC determined that such actions "will always outrage our standards of decency" to the point of being cruel and unusual.[115] As such, the current context of a nation-wide housing crisis and a public health emergency of toxic drugs increasingly killing people experiencing homelessness,[116] must be taken into consideration when determining if the Bylaw Impound Scheme is cruel and unusual by nature.

The Bylaw Impound Scheme gives City officials the authority to seize and impound belongings,[117] immediately dispose of certain personal property,[118] and impose fees and other measures to retrieve one's belongings.[119] The effects of this state action can be considered when determining whether such treatment is cruel by nature.[120] While the effects of losing essential survival items could be devastating, the more general act of impounding property or imposing fees for an administrative process is unlikely to be seen as cruel and unusual by nature.

In *R v Boudreault*, the SCC determined monetary fines had a "valid penal purpose"[121] and thus, by their very nature, were not cruel or unusual. Similarly, in *Montague* and *R v Lambe*, the Courts of Appeal determined that the forced forfeiture of property does not amount to cruel and unusual treatment.[122] These cases suggest that courts are hesitant to limit the constitutionality of government entities' ability to generally seize property or levy fines. However, like other aspects of the treatment test, courts could offer greater clarity around whether non-penal government action can *ever* be caught under this part of the test. Given the very real and detrimental effects of having survival supplies confiscated, treatment should not be excluded from this branch despite its potentially limited application.

ii. Grossly Disproportionate

Even if the treatment is not cruel by nature, it can still be cruel and unusual if its *severity* is grossly disproportionate to the nature of the offence.[123] For example, in *Boudreault*, a victim surcharge fine was held to be cruel and unusual. In that case, the Court did not find the general act of levying a fine to be unconstitutional. Instead, the fine was found

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114 Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 589 at 595.

115 *R v Smith (Edward Dewey)*, 1987 CanLII 64 at 1074 (SCC) [*Smith*].

116 BC Coroners Service, Information Bulletin, "Sharp rise in deaths among people experiencing homelessness continues in 2022" (14 December 2023), online (pdf): <gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/news/2023/bccs_homeless_deaths_2023.pdf> [perma.cc/4WSM-76KT].

117 *Amendment Bylaw*, *supra* note 21, ss 4(1), 5(e).

118 *Property in Custody Bylaw*, *supra* note 20, s 4.

119 *Ibid*, ss 5, 6. Merely because bylaw officers could exercise discretion not to impound or destroy items, or that the impounded life-sustaining items can be released without a fee, does not necessarily preclude the impound or destruction from being cruel and unusual by the very nature of the actions. See *Bissonnette*, *supra* note 52 at para 68.

120 See Kerr & Berger, *supra* note 104 at 239.

121 *Boudreault*, *supra* note 63 at para 62.

122 See *Montague*, *supra* note 78 at para 51. See also *R v Lambe*, 2000 NFCA 23 at para 56.

123 *Bissonnette*, *supra* note 52 at para 62. See also Kerr & Berger, *supra* note 104 at 240.

to be cruel and unusual due to its grossly disproportionate effects on low-income and marginalized individuals.[124]

Charter test cases are often very fact dependent, yet the gross disproportionality analysis under section 12 can be determined either by (1) assessing the facts specific to the case at hand *or* by (2) assessing a reasonable hypothetical situation that could arise under the impugned law.[125] Under the second method of analysis, hypotheticals must be "reasonable" in view of the "range of conduct in the offence in question" and can consider certain personal characteristics.[126]

In this vein, this paper will present two hypothetical situations with which to consider whether the Bylaw Impound Scheme is grossly disproportionate.

1. First, a person with a substance use disorder who has their harm reduction supplies and drug of choice destroyed in the process of the Bylaw Impound Scheme being enforced ("Hypothetical #1").

2. Second, a person who is unable to comply with the bylaws because of a mobility-related disability and has their tent, sleeping bag, and mobility aid impounded ("Hypothetical #2").

In *Canadian Civil Liberties Association v Canada* ("*CCLA*"), the Ontario Court of Appeal ("ONCA") clarified that determining whether government action is grossly disproportionate is "an inherently comparative exercise."[127] When conducting an analysis of the principles of fundamental justice for a section 7 *Charter* analysis, gross disproportionality compares the rights infringement caused by the law with the objective of the law.[128] When determining gross disproportionality under section 12, it is less clear precisely what the impugned punishment or treatment should be compared to.

As previously noted, many of the case precedents discussing section 12 have been developed by the SCC in the context of criminal law. In these cases, gross disproportionality is a comparison between the mandatory minimum sentence and a fit and appropriate sentence considering the objectives and principles of sentencing.[129] However, the principles of sentencing do not neatly apply to non-punitive administrative decisions. Instead, in the context of administrative segregation in carceral spaces, the ONCA has developed a two-part approach to section 12 gross disproportionality modelled after the SCC mandatory minimum sentence case law.[130] In this approach, the court must first establish a "benchmark"[131] of what appropriate conditions or treatment would be. For example, in *Ogiamien v. Ontario* ("*Ogiamien*"),

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124 *Boudreault*, *supra* note 63 at para 110.

125 *R v Hills*, 2023 SCC 2 at paras 68-71 [*Hills*]. Reasonable hypotheticals have also been applied to non-criminal penalties as well, see *Canadian Doctors*, *supra* note 81 at paras 169, 641–42.

126 *Hills, supra* note 125 at para 77.

127 *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at para 86 [*CCLA*].

128 *Bedford*, *supra* note 8.

129 *Hills, supra* note 125 at para 4.

130 *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 [*Ogiamien*]; *CCLA*, *supra* note 127.

131 *Ogiamien, supra* note 130 at para 10.

the ONCA considered what would be "appropriate" or ordinary prison conditions.[132] Second, the court must assess the extent to which the impugned treatment departs from the benchmark ("*Ogiamien* Test"). In *Ogiamien*, for example, if the effects of a prison lockdown resulted in treatment grossly disproportionate to treatment under ordinary conditions, then section 12 would be violated.[133]

The factors outlined by the SCC for assessing whether government action is grossly disproportionate have also been developed in the context of mandatory minimum sentence cases.[134] However, it is less clear whether these factors apply similarly using the *Ogiamien* Test. In the 2023 decision of *R v Hills*, the SCC regrouped a wide range of factors to outline three key considerations to determine gross disproportionality: "(1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives."[135]

Numerous SCC decisions highlight the importance of comparing the punishment or treatment with the scope, nature, or seriousness of the offence,[136] as well as the effects of the treatment.[137] However, the ONCA has expressly stated that considering the purpose or reason of the government treatment is not consistent with the jurisprudence for treatment-related cases.[138] As such, this paper will focus on the two key factors in determining whether treatment is grossly disproportionate: the scope, nature, or seriousness of the offence and the effects of the treatment. Combining leading appellate-level decisions with case law from the SCC, the author suggests that the appropriate test for determining whether treatment is grossly disproportionate so as to be cruel and unusual is as follows:

1. First, the court must establish a benchmark of appropriate or ordinary conditions or treatment.

2. Second, the court should assess the extent the impugned treatment departs from that benchmark, considering:

   a. the scope and reach of the offence; and

   b. the effects of the treatment on the offender.

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132 *Ibid.*

133 *Ibid*.

134 Kerr & Berger, *supra* note 104 at 240.

135 *Hills, supra* note 125 at para 121. For a list of factors considered in a case where treatment has been found to be grossly disproportionate but was decided prior to the two prongs articulated in *Bissonnette*, see *Canadian Doctors*, *supra* note 81 at para 614. However, these factors have since been found not to apply to situations where discretion is permitted in the decision of treatment or punishment (see *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 at para 182).

136 *R v Goltz*, 1991 CanLII 51 (SCC) [*Goltz*]. See also *R v Konechny*, 1983 CanLII 282 (BCCA) [*Konecny*]; *R v Ferguson*, 2008 SCC 6 at para 13 [*Ferguso*n]*; R v CAM*, 1987 CanLII 128 (NSCA)*; R v CBA*, 2021 BCSC 2107.

137 *Smith*, *supra* note 115 at 1072: "the effect of that punishment must not be grossly disproportionate to what would have been appropriate"; *Goltz*, *supra* note 136 at 513*; Konecny*, *supra* note 136 at para 28.

138 *CCLA, supra* note 127 at paras 87–89, 96.

a. The "Benchmark" of Appropriate Treatment

The "benchmark" approach was established in ONCA decisions considering whether administrative segregation or lockdown of inmates in federal and provincial correctional institutions constitutes cruel and unusual treatment. In *Ogiamien*, the benchmark was defined as the "appropriate" and "ordinary" prison conditions in the absence of a lockdown. In *CCLA*, the benchmark was the comparison between "the effects of prolonged administrative segregation" and "incarceration in an ordinary prison range."[139]

Courts across Canada have similarly begun to recognize the appropriate and ordinary conditions for unhoused individuals, as determined under the *Charter*, as having the right to protect themselves from the elements by erecting basic shelter in public space.[140] While bylaws aligning with these court decisions have limited sheltering to overnight hours, implicit in these decisions is the principle that individuals should not be subjected to regular and repeated seizure of belongings that were part of previous overnight sheltering bans. In this way, the benchmark for appropriate treatment can be understood as the right to maintain the necessary equipment required to meaningfully protect oneself from the elements.

As discussed, the Bylaw Impound Scheme effectively prevents individuals from experiencing the benefit of this right. The Scheme prohibits individuals from sheltering during daytime hours and prevents people from sheltering overnight by impounding people's belongings, leading to their inability to shelter for several days before they are able to retrieve their property from the City or source new sheltering materials. Recent decisions across Canada have considered the ways that encampments reduce risk of overdose death.[141] Similarly, recent provincial initiatives to decriminalize possession of illicit substances in legal sheltering areas further suggest that the benchmark also includes the right to possess substances and associated harm reduction materials.[142] In this way, the appropriate benchmark from which to compare gross disproportionality includes one's ability to free from regular seizure of belongings required for personal safety and wellbeing. The scope of offending the Bylaw Impound Scheme and the effects of the treatment will be briefly discussed below.

b. The Scope and Reach of the Offence

The Bylaw Impound Scheme permits law enforcement to impound and destroy belongings for violations of the *Parks Bylaw* and *Streets Bylaw*. While these bylaws are notionally applicable to all citizens, they are disproportionately enforced against individuals who rely on public space to survive. Individuals experiencing homelessness have limited options for shelter and

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139 *Ibid* at para 97.

140 See *Adams 1*, sup*ra note* 7 and *Adams 2, supra no*te 7. See also *Shantz, supra* note 6; *Waterloo, supra* note 7.

141 See *Waterloo, supra* note 7.

142 Health Canada, "Subsection 56(1) class exemption to possess small amounts of certain illegal substances in the province of British Columbia – health care clinics, shelters and private residences", online: <canada.ca/en/health-canada/services/health-concerns/controlled-substances-precursor-chemicals/policy-regulations/policy-documents/subsection-56-1-class-exemption-health-care-clinics-shelters-private-residences.html> [perma.cc/XT6E-SRHK].

storing their belongings. As a result, they inevitably violate the restrictive bylaws that govern public space, demonstrating a general lack of willfulness or moral culpability in the offence. Further, unlike the criminal offences often discussed in section 12 analyses, violations of the Bylaw Impound Scheme are relatively minor and property-related offences.

c. Actual Effect of the Treatment

In 2016, the British Columbia Government declared a public health emergency due to the increasing overdose deaths across the province.[143] Since then, social science evidence has demonstrated that law enforcement seizures of controlled substances, especially opioids, lead to a significantly higher prevalence of overdoses compared to individuals who have not had their substances seized.[144] Further, research shows that the more times a person overdoses, the greater the chance that they will eventually experience a fatal overdose.[145] The *Property in Custody Bylaw* explicitly permits immediate disposal of items such as food, controlled substances, or items "manufactured for single use."[146] This definition includes harm reduction supplies which are meant to curb the spread of communicable diseases and prevent overdose death. In the 2023 case of *Harm Reduction Nurses Association v British Columbia (Attorney General)*, the BCSC granted an interim injunction against British Columbia's *Restricting Public Consumption of Illegal Substances Act*[147] on the basis that irreparable harm would be caused by increasing overdose death risk through the seizure of people's substances.[148] While injunction applications have a significantly lower bar than a section 12 analysis, a bylaw that permits the destruction of substances or harm-reduction supplies should be seen as grossly disproportionate, especially when considered against the backdrop of efforts to decriminalize drugs in legal sheltering areas.

For example, in Hypothetical #1, a bylaw impound scheme which allows for the immediate seizure and disposal of substances, thereby substantially increasing a person's likelihood of overdose death, should be understood as grossly disproportionate to the benchmark established by the decriminalization of drugs. Someone at risk of overdose death could be placed at a significantly greater risk by having their substance or naloxone kit immediately destroyed if they happen to sleep past 7 a.m., or at any hour, if they shelter outside of the few lawful sheltering areas.

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143 British Columbia Ministry of Health, News Release, "Provincial health officer declares public health emergency" (14 April 2016), online: <news.gov.bc.ca/10694> [perma.cc/HG45-4LPG].

144 Kanna Hayashi et al, "Police seizure of drugs without arrest among people who use drugs in Vancouver, Canada, before provincial 'decriminalization' of simple possession: a cohort study" (2023) 20:117 Harm Reduction J 1 at 4; Ray Bradley et al, "Spatiotemporal Analysis Exploring the Effect of Law Enforcement Drug Market Disruptions on Overdose, Indianapolis, Indiana, 2020–2021" (2023) 113 Am J Public Health 750; G Mohler et al, "A modified two-process Knox test for investigating the relationship between law enforcement opioid seizures and overdoses" (2021) 477 Royal Society Publishing J 1.

145 Alexander Caudarella et al, "Non-fatal overdose as a risk factor for subsequent fatal overdose among people who inject drugs" (2016) 162 Drug Alcohol Dependence 51 at 53.

146 *Property in Custody Bylaw*, *supra* note 20, ss 2, 4.

147 *Restricting Public Consumption of Illegal Substances Act,* SBC 2023, c 40.

148 *Harm Reduction Nurses Association v British Columbia (Attorney General)*, 2023 BCSC 2290 at paras 76, 89.

Beyond the authority to immediately destroy certain items, the Bylaw Impound Scheme places no limit on the types of items that can be seized and impounded if they are deemed unlawfully present on City property. The Bylaw Impound Scheme also makes no distinction between impoundment of commercial property versus items one relies on for daily survival. Further, it acknowledges that life-supporting items are vulnerable to be seized,[149] with only the loose promise that the City will "endeavor to return" the items within 48 hours.[150] This means that as a result of government intervention, people can be left without life-sustaining items such as their tents, sleeping bags, and waterproof or winter apparel for up to two days. Previous City bylaws which restricted the use of similar items were found to be unconstitutional for interfering with a person's right to life and security, particularly by infringing on their dignity.[151]

Considering Hypothetical #2, forcing a person with a mobility-related disability to dismantle and relocate their shelter daily or risk having their belongings impounded, followed by a two-day wait to retrieve them, is likely grossly disproportionate to the benchmark of being able to protect oneself from the elements with rudimentary shelter. Under the Bylaw Impound Scheme, a person with reduced mobility could be separated from their survival items for 48 hours in the middle of a Canadian winter, if their belongings are impounded. If it is contrary to human dignity to prevent people from sheltering overnight, as has been established by courts across Canada, it is certainly contrary to human dignity to enforce bylaws that effectively prevent sheltering by seizing and destroying the very materials required to shelter.

Personal characteristics of a specific offender or reasonably hypothetical offender should be considered when discussing the effects of government treatment.[152] Characteristics such as "age, poverty, race, Indigeneity, mental health issues, and addiction"[153] are valid and important considerations in determining gross disproportionality in sentencing.[154] It would be counter-intuitive if they were not similarly considered for non-penal forms of government treatment, such as the Bylaw Impound Scheme. In Victoria, the unhoused population is disproportionately comprised of Indigenous people,[155] meaning, by inference, that Indigenous people are disproportionately impacted by the Bylaw Impound Scheme. Indigenous peoples are overrepresented in drug poisoning deaths in British Columbia,[156] and their risk of overdose is likely to increase when interacting with the Bylaw Impound Scheme. The ongoing harms

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149 *Property in Custody Bylaw*, *supra* note 20, s 6(3).

150 *Ibid*, s 5(1).

151 See *Adams 2*, *supra* note 7 at para 109.

152 *Hills*, *supra* note 125 at paras 67, 133, 135.

153 *Ibid* at paras 86–7.

154 *Nur*, *supra* note 107 at para 74. See also Debra Parkes, "Punishment and its Limits" (2019) 88:1 SCLR 351 at 359.

155 Lauren Davis et al, *2023 Greater Victoria Point-in-Time Homeless Count and Housing Needs Survey* (Victoria: Capital Regional District, 2023), online (pdf): <communitycouncil.ca/wp-content/uploads/2023/08/2023-Point-in-Time-Count-Report.pdf> [perma.cc/3734-YJ7H].

156 BC Coroners Service, *Death Review Panel: An Urgent Response to a Continuing Crisis* (Victoria: Government of British Columbia, 1 November 2023), online (pdf): <gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/death-review-panel/an_urgent_response_to_a_continuing_crisis_report.pdf> [perma.cc/73H7-RPY7] at 14.

of colonial policies should carry significant weight when considering the effects of the scheme and their gross disproportionality.[157]

Further, nearly one in four people experiencing homelessness in Victoria are over the age of 55,[158] with only thirteen per cent earning employment income.[159] Additionally, more than two-thirds of this population has a substance use issue and nearly half have a physical disability.[160] This suggests that seniors, people experiencing poverty, and people with disabilities are also disproportionately impacted by homelessness, and by extension, the bylaws that are enforced in public space. Considering the vulnerable populations that make up Victoria's unhoused community, the effects of immediate food or controlled substances disposal and temporary impoundment of survival belongings appears significantly more severe.

The deleterious effects of the Bylaw Impound Scheme have also been acknowledged more broadly by the judiciary, administrative bodies, and the public. Courts in British Columbia are beginning to acknowledge the harms caused by displacement and the loss of personal survival items as "substantial hardship"[161] and "serious harm" [162] to vulnerable people. Public bodies such as the Canadian Human Rights Commission have acknowledged that such "harassment and violence from police [and] bylaw officers…[is] an assault on…human dignity."[163] Similarly, community members have turned out in numbers to express their disapproval of the Bylaw Impound Scheme and the arbitrary nature of impoundments and disposals.[164] These increasing levels of public engagement with the issues caused by the Bylaw Impound Scheme demonstrate outraged standards of decency as contemplated by the section 12 test.[165] Although gross disproportionality does not depend on "whether a majority of Canadians support the penalty" or not,[166] they do speak to the issue of compatibility with human dignity, an objective which underlies *Charter* jurisprudence regarding section 12.

d. Treatment is Grossly Disproportionate to the Benchmarks

Considering the seriousness of the offence and the effects of enforcement, the Bylaw Impound Scheme should be understood as cruel and unusual on the basis of being grossly disproportionate to the appropriate or ordinary conditions of legal sheltering. The Bylaw Impound Scheme is enforced for relatively non-serious property-related bylaw offences

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157 United Nations Economic and Social Affairs, *State of the World's Indigenous Peoples*, UNDESA, UN DocST/ESA/328 (2009) at 21 [*UNSOWIP*].

158 Davis et al, *supra* note 155.

159 *Ibid* at 6.

160 *Ibid*.

161 *Bamberger*, *supra* note 65 at para 194.

162 *Prince George (City) v Johnny*, 2022 BCSC 282 at para 82.

163 Canadian Human Rights Commission, "Homeless encampments" (19 July 2023), online: <housingchrc.ca/en/homeless-encampments> [perma.cc/PPQ7-AMHW].

164 Kori Sidaway, "Approximately 100 people protest Victoria's enforcement of sheltering bylaws", *Chek News* (21 April 2023), online: <cheknews.ca/hundreds-protest-victorias-enforcement-of-sheltering-bylaws-1149641/> [perma.cc/WZ9P-G3RA].

165 Kerr & Berger, *supra* note 104 at 239–40.

166 *Hills*, *supra* note 125 at para 110.

committed by persons experiencing homelessness who lack moral culpability or willfulness in the offence. The effects of the Scheme cause serious harms to life by confiscating life-sustaining belongings and increasing overdose risks, especially considering the various personal characteristics of those experiencing homelessness. This gross disproportionality rises to the level of being "incompatible with human dignity" and "an outrage to standards of decency."[167]

CONCLUSION

Section 12 of the *Charter* has been seen by scholars as "little more than a faint hope guarantee."[168] Until the courts meaningfully consider including administrative decisions that amount to treatment, the test risks becoming so restrictive so as to be a no hope guarantee. The City's Bylaw Impound Scheme demonstrates that the treatment branch of the test for section 12 cruel and unusual treatment or punishment could be clarified and expanded. It is difficult to conceive of a government action that more clearly engages the dignity-focused purpose of section 12 than the Bylaw Impound Scheme. Further, it is hard to imagine a government intervention more grossly disproportionate than seizing a person's belongings in a way that significantly increases their risk of death for merely violating a municipal property bylaw. In a society increasingly regulated by administrative decision makers, the Bylaw Impound Scheme highlights the need for clarifying the section 12 analysis to ensure people are protected from non-penal violations of their human dignity.

As with many communities across Canada, Victoria's unhoused population is disproportionately represented by Indigenous people. Considering the historical and ongoing harms caused by colonial government policies of displacement and dispossession,[169] and Canadian governments' domestication of the *United Nations Declaration on the Rights of Indigenous Peoples*,[170] there is an increased legal and moral obligation to align bylaws with the *Charter*. Beyond the *Charter*, municipalities and courts alike should begin seriously considering whether policies such as the Bylaw Impound Scheme are consistent with the province's *Declaration on the Rights of Indigenous Peoples Act*[171] and assertions of Indigenous legal orders.

Until the courts begin to address the existing limitations and uncertainties inherent in current legal tests that are used to determine cruel and unusual treatment or punishment, the *Charter* value of human dignity will remain in question. Unfortunately, it will undoubtedly require a *Charter* challenge, after harm has already been caused and lives have been lost, before any meaningful change is made. What is clear is that government actions that do not amount to punishment, through regimes like the Bylaw Impound Scheme, will continue to have detrimental effects on some of society's most vulnerable. Until the "meaning of cruel and unusual" is considered "afresh" through the Charter's "underlying values,"[172] Victoria's unhoused population will not receive the full benefit of the *Charter*.

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167 Kerr & Berger, *supra* note 104 at 239–40.

168 Cameron, *supra* note 12 at 588.

169 United Nations Economic and Social Affairs, *State of the World's Indigenous Peoples*, UNDESA, UN DocST/ESA/328 (2009) at 21.

170 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007).

171 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

172 Cameron, *supra* note 12 at 588.

APPENDIX A – ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW

NO. 23-105

ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW

A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is to:

1. establish consistent practices and regulations pertaining to the removal, seizure and impounding of items occupying public places; and

2. allow for the City to recover costs associated with managing such items.

Contents

Under its statutory powers, including sections 8(3)(b) and (h), 36, 46 and 64 of the *Community Charter*, the Council of the Corporation of the City of Victoria in an open meeting assembled enacts the following provisions:

PART 1 - INTRODUCTION

Title

1 This Bylaw may be cited as the "Property in Custody Bylaw".

Definitions

2 In this Bylaw:

"at cost"

means the actual cost of the work as determined by the City, including the amount expended by the City for gross wages and salaries, employee fringe benefits, materials, equipment rentals at rates paid by the City or set by the City for its own equipment, administration charges, the cost to hire third parties to perform the work, transportation costs, disposal fees, and any other expenditures incurred in undertaking the work;

"bulky item"

includes large, heavy, unwieldy or irregularly shaped items, such as furniture, sheet plywood, lumber, heaters, fencing, structures, and includes a shelter, unless such shelter is lawfully temporarily placed, secured, erected, used or maintained by a homeless person in accordance with Parks Regulation Bylaw;

"Director"

means the Director of Bylaw Services or their authorized delegate;

"hazardous material"

includes items, agents, substances or materials which may be hazardous to human health or the environment, and includes, but is not limited to, fuel, harmful chemicals, noxious substances, animal or human waste, mould, food, controlled substances within the meaning of the *Controlled Drugs and Substances Act*, weapons (real or imitation), sharp objects, needles, or any another similar item, agent, substance or material, and includes property or things that may be contaminated by any of the foregoing;

"homeless person"

has the same meaning as in the Parks Regulation Bylaw;

"owner"

includes a person who owned, controlled, possessed or was entitled to possession of a property or thing immediately prior to its removal, seizure or impounding;

"property return facility"

means a location designated from time to time by the Director as where members of the public can attend for the purpose of requesting the return of

seized property, the location of which facility shall be published on the City's website (www.victoria.ca) and posted at the Bylaw Services office;

"retained property"

means any property or thing that is removed, seized, or impounded by the City or a police officer that is not disposed of pursuant to section 4 ;

"rubbish"

includes any item that, in the opinion of a City employee:

(a) appears to be of no resale value, or negligible resale value,

(b) is damaged or soiled to the extent that it appears it cannot reasonably be used for its intended purpose,

(c) was manufactured for single use,

(d) appears to contain an unidentifiable, noxious, or hazardous substance,

(e) is perishable,

(f) was manufactured for the purpose of packaging a product or thing, including food or beverage, or

(g) was part of a cart, bicycle, machine, or other similar item, including wiring and other small parts;

"shelter"

means a structure, improvement or overhead shelter, including a tent, lean-to, or other form of overhead shelter constructed from a tarpaulin, plastic, cardboard or other rigid or non-rigid material;

"work"

means any action taken by the City to remove, seize, transport, store, or dispose of or to cause the removal, seizure, transport, storage or disposal of any property or thing placed or left in a public place in contravention of the provisions of a City bylaw or the terms of a licence under a City bylaw.

Application

3 (1) This Bylaw applies to any property or thing that is removed, seized, or impounded by the City or a police officer pursuant to any City bylaw.

(2) Notwithstanding subsection (1), this Bylaw does not apply to vehicles impounded pursuant to a City bylaw or animals impounded pursuant to the Animal Responsibility Bylaw.

PART 2 – MANAGEMENT OF REMOVED, SEIZED OR IMPOUNDED PROPERTY

Immediate Disposal

4 Any property or thing that is removed, seized, or impounded may be immediately and permanently disposed of without notice or compensation to any person if it is rubbish, hazardous material, or a bulky item.

Claiming and Disposal of Retained Property

5 (1) Within 14 days of the date of removal, seizure or impounding, owners of retained property may attend at the property return facility to claim and request the return of the retained property, after which the City will endeavor to return the retained property within 48 hours.

(2) Any retained property that is not claimed pursuant to subsection (1) may be immediately and permanently disposed of without notice or compensation to any person.

(3) Permanent disposal of unclaimed retained property may be made to a landfill, recycling facility, or other waste disposal facility or, with the permission of the Director, to a registered charity.

(4) Notwithstanding subsection (1), the Director may provide any retained property to the police if they believe that such property may be stolen, may have been used in commission of a crime, or may be misplaced or lost.

Fees and Conditions for Removed, Seized or Impounded Property

6 (1) For each removal, seizure or impounding of any property or thing under a City bylaw, the owner of that property or thing must pay the fee prescribed in Schedule A to the City.

(2) Retained property which has been seized shall not be released without payment of the applicable fee.

(3) Notwithstanding subsections (1) and (2), no fee is payable for return of retained property to a homeless person where in the opinion of the Director such item is a life-supporting item such as a tent, sleeping bag, medication, medical device, cell phone, personal identification, or waterproof or winter apparel.

(4) For the purposes of subsection (1), where commercial property or things are removed, seized or impounded:

(a) the fee is payable regardless of whether the property or thing is impounded or seized, and

(b) if the person who unlawfully placed or left the property or thing is not the owner, the owner and the person who unlawfully placed or left the property or thing are jointly and severally responsible for the fee.

(5) Persons claiming retained property must, as a condition of claiming such property, execute a compliance agreement in a form prescribed by the Director stating that the claiming party will not repeat the unlawful behaviour.

PART 3 – GENERAL

No Common Law Duty

7 Nothing in this Bylaw shall be construed to impose a private law duty of care on any City employee, agent of the City, or police officer with regard to the removal, seizure, impounding, return, disposal or donation of any property or thing pursuant to this Bylaw or any related statutory authority.

No Liability

8 No City employee, agent of the City, or police officer shall be liable to any person or entity for the application of this Bylaw.

Severability

9 If any provision or part of this Bylaw is declared by any court or tribunal of competent jurisdiction to be illegal or inoperative, in whole or in part, or inoperative in particular circumstances, it shall be severed from the Bylaw and the balance of the Bylaw, or its application in any circumstances, shall not be affected and shall continue to be in full force and effect.

Commencement

10 This Bylaw comes into force on adoption.

READ A FIRST TIME the	**7th**	day of	**December**	2023
READ A SECOND TIME the	**7th**	day of	**December**	2023
READ A THIRD TIME the	**7th**	day of	**December**	2023
ADOPTED on the	**14th**	day of	**December**	2023

"CURT KINGSLEY"
CITY CLERK

"MARIANNE ALTO"
MAYOR

APPENDIX B – MISCELLANEOUS AMENDMENTS BYLAW (FOR ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW)

NO. 23-106

MISCELLANEOUS AMENDMENTS BYLAW (FOR ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW)

A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is to amend the *Parks Regulation Bylaw* and the *Streets and Traffic Bylaw* to:

1. establish consistent practices for the impounding or disposal of objects occupying a highway or public place; and

2. insert references to the new *Property in Custody Bylaw*.

Contents

Under its statutory powers, including sections 8(3)(b) and (h), 36, 46 and 64 of the *Community Charter*, the Council of the Corporation of the City of Victoria in an open meeting assembled enacts the following provisions:

Title

1 This Bylaw may be cited as the "Miscellaneous Amendments Bylaw (For Property in Custody Bylaw)".

***Parks Regulation Bylaw* Amendments**

2 Bylaw No. 07-059, the Parks Regulation Bylaw, is amended in the Table of Contents as follows:

(a) the entry for section 19 is repealed and replaced with "Removal, Impounding and Disposal".

3 The Parks Regulation Bylaw, is further amended in section 14 as follows:

(a) by repealing subsection (5) entirely and replacing it with the following:

"(5) [Repealed]"; and

(b) by inserting the following new subsections immediately after subsection (6):

"(7) A person must not place, or cause or permit to be placed or left, any property or thing so as to occupy any part of a park.

(8) Subsection (7) does not apply to a person who is authorized to occupy such part of a park pursuant to this Bylaw or another City bylaw."

4 The Parks Regulation Bylaw is further amended as follows:

(a) by repealing section 19 entirely and replacing it with the following:

"**Removal**, **Impounding and Disposal**

19 The Director, a person authorized by the Director, a bylaw officer, or a police officer, may remove, seize, and impound or cause the removal, seizure or impoundment of any property or thing that unlawfully occupies, or has been unlawfully placed or left in, a park, and such item will be dealt with in accordance with the Property in Custody Bylaw."

***Streets and Traffic Bylaw* Amendments**

5 Bylaw No. 09-079, the Streets and Traffic Bylaw, is amended in section 102 as follows:

(a) in subsection (1), by striking out "subsections 101" and replacing it with "section 101(1)";

(b) by repealing subsections (1)(a) and (b) entirely and replacing them with the following:

"(a) A person must not place, or cause or permit to be placed or left, any of the following items so as to occupy, obstruct, or cause a nuisance on any part of a street, sidewalk or other public place:

(i) any property or thing, or

(ii) a sign, as defined in the Sign Bylaw.

(b) [Repealed]";

(c) in subsection (2), by striking out "(a)"

(d) in subsection (2)(d), by striking out "102" and replacing it with "101";

(e) by repealing subsection (3) entirely and replacing it with the following:

"(3) The Director of Engineering, a person authorized by the Director of Engineering, a bylaw officer, or a police officer, may remove, seize, and impound or cause the removal, seizure or impoundment of any property or thing that unlawfully occupies, or has been unlawfully placed or left in, a street, sidewalk or public place, and such item will be dealt with in accordance with the Property in Custody Bylaw.";

(f) by repealing subsections (4) through (10) entirely; and

(g) by renumbering current subsection (11) as new subsection (4).

6 The Streets and Traffic Bylaw is further amended as follows:

(a) in both sections 102A(13) and 103A(4), by inserting the following immediately after the words "this section":

", and the portable sign will be dealt with in accordance with the Property in Custody Bylaw.";

(b) Schedule H (Detention, removal and impoundment fees) is repealed entirely; and

(c) in the Table of Contents, the entry for Schedule H is repealed and replaced with the following:

"Schedule H – [repealed]".

Commencement

7 This Bylaw comes into force on adoption.

READ A FIRST TIME the	**7th**	day of	**December**	2023
READ A SECOND TIME the	**7th**	day of	**December**	2023
READ A THIRD TIME the	**7th**	day of	**December**	2023
ADOPTED on the	**14th**	day of	**December**	2023

"CURT KINGSLEY"
CITY CLERK

"MARIANNE ALTO"
MAYOR