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A PLACE IN COMMON SPACE: STATE PROPERTY OWNERSHIP AND COMMON SPACES IN CANADA

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INTRODUCTION

The state's ownership of common spaces, like city streets and parks, is unlike any other form of property ownership. It is true that, under Canadian law, the state holds property rights to common spaces; the state owns these pieces of land.[1] However, the state's ownership of these spaces is different than that of a private owner. The state, unlike a private property owner, cannot exclude citizens arbitrarily from using publicly accessible spaces. Citizens cannot be excluded from using the streets and parks simply because it is the state's preference. At the same time, citizens must, under some circumstances, be excluded from these spaces. What are these circumstances that give the state the right to exclude others from common spaces? This question has been examined in *Charter* challenges made by protestors, in the context of s. 2(b) rights, and the homeless, in the context of s. 7 rights. In these cases, the state attempted to exclude these citizens from using the property in a certain way. How the courts interpreted and understood state property rights to common spaces was pivotal to their final conclusions. From past jurisprudence, one important conclusion about the state's property rights to common spaces can be drawn: there is *something* that makes the state categorically different from a private property owner. However, Canadian courts still tend to treat state ownership as if it were private ownership. Through analysis of protestor and homeless *Charter* litigation, this paper argues that Canadian courts must depart from interpreting the state as a private property owner and instead must critically evaluate, interrogate

[1] *Montréal (City) v 2952 Québec Inc*, [2005] 3 SCR 141 at para 61, 258 DLR (4th) 595 [*Montréal*].

and supplant the state's ownership objectives by integrating the broader social context, relationships and history rooted in common spaces.

This paper will be divided into three sections. The first part will examine what makes state ownership of common spaces different from any other type of property ownership. This paper does not seek to determine the exact content of the state's property right to common spaces. Rather, the thrust of this portion of the paper is to identify that there is a valuable and indispensable distinction between state ownership of common spaces and private ownership.

Part two and part three of this paper will focus on two strands of *Charter* litigation involving common spaces: protestors with s. 2(b) and the homeless with s. 7. This will illustrate how courts are too deferential to the state's property rights. For both protestors and the homeless, judicial reliance on conceptualizing the state as if it were a private property owner can undermine *Charter* challenges. This deference, although appropriate when examining private property rights, is not suitable because of the social context, relationships and history tied to common spaces. While a private owner may, albeit subject to some degree of restriction, 'set the agenda' for his or her use of the property, the state's ownership agenda must be subject to some judicial scrutiny. The state's desired use of the land cannot override the historic and essential relationship between common spaces, protestors and the homeless.

For protestors, their claims are undermined by the fact that courts are unnecessarily deferential to the state's desired use of the property. This portion of the paper will

examine three cases – *Batty v Toronto (City)* [2], *Weisfeld v R*[3] and *Vancouver (City) v Zhang*.[4] In *Batty*, the state's gentrified definition of "traditional" activities is accepted by the court, which ignores the judicially recognized tradition of free expression in common spaces. The decision antagonizes the protestors, as if they were intruders on private property, when the pursuit of free expression should be integrated into the state's ownership objectives. The analysis is similar in *Weisfeld* where the court prioritizes the aesthetics and symbolism of Parliament Hill – the state's ownership objective – in a way that overlooks the need to protect certain forms of free expression. In *Zhang*, the court defers to the state by recognizing that the state can evict protestors even when there is no "competing use" for the public area. In all three cases, the courts are too deferent to the state's property objectives which inappropriately devalues free expression's history and vital relationship with common spaces.

For the homeless, while *Charter* challenges were successful in *Adams v Victoria (City)*[5] and *Abbotsford (City) v Shantz*[6], the decisions continue to treat the state like a private property owner, which will be detrimental to future homeless *Charter* challenges. The success in *Adams* and *Abbotsford* are, in a sense, fool's gold for other Canadian homeless communities. The judges should have embraced an approach

[2] 2011 ONSC 6862, 108 OR (3d) 571 [*Batty*].
[3] [1995] 1 FCR 68, 1994 CarswellNat 1421 (WL Can) (CA) [*Weisfeld*].
[4] 2007 BCCA 280, 157 ACWS (3d) 683 [*Zhang*].
[5] 2008 BCSC 1363, 299 DLR (4th) 193 [*Adams BCSC*] aff'd 2009 BCCA 563, 313 DLR (4th) 29 [*Adams BCCA*].
[6] 2014 BCSC 2385, 247 ACWS (3d) 926 [*Abbotsford*].

that independently assessed the state's objective in a broader social context, rather than defer to the state like it was a private property owner.

This reliance on understanding the state as a private property owner perpetuates two problems in this type of *Charter* litigation. First, in both *Adams* and *Abbotsford*, one of the state's objectives in regulating the homeless is to help create a sense of community and socialization. However, this desire to create a community is paradoxical because it acts as a justification for denying a vulnerable portion of society – the homeless – a place in this community. There is no judicial discussion of this paradoxical state objective. Second, there is also a unique relationship between the homeless and common spaces. Without access to common spaces, the homeless face the criminalization of their existence. While the majority of the public's relationship with places like parks is one of usefulness, the relationship between the homeless and common spaces is one of necessity.

What an examination of these cases indicates is that courts must deviate from interpreting the state as a private property owner. Courts cannot use private property models as a crutch to resolving these disputes. This means that the state's objectives as an owner, unlike private property owners, cannot be immune to judicial criticism. Deference to state property rights generates results that are disconnected from the social context, relationships and history embedded in the existence of common spaces.

PART I: THE OWNERSHIP OF COMMON SPACES

Canadian courts have been consistent that the "owner" of common spaces is the state. Most recently, in *Montréal (City) v 2952-1366 Québec Inc.*, McLachlin CJ and

Deschamps J, speaking for a majority of the Court, explain that "public property is government-owned".[7] In *Adams*, a group of homeless people claimed a Section 7 right to erect rudimentary shelters overnight in a park. The city claimed that this was an attempt to make a property rights claim to a public park. Rather than discuss whether the homeless do have any property right to the public space, the British Columbia Court of Appeal dismissed the city's argument by stating that the homeless were not seeking any property right but rather "a right to be free of a state-imposed prohibition".[8] By inference, it appears that if the homeless were indeed asserting a property rights claim, then this would be, in the eyes of the Court of Appeal judges, fatal to their *Charter* claim.

However, the fact that the state owns the property is not particularly instructive in highlighting its property rights, especially to publicly accessible common spaces. In *Montréal*, the Court settled a division amongst the judges as to whether s. 2(b) applied to all state property, or just some types of state property. The Court, in deciding that s. 2(b) applies only to some types of state property, distanced itself from a distinction based on ownership by the state. Instead, the Court focused on the distinction between public and private uses – rather than mere state ownership.[9] The application of the *Charter* to state property depends not on ownership but instead on whether the property is private or public in nature.[10] For example, freedom of expression is protected in publicly accessible spaces – like

[7] Montréal, *supra* note 1 at para 61.
[8] *Adams BCSC*, *supra* note 5 at para 100.
[9] *Montréal*, *supra* note 1 at paras 63-64.
[10] *Ibid* at para 64.

parks – but would not necessarily be protected on an army base or the Prime Minister's home even though these are also state-owned.[11] One needs to go beyond the 'owner' label in order to fully understand the state's property rights to common spaces. The Supreme Court makes it clear that there is something about state ownership of common spaces that differentiates it not only from private property ownership, *but also from other forms of state ownership.*

This is further demonstrated by the fact that Canadian courts often indicate discomfort with the word "owner" as a way to describe the state's ownership of common spaces. In *Vancouver (City) v Burchill*[12], a 1932 Supreme Court of Canada case, the court considered whether the city owed a duty to a taxi driver who was killed in car accident but did not have a taxi permit. The city tried to argue that, without the license, Burchill was trespassing and was, therefore, owed no duty.[13] The Supreme Court rejected this argument in holding that while "municipalities are <u>in a sense</u> owners of the street" that this ownership is somewhat qualified:

> [Municipalities] are not, however, owners <u>in the full sense of the word</u>, and <u>certainly not to the extent that a proprietor owns his land</u>. The land-owner enjoys the absolute right to exclude anyone to do as he pleases upon his own property It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public.[14]

[11] *Ibid* at para 71; *see also* C.B. MacPherson, "The Meaning of Property" in C.B. MacPherson, ed, *Property: Mainstream and Critical Positions* at 4.
[12] [1932] SCR 620, [1932] 4 DLR 200 [*Burchill*].
[13] *Ibid* at 625.
[14] *Ibid* [emphasis added].

Chief Justice Lamer, in *Committee for the Commonwealth of Canada v Canada*[15], notes that the government does not have the same rights as a private owner and that there is a "quasi-fiduciary" relationship between the state and the public.[16] Despite a splintered court in *Commonwealth*, all three of the primary judgments quote from a U.S. decision, *Hague v Committee for Industrial Organization*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public".[17] Analogizing the state's ownership to a trust in *Commonwealth* and *Burchill* signifies that the state's ownership of these spaces is very different compared to a private owner.

In *Commonwealth*, L'Heureux Dubé J, when referring to the state's property, puts the possessive 'its' in quotations.[18] By doing this, she indicates that while state ownership is technically accurate, the fact of the state having "possession" of common spaces still leads to uneasiness. In *R v SA*[19], Bielby J of Alberta Court of Appeal, notes, in dissent on other issues, that the offence of trespassing on public lands seems "like an awkward fit".[20]

However, comparisons are still made between private property ownership and state ownership of common spaces. Justice La Forest, writing for himself in *Commonwealth*, states that, "[a]s a general proposition, the Crown's proprietary

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[15] [1991] 1 SCR 139, 77 DLR (4th) 385 [*Commonwealth*].
[16] *Ibid* at 114.
[17] *Hague v Committee for Industrial Organization* 307 U.S. 496 (1939) at 515-516 [*Hague*]; *Commonwealth*, *supra* note 15 at 114-115, Lamer CJC; 199-200, L'Heureux Dubé J; 230, McLachlin J.
[18] *Commonwealth*, *supra* note 15 at 168; "While government has the right to manage 'its' property for public good…"
[19] 2014 ABCA 19, [2014] 9 WWR 39 [*R v SA*]
[20] *Ibid* at para 339.

rights are the same as those of a private owner, but in exercising them the Crown is subject to the overriding requirements of the [*Charter*]".[21] In *R v SA*, the Alberta Court of Appeal discussed the state's property rights to a subway station and drew a comparison between the owner of a shopping centre and the state:

> A landowner who lets all comers enter its premises (such as a shopping centre) and indeed invites them to do so, does nothing irrevocable. The owner can later qualify the permission and forbid certain types of activity, or it can entirely revoke the permission in some cases[22]

This is a reference to *Harrison v Carswell*[23], a pre-*Charter* decision where the Supreme Court upheld the conviction for a picketer on a shopping mall's premises. Citing a prior decision, the Supreme Court held that "an owner who has granted a right of entry to a particular class of the public has not thereby relinquished his or its right to withdraw its invitation to the general public or any particular member thereof…"[24]

These comparisons between state property ownership and private property ownership from La Forest J and the Alberta Court of Appeal are concerning. Not only do they contradict the principles from *Burchill, Commonwealth* and *Montréal,* the state's property right simply cannot be accurately analogized to a private owner subject only to *Charter* scrutiny. First, at the very minimum, common property is necessary to facilitate free movement; there must be some method by which people

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[21] *Commonwealth*, *supra* note 15 at 165 [emphasis added].
[22] *R v SA*, *supra* note 19 at 105.
[23] [1976] 2 SCR 200, 62 DLR (3d) 68 [*Harrison*]
[24] *Peters v The Queen* (1971), 17 DLR (3d) 128 at 146, 1971WL115004 (WL Can) (SCC); *Ibid* at 214.

can move freely between different privately controlled spaces.[25] Commerce, socialization and the legal existence of the homeless are dependent on the state creating and maintaining common spaces. The legal obligation to have common space was not created with the advent of the *Charter*. As the *Burchill* case demonstrates, the crucial differences between state and private ownership have been recognized long before the *Charter*'s existence.

As an example, a shopping centre owner has no obligation to have the homeless to sleep on his or her premises. Yet the state does have this obligation because the alternative would be the criminalization of the homeless' existence. In addition, given the nature of free expression, if citizens are unable to access public spaces, then the value of that right would be significantly weakened. The state's ownership of common spaces is different from private owners. While the *Charter* is one of those differences, it cannot be the *only* difference. There is something inherent to publicly-accessible spaces which dictates that the state has some responsibility to ensure that these spaces are managed in the public interest.

Despite this, judges adjudicate decisions as if the state is a private owner that is owed deference with regards to its desired use of its land. This failure to acknowledge and incorporate the fundamental differences between state ownership of common spaces and other types of ownership leads to an inappropriate amount of deference shown to the state. While the state may be an "owner", its ownership of common spaces is markedly different from other types of ownership and this must

[25] Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365 at 393 [Hamill 2012]

be reflected in judicial analysis. Part two and three of this paper will examine jurisprudence and the problems that arise when the state is treated like a private property owner.

PART II: PROTESTORS, FREEDOM OF EXPRESSION AND COMMON SPACES

In *Commonwealth*, the three judgments from Lamer CJ, L'Heureux Dubé J and McLachlin J (as she then was), all reference to a U.S. decision from 1939, *Hague v Committee for Industrial Organization*, which states:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.[26]

McLachlin J also discusses a "venerable tradition…that some types of state-owned property are proper forums for public expression" and the fact that "the right of free speech has traditionally been associated with streets and by-ways and parks".[27] The decision in *Commonwealth*, the seminal *Charter* decision with regards to freedom of expression in common spaces, was splintered, however, the entire court agreed that there is a historic relationship between publicly accessible common spaces and the rights of free expression.

In *Peterborough (City) v Ramsden*[28], Iacobucci J recognized that putting up posters in common spaces – even for commercial advertising purposes – is a "historically and

[26] *Hague*, *supra* note 17 at 515-516; *Commonwealth*, *supra* note 15 at 114-115, Lamer CJC; 199-200, L'Heureux Dubé J; 230, McLachlin J.
[27] *Commonwealth*, *supra* note 15 at 230.
[28] [1993] 2 SCR 1084, 106 DLR (4th) 233.

politically significant form of expression".[29] The Supreme Court has repeated this principle more recently in *Montréal*, where the Court acknowledged that "[o]ne aspect of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression".[30] In *Vancouver (City) v Zhang*, the Court of Appeal for British Columbia noted how "[p]ublic streets are, as they have been historically, spaces in which political expression takes places…"[31]

Common spaces are necessary to the proper exercise of the right to free expression. Free speech and expression, unlike most other rights which can be exercised in private, is not possible without open space to express oneself.[32] In *Saumur v Québec (City)*[33], Rand J stated that communication in common spaces is "in some circumstances the only practical means available for any appeal to the community generally" and even quoted from the Bible to illustrate the historic connection between common spaces and the free communication of ideas.[34] In *Commonwealth*, L'Heureux Dubé J argued that if the public could not engage in expressive activity on government-owned property, "then there would be little if any opportunity to exercise their rights of freedom of expression."[35] She continued by expressing concern that if common spaces were not available for the public that the ability to

[29] *Ibid* at 107.
[30] *Montréal*, *supra* note 1 at 61.
[31] *Zhang, supra* note 4 at para 41.
[32] Timothy Zick, "Property, Place and Public Discourse" (2006) 21 Wash U JL & Pol'y 173 at 174 [Zick]
[33] [1953] 2 SCR 299 at 332, 4 DLR 641.
[34] *Ibid* at 332.
[35] *Commonwealth*, *supra* note 15 at 198.

communicate and engage in free expression would be limited to the wealthy.[36] Zick echoes this by noting that access to billboards and the radio is limited to the "wealthy elite".[37] The nature of free speech and the comments made by Canadian judges indicate that there is a unique, if not vital, relationship between common spaces and the exercise of free expression. The *Charter* right to free expression exemplifies this need for free expression.

However, the actual adjudication of these *Charter* claims in the context of common spaces is often rooted in a private property analysis, which disconnects the judicial discussion from the realities of free expression and common spaces. The following three cases will illustrate how courts often elevate the state's ownership objectives – as if it were a private owner – at the expense of the ancient and judicially recognized relationship between free expression and common spaces.

BATTY V. TORONTO (CITY)

The decision in *Batty v Toronto (City)* contains three problems which stem from the court's private property framework. First, the decision unfairly elevates certain gentrified, state-defined "traditional" activities over the equally traditional role of free expression in common spaces. Second, Brown J paints a conflict between the protestor's free expression rights and the state's intended use of the land when the state's intended use of the land should *include* protecting free expression rights. Finally, the court's remedy could have better alleviated the neighbouring citizens'

[36] *Ibid*.
[37] Zick, *supra* note 32 at 198.

concerns had Brown J embraced a more contextual understanding of the state's property, as opposed to a private property model.

In *Batty*, a group of "Occupy" protestors set up a large and disruptive encampment in St. James Park in Toronto. In the decision, which upheld the trespass notice from the city, Justice Brown writes that "the *Charter* does not permit the protestors to take over public space without asking, excluding the rest of the public from enjoying their traditional use of that space."[38] However, Brown J's definition of "traditional use" is almost entirely focused on gentrified activities like dog walking and picnicking, which mirrors the state's conception of the park's "intended purpose". The decision cites comments from Richard Ubbens, Toronto's Director of Parks, as a means to explain what the park's traditional and intended purpose is:

> …the uses of the park were those typical of an urban park. Its citizens enjoyed strolling through the park, walking their dogs, eating lunch, reading books, playing catch, sitting on the grass, in the gazebo, or on the benches, playing with their children…[39]

Batty defers to the state's view of traditional activities while ignoring the traditional role of common spaces as a home for free expression. This is not to say that walking, eating lunch or reading books are not traditional or important activities. However, *Batty* overemphasizes this state-defined view of traditional activities at the expense of the equally traditional activity of free expression. Rather than categorize protests and free expression as another type of traditional activity, the *Batty* decision paints a conflict between the Occupy Toronto movement and the traditional, gentrified

[38] *Ibid* at para 15 [emphasis added].
[39] *Ibid* at para 25.

uses of a public park. By doing this, Brown J defers to the state's ownership as if it were a private property owner.

Brown J writes that state regulation of public parks protects these parks from "chaos" and maintains them as "oases of tranquility".[40] While it is true that parks are, in a temporal sense, more frequently "oases of tranquility", previous judicial commentary and the essence of the right to freedom of expression indicate that free expression should be considered alongside these "traditional" uses, rather than a burden on them. As Kohn notes, in reference to the *Batty* decision:

> Opponents of the occupation came to interpret it as a struggle between traditional, legitimate uses of public space (dog walking, strolling and enjoyment of nature) and illegitimate, private uses such as camping, preparing food, protesting and sub-cultural community building.[41]

However, rather than viewing this as a struggle between traditional and non-traditional uses, a more effective (and accurate) perspective would seek to integrate free expression as if it were a traditional use of the space as well.

It may not be the state's intended purpose for parks and streets to be a refuge for political protest. However, unlike a private property owner, the state's intended use of the land must be considered in context with its relationship to the public. If the state's objective is to protect "traditional" activities, then this must include free expression. As Zick notes, in the US context, "so long as officials can articulate a legitimate and content-neutral interest and displacement [of the expression] serves that interest in some minimal fashion, the zoning of speech will continue to be

[40] *Ibid* at para 91.
[41] Maragret Kohn, "Privatization and Protest: Occupy Wall Street, Occupy Toronto, and the Occupation of Public Space in a Democracy" (2013) 11 Perspect Polit 99 at 100.

permitted".[42] In order to prevent this, the concept of free expression must be read into the state's objectives and purpose for the land, regardless of whether this is the state's intended purpose. Citizens rely and depend on the ability to express themselves in common spaces and this judicially recognized reality cannot be overshadowed by the state-defined purpose of traditional activities.

Justice Brown adopts a private property approach that antagonizes activities that are contrary to the state's intended purpose. He refers to the fact that the protestors have caused damage which will require taxpayer money to repair.[43] While there is no justification for the protestors to completely destroy the park, some degree of damage must be permitted. The protection of taxpayer funds to protect a fundamental freedom should not be painted as a burden on society. If Brown J approached the facts with an understanding of the social context and relationship between protestors and common spaces, he could have found that the repairs required after the Occupy Toronto protests are necessary and reasonable park expenditures – like trimming the shrubbery or repairing a children's swing set. Instead the protestors are framed as outsiders invading on the state's property rights and, thus, responsible for the consequences of actions that were undesirable to the owner. This could have been avoided if Brown J resisted a private property perspective of the state's property rights.

Finally, this private property approach also generated a remedy that is disconnected from the concerns of the citizenry and government. The court upheld the eviction, which meant the protestors (1) could not erect structures or (2) use the park during

[42] Zick, *supra* note 32 at 197.
[43] *Batty*, *supra* note 2 at para 98.

overnight hours. At first glance, it appears as if this remedy delicately balances the needs of the protestors and the community. However, the Occupy Toronto movement would still be allowed to protest, albeit without structures, in the park from 5:30 a.m. until 12:00 a.m.[44] Hamill notes that "these hours of protest would arguably be just as much of a nuisance to local residents and businesses as the twenty-four-hour protest".[45] The decision's conclusion does not really alleviate the major concerns of the city and its residents.

Had *Batty* embraced a more contextual understanding of the state's property rights, a more appropriate remedy could have been crafted. For instance, many of the problems that the city and residents complained about had very little to do with the expressive efforts of the protestors. Most of the complaints were related to protestors shouting obscenities, using alcohol and drugs, and verbally abusing and intimidating passers-by.[46] Understanding that there is a relationship between common property and free expression, those behaviours which are harmful and minimally related or unrelated to the actual expression could be isolated from the expressive activities and grounds, in and of themselves, for eviction. In other words, Brown J could have ruled that the protestors had a right to be in the park overnight – perhaps with a smaller encampment – but if some of the protestors engaged in those harmful, minimally expressive activities, the police could evict some or all of the protestors. This remedy would be much more suitable and would have better alleviated the city's concerns.

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[44] *Ibid* at para 104; Hamill 2012, *supra* note 25 at 383.
[45] Hamill 2012, *supra* note 25 at 383.
[46] *Batty*, *supra* note 2 at para 42.

The *Batty* decision illustrates the inherent shortcomings in analogizing the state's property ownership with private ownership. The decision unfairly prioritizes certain "traditional" activities over the equally traditional activity of free expression, antagonizes the protestors as if they are invading on the state's private property rights and, finally, crafts a remedy that is unlikely to address the city's concerns. Had Brown J distanced his decision from a private property lens, these problems could have been avoided. Justice Brown needed to interrogate the state's objectives and recognize that it was at odds with the historic relationship between the common spaces, like parks, and the exercise of free expression.

WEISFELD V. R

The *Weisfeld v R* decision provides another example of the court's prioritization of state objectives over free expression in common spaces. In *Weisfeld*, a group of protestors erected a series of structures – called the Peace Camp – on Parliament Hill to protest cruise missile testing in Canada. Linden JA of the Federal Court of Appeal considered two state objectives in the s. 1 analysis. The state was justified in removing the protestors' structures, first, because they posed a threat to safety, health and security and the overall maintenance of the lawns.[47] The second state rationale was based on preserving the aesthetics and symbolism of Parliament Hill.[48]

[47] *Weisfeld*, *supra* note 3 at para 65.
[48] *Ibid* at para 66.

The public safety objective is reasonable; the protestors posed a fire hazard, lacked adequate sanitary facilities and created an insect infestation.49 However, the second objective to preserve the aesthetic and symbolism of Parliament Hill raises the same concern that the state's definition of "traditional use" can prevail over the integration of free expression activities into common spaces. The judgment's reliance on the safety and health objectives to save the government action under s. 1 is sound, but the inclusion and discussion of the aesthetic objective prioritizes certain traditional uses over others and ultimately indicates deference to the state's property rights.

Justice Linden notes that the government hoped to keep Parliament Hill in an aesthetically pleasing condition "so that it could be enjoyed by Canadian and visitors alike".[50] He explains that "the majesty and grandeur of the Parliament Buildings and the great expanse of attractive green lawns makes Parliament Hill a site of which all Canadians can be proud" and adds that the Hill is "a major tourist attraction seen by million of people each year".[51]

> Zick, commenting on US case law, writes that it is a
>
> …testament to the fragility of the fundamental rights to publicly assemble and communicate that they may yield to even such seemingly trivial concerns as the harm that will come to *public lawns* by their mere exercise[52]

Zick's comments are particularly pertinent to the *Weisfeld* decision. The pursuit of clean, aesthetically appealing common spaces is not inappropriate or ethically

[49] *Ibid* at para 65.
[50] *Ibid* at para 66.
[51] *Ibid*.
[52] Zick, *supra* note 32 at 175-176.

pernicious. However, Zick does highlight how certain "seemingly trivial concerns" are prioritized over essential rights like free expression.

Aesthetic-based objectives do not always need to be secondary to free expression rights. In *Weisfeld*, there was a weak connection between the goals of the protest and the expressive value generated from the structures in the Peace Camp. This is unlike *Zhang* where the court found that that the structures were important to the message's communication.[53] In some situations, like the one in *Weisfeld*, perhaps aesthetics should prevail over the right to erect a structure on common space because the protestor can engage with the public in different, equally effective ways – such as distributing pamphlets.

However, the court failed to engage in this debate. There was no discussion whether the salutary effects of a more aesthetically pleasing Parliament Hill should outweigh the protestors' choice of method for expression. This creates uncertainty for situations, like *Zhang*, where the protestors' structures play a much more integral role in the message's expression. In those situations, can aesthetics still prevail over the establishment of visually unappealing — yet expressively important — structures? *Weisfeld* is unfortunately silent on this issue and instead easily accepts and defers to the state's arguably unimportant aesthetic objectives.

Beyond this aesthetic objective, Linden JA also mentions how the Peace Camp may also have an impact on the "symbolic importance" of Parliament Hill.[54] He explains: "Parliament Hill is a powerful symbol of Canada, representing our democratic tradition to both its citizens and residents, as well as to the millions of visitors who

[53] *Zhang*, *supra* note 4 at 72, 74.
[54] *Weisfeld*, *supra* note 3 at 67.

come to this country each year.".[55] There is some irony in the government justifying the removal of a *political protest* in order to preserve the symbolism of Canada's "democratic tradition". Like the aesthetic objectives, the fact that the protestors can engage in other powerful forms of expressions – like verbal communication, pamphlets or banners – makes the government's restriction more justified. However, Linden JA's acceptance of the government's goal without discussing how it paradoxically stifles democratic values indicates how the court is too deferent to the state's interpretation and vision for how its common spaces are to be enjoyed.

VANCOUVER (CITY) V. ZHANG

Unlike *Weisfeld* and *Batty*, *Zhang* was decided in favour of the protestors. However, still, the decision leaves room for future courts to defer to the state rather than recognize the historic and vital relationship between free expression and common spaces. In *Zhang*, a group of protestors set up banners and a hut on a city street near the Chinese Consulate in Vancouver. Justice Huddart, for the British Columbia Court of Appeal, held that because there was no exemption or criteria for erecting politically expressive structures in the city's by-laws, the by-laws were not minimally impairing and, thus, not justified under s. 1 of the *Charter*.[56]

In the minimal impairment discussion, Huddart JA writes that had Vancouver's city council "instituted what might be called a "Political Structure Policy", as it did for commercial and artistic expression, as part of its regulatory scheme, [his] conclusion

[55] *Ibid*.
[56] *Zhang*, *supra* note 4 at para 67.

might well be different".[57] In the proportionality of effects discussion, Huddart JA concludes, "while the By-law provides for exceptions to be granted, the City did not justify why this regulatory scheme, as opposed to a more sensitively tailored regulatory scheme, has salutary effects for the City".[58]

Zhang found that Vancouver's by-law framework was inadequate because of the opaque exception process within the blanket prohibition on structures. This gives the impression that had Vancouver's regulatory framework provided a more systematic approach to reviewing applications for exceptions, the by-law in question could be minimally impairing and proportional. Justice Huddart suggests that if there were a policy with defined decision-making criteria, like public safety, orderly use and proper management, the by-law could be constitutional.

However, the focus on the city's procedure in *Zhang* is confusing when considering that the court found, as a fact, that "there was no evidence the location was subject to a competing use".[59] Unlike *Batty*, there was also no suggestion that the protestors' billboard or shelter threatened any opposing use of the space or public safety. Why, then, was the Court of Appeal's decision made based on a flaw in the city's regulatory framework and not based on the fact that expressive activity – especially of a political nature – is historically connected to city sidewalks? Justice Huddart's heavy reliance on the inadequately drafted by-laws suggests that the protestors may not have a right to use common space even when there is no competing use. The *Zhang* decision passed up an opportunity to rule in favour of the claimants because

[57] *Ibid* at para 69.
[58] *Ibid* at para 75.
[59] *Ibid* at para 72.

free expression critically depends on the availability of common space and should not be denied when there is no other competing use or public safety concerns. While the Court of Appeal ruled in favour of the protestors, the judgment makes room for future courts to defer to the state's property right and exclude free expression even where there is no competing use for the property – an indefensible outcome considering the relationship between freedom of expression and common spaces.

PART III: HOMELESSNESS, SECURITY OF THE PERSON AND COMMON SPACES

Two recent decisions from British Columbia – *Victoria (City) v Adams* and *Abbotsford (City) v Shantz* – have dealt with *Charter* challenges by the homeless to city park by-laws. In both cases, the *Charter* claimants were successful in establishing that the by-laws violated their s. 7 rights to life, liberty and security of the person and could not be saved by s. 1.

However, the success of these decisions is far from sustainable because of the judicial persistence on a private property perspective of the state's property rights to common spaces. *Adams* and *Abbotsford* are both examples of a successful homeless *Charter* challenge within a private property model. However, had the courts instead imported a more contextual understanding of the state's property rights, a more sustainable precedent could have been set. This portion of the paper will first examine why *Adams* and *Abbotsford* are only partial victories for the homeless communities. Second, this portion of the paper will demonstrate how and why the courts should have resolved the dispute outside of a private property perspective.

ADAMS AND ABBOTSFORD: CHARTER SUCCESS OR FOOL'S GOLD?

Despite the similarities between *Adams* and *Abbotsford*, there is one significant difference between the two decisions that must be highlighted. In *Adams*, the city of Victoria permitted overnight sleeping but had by-laws which prohibited any overhead protection.[60] Ross J of the British Columbia Supreme Court held that the impugned by-laws were both arbitrary and overbroad and thus violated the homeless' s. 7 rights.[61]

Justice Ross' analysis is, however, narrowed to the question of whether the city's ban on erecting structures is constitutionally permissible. Much of her analysis rests on the idea that the ban on structures itself does not prevent any harm.[62] For example, she writes, "there is no evidence and no reason to believe that any of the damage described [by the city] would be increased if homeless people were allowed to cover themselves with cardboard boxes or other forms of overhead protection while they slept.".[63] She explains that the city's concerns about damage to the sensitive ecosystem, disturbance of birds, damage to the parks' bluffs, increased litter, syringes being left in the park, and damage to the parks' turf are all problems that can and will occur irrespective of whether the homeless can erect overhead protections.[64] Ross J makes effort to clarify that the issues in the case are not whether the city can regulate the size and locations of structures but, instead, "the

[60] *Adams BCSC*, *supra* note 5 at para 4.
[61] *Ibid* at para 5.
[62] *Adams BCSC, supra* note 5 at para 191; *Adams BCCA supra* note 5 at 71-74, 129.
[63] *Adams BCSC, supra* note 5 at para 193.
[64] *Ibid*.

issue is much more specific: that being the complete prohibition on taking a temporary abode including overhead protection".[65]

In the proportionality stage of Ross J's s. 1 analysis, she finds that there is no rational connection between the measures and the objectives of the legislation. She notes that the problems that the city wishes to prevent, namely drug use, public elimination of bodily waste, vandalism, litter and crimes by and against homeless people, "are not matters that are related to the sort of shelter homeless people are permitted to erect".[66] This seems to imply that, however, that those listed problems could be connected to homeless sleeping in parks generally. Unlike *Abbotsford*, *Adams* is narrow in its scope as it seems to apply only to the issue of shelters being erected in situations where sleeping in the park is permitted. This makes *Adams*' applicability to other sets of facts limited.

In *Abbotsford,* the court decided that the by-laws in question were overbroad and grossly disproportionate. Justice Hinkson's analysis of overbreadth and gross disproportionality are both susceptible on appeal. First, on the question of overbreadth, the analysis of the by-laws is underdeveloped and/or incorrectly reliant on *Adams*. After outlining the relevant law, Hinkson J discusses whether the by-laws are overbroad in just two short paragraphs:

> In *Adams BCSC*, Ross J applied the test in *Heywood* for overbreadth and the Court of Appeal approved the use of the test that she applied. If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to achieve that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[65] *Ibid at 188.*
[66] *Ibid* at 204.

> I conclude that the impugned Bylaws that deny the City's homeless overnight access to public spaces without permits and prevents them from erecting temporary shelters without permits are overbroad.[67]

While Hinkson J's statement of the law is concise and helpful, there is no application of the law to the specific facts of the case. It is arguable, although hardly evident, that Hinkson J is simply applying the overbreadth reasoning in *Adams*. However, as mentioned, *Adams*' application to *Abbotsford* is limited because much of *Adams*' conclusion on overbreadth is dependent on the fact that the city in *Adams* did not prohibit sleeping in the park, but only erecting structures. In *Abbotsford*, the impugned by-law *did* prevent overnight sleeping the park and is, thus, distinguishable from *Adams.* This is a critical difference and that makes *Abbotsford*'s conclusion on overbreadth susceptible on appeal.

Abbotsford also finds the city's by-laws grossly disproportionate, however, this conclusion could also be challenged on appeal. Hinkson J grounds her analysis in the fact that the homeless were continually being displaced and evicted and that this has a "serious effect on the psychological or physical integrity of the city's homeless".[68] She found that "this constant movement of the homeless exacerbated their already vulnerable position, as it inhibited the ability of the service providers who endeavoured to help the City's homeless to actually locate them and provide help.".[69] However, the remedy in *Abbotsford* only allows the homeless to erect temporary shelters between 7:00pm and 9:00am the following day. This seems to

[67] *Abbotsford*, *supra* note 6 at 202-203.
[68] *Ibid* at 209.
[69] *Ibid*.

do little to resolve constant displacement, as the homeless will still be required to move their belongings on a daily basis. In addition, in some situations, the homeless may simply be unable to move somewhere else during the day or quickly enough to comply with the 9:00am deadline, especially if they are unwell.[70] While there is nothing inherently wrong with the court's remedy, the fact that it may not alleviate the serious physical and psychological harms that Hinkson J discusses raises concerns about the way the decision reaches its conclusion. This makes Hinkson J's conclusion susceptible to appeal by both the city, who may be dissatisfied with this inconsistent analysis, and the homeless, who may be unsatisfied with the remedy that does not adequately alleviate the problem of constant displacement.

MOVING ADAMS AND ABBOTSFORD AWAY FROM A PRIVATE PROPERTY PERSPECTIVE

As explained above, the *Adams* and *Abbotsford* decisions may prove ultimately unhelpful in future *Charter* litigation involving bans on overnight access to parks that affect the homeless. There are, at least, some causes for concern regarding the precedential power of these decisions. This is unfortunate because had the courts deferred less to the state's conception of how its property was to be managed and instead examined the social relations that underpin common spaces, like public parks, both decisions could have recognized a homeless right to use the parks overnight in a much more legally sustainable and powerful way.

[70] Sarah E Hamill, "Private Property Rights and Public Responsibility: Leaving Room for the Homeless" (2011) 30 Windsor Rev Legal & Soc Issues 91 at 109 [Hamill 2011].

The decisions in *Adams* and *Abbotsford* highlight two problems. First, much how the court in *Batty* showed deference to the city's definition of "traditional" activities, these decisions show deference to the state's conception of "community", which excludes the homeless from this community. Second, in addition to deferring less to the city's ownership objective, the courts could and should have acknowledged the unique relationship between the homeless and common property given that the legal existence of the homeless is dependent on access and use of common spaces. The following analysis will demonstrate the flaws of relying on a private property model in these types of cases and suggest how the courts should have reasoned these cases.

A) DEFERENCE TO THE STATE'S CONCEPTION OF COMMUNITY

Much like how the state's control over what is deemed to be "traditional" uses in freedom of expression cases, *Adams* and *Abbotsford* involve the state controlling what it means to be a part of a community. In both the *Adams* and *Abbotsford* decisions, the state and the courts recognize the role of the common space as a place for recreation, socialization and community. In *Adams*, the city claimed that "parks provide significant environmental, recreational, social and economic benefits to the community"[71] and that "parks and public spaces positively affect the quality of urban life, contributing tangible and intangible benefits to the community".[72] In *Abbotsford*, a similar rationale is used by the city. The various impugned by-laws'

[71] *Adams BCSC*, *supra* note 5 at 200.
[72] *Ibid* at 173.

objectives had a "view to ensuring that parks are available to current and future members of the public for pleasure, recreation, or similar community uses".[73]

However, the pursuit of these objectives makes the state's arguments rather paradoxical. In essence, the state is attempting to use the "quality of urban life" and "tangible and intangible benefits to the community" as a justification for denying the homeless any semblance of a decent urban life or sense of community. The state's objective implicitly prioritizes the socialization of the majority over the homeless' ability to even have the capacity to socialize or live in a community. The courts too easily accept the state's objective without examining its inherent paradoxical nature.

Hamill, in her discussion of *Adams*, writes:

> The City of Victoria argued, and the Court of Appeal agreed, that it had a duty to regulate its parks so that they were protected and maintained for everyone to use. Nevertheless, the homeless were not included in that category, because their use was and is necessarily different from that of everyone else.[74]

The socialization and community envisioned by Abbotsford and Victoria did not include the homeless; the homeless were using the land in a way the city did not envision. However, rather than recognizing that the city must be willing to accommodate that different use of the land, *Abbotsford* and *Adams* shy away from invading into what the cities have defined as "socialization" and "community". As Hamill contends, "regulations which make publicly accessible property more attractive to other citizens by denying the existence of the homeless are

[73] *Abbotsford, supra* note 6 at 19.
[74] Hamill 2011, *supra* note 70 at 113.

unacceptable and unworkable."[75] If the pursuit of community is the state's actual goal, then the integration of the homeless is imperative.

Rather than defer to the state's conception of socialization and community, the courts could have taken the opportunity to highlight the contradictory state objective when examining the overbreadth principle in their s. 7 analyses. In *Canada (AG) v Bedford*[76], the Supreme Court reviewed the principles of fundamental justice, including overbreadth. The Court explained that overbreadth is when "the law goes too far and interferes with some conduct that bears no connection to its objective".[77] For example, in *R v Heywood*[78], the accused was prohibited from "loitering" in public parks because he was previously convicted of a listed offence.[79] The Supreme Court held that "insofar as the law applied to offenders who did not constitute a danger to children, and insofar as the law applied to parks where children were unlikely to be present, it was unrelated to its objective" and, therefore, overbroad.[80]

The same reasoning should apply to the homeless. By-laws like the ones in *Abbotsford* and *Adams* are overbroad insofar as they apply to the homeless because there is no connection between preventing the homeless from accessing common spaces and the objectives of improving the quality of urban life and society's sense of community. In fact, those state objectives are hindered when members of society are denied the ability to access common spaces to rest and sleep. In both *Adams* and *Abbotsford*, the courts had an opportunity to recognize this but instead, in effect,

[75] *Ibid*.
[76] [2013] 3 SCR 1101, 2013 SCC 72 [*Bedford*]
[77] *Ibid* at para 101.
[78] [1994] 3 SCR 761, 120 DLR (4th) 348.
[79] *Ibid*; *Bedford*, *supra* note 76 at para 101.
[80] *Bedford*, *supra* note 76 at para 101.

defer to the state's concept of community, which, as mentioned, necessarily excludes the homeless.

B) THE UNIQUE AND NECESSARY RELATIONSHIP BETWEEN THE HOMELESS AND COMMON SPACES

Beyond the fact that the *Adams* and *Abbotsford* over rely on the state's defined use for the land, the courts should have more closely examined the social relationship between the homeless and common space. Unlike other citizens, the homeless have a deep connection and reliance on common spaces because the homeless, by definition, lack private property rights.

Common spaces are used temporarily; no one has a right to permanently use a piece of land in a park. However, as Hamill notes, "the understanding that citizens only want *temporary* access to public property assumes that they have private property of their own to retreat to".[81] In the case of the homeless, there is only private property to retreat to if they are given permission from the owner. When shelters are full or unsafe, there is rarely any private property to use making their existence dependent on the accessibility of common spaces. While for the majority of the public, their relationship with common spaces is valuable and beneficial, the relationship between the homeless and common property is one of *necessity*. This is not to say that the homeless are entitled to a permanent place in common property. However, this does mean that they should be entitled to use these common spaces in ways that may not be permitted by other members of the public, including overnight access or the right to erect temporary or semi-permanent structures.

[81] Hamill 2011, *supra* note 70 at 95.

Given that holding no property in land is a legally acceptable outcome for some in society, there is an ongoing understanding between the state and the homeless that certain parts of state-owned property will be made available. Otherwise, the homeless could be criminalized for simply existing (which, arguably, occurs in some cases). When the homeless do not have permission to use private property, the alternative cannot be a crime. Therefore, this relationship dictates that common spaces be legislated so that the homeless can use it in a way that respects their dignity and life-preservation. Even if this is not the intention of the state, as owner, the relationship between common spaces and the homeless insists the state have an obligation to accommodate. This is especially true given the status of the homeless in society. Hamill argues that:

> There is some irony then, that when an individual has no private property rights and thus is most in need of his share of the public benefit of public property, he is most likely to find public property closed to him through regulations which criminalize his lack of private property.[82]

Given that being homeless is 'legal', courts and the law should recognize that common spaces must accommodate the homeless, whether or not it is the state's intention as owner.

The courts in *Abbotsford* and *Adams* should have analyzed these facts from a contextual and social relations perspective, which would have better reflected the state's property rights with respect to the homeless. Instead, the court in *Adams* narrowed the issues to the use of shelters while the court in *Abbotsford* rested its judgment on (1) a case, *Adams*, that does not apply and (2) the finding of harms that

[82] *Ibid* at 111.

its own remedy will be unlikely to resolve. These decisions missed an opportunity to engage with the moral questions about what "community" means and the deeply entrenched relationship between the homeless and common spaces, which would have enhanced the judiciary's ability to adequately and fairly adjudicate disputes like this in the future.

CONCLUSION

The state is an owner of its property, which includes common spaces like city parks and streets. However, the "ownership" label – especially as it applies to common spaces – must be qualified. The state's desired use of its common spaces is not entitled to the same deference that a private property owner is entitled to. However, as seen in jurisprudence, courts are willing to defer to state objectives and overlook the historical relationships between certain activities and common spaces.

In the freedom of expression context, courts defer to state-defined "traditional" activities instead of recognizing that freedom of expression is equally traditional. The *Batty* and *Weisfeld* decisions illustrate how the state's desired use of its property – like gentrified uses of parks and the protection of aesthetics – are prioritized over freedom of expression rights. This leads to judicial decisions that antagonize freedom of expression as if it is a violation of the state's will as a private property owner. In addition, as the *Batty* decision demonstrates, a shift away from a private property framework may allow for remedies that better protect expressive activities *and* the concerns of wider community of Canadians. The *Zhang* decision, while a victory for the protestors, still indicates that courts will be willing to defer to state objectives in the future – even when the protestor's activities face no

competing uses. All of these cases exemplify the problems that can emerge from a private property perspective. Instead, the courts would have benefitted by approaching the state's property rights with an understanding of the history, context and relationship between protestors and common spaces.

For the homeless under s. 7, the *Adams* and *Abbotsford* decisions are helpful to the particular claimants but may have trouble setting a precedent for future homeless *Charter* claimants. The *Adams* decision only applies to a ban on the homeless erecting structures in parks. The *Abbotsford* decision faces potential challenges on appeal as its analysis incorrectly relies on *Adams* and also devises a remedy that is at odds with its gross disproportionately analysis. The courts should have embraced a model of state ownership that incorporates the social relationship between the homeless and common spaces. This could be accomplished in two ways. First, the courts should have critically assessed the state's paradoxical claim that creating a sense of community and socialization requires the marginalization of the homeless from this community. Second, the courts should have recognized that there is a special and vital relationship between common spaces and homeless communities. Challenging state objectives and integrating a greater understanding of the relationship between the homeless and common spaces will help strengthen the judicial analysis for future similar cases.

Property law must be delicately tailored to balance competing interests. However, the balancing framework cannot treat state ownership of common spaces like any other kind of ownership. When, in *Batty*, Brown J says that "without some balancing of what people can and cannot do in parks, chaos would reign; parks would become

battlegrounds of competing uses"[83], he paints a false choice. The choice is not between state regulation and Hobbesian mayhem.[84] Rather, the choice is between two different types of regulation: one that treats the state's property rights with unnecessary, private property reverence and one that cross-examines the state's ownership objectives against social context and relationships. This subtle change in legal perspective, however, requires a shift from the current emphasis on the state's control of common spaces through a private ownership model towards a deeper and more contextual understanding of state property that views freedom of expression and homeless camping as synonymous, rather than competitive, with the state's intended use of its property.

[83] *Batty*, *supra* note 2 at para 91.
[84] Hamill 2012, *supra* note 25 at 384.

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