

Anti-camping Bylaw's Unconstitutional Status Upheld by Court of Appeal

On December 9, 2009 the British Columbia Court of Appeal released its reasons for judgment in the *Victoria (City) v. Adams* case.

The decision of the Trial Judge (released in October 2008 and reported on in our client bulletin at <http://www.sms.bc.ca/client/2008/oct2008-1.html>) received widespread attention. Given the importance of the issues, a number of additional parties sought and were granted intervenor status at the Court of Appeal, including the Union of British Columbia Municipalities, the British Columbia Civil Liberties Association, The Poverty and Human Rights Centre, and Pivot Legal Society. The Attorney General of British Columbia participated as an intervenor on the appeal as well.

On appeal, the City argued that the Trial Judge's decision represented an improper intrusion into the arena of complex policy decisions, given that the issues concerned the allocation and use of public parks and other municipal resources, which are decisions best made by elected officials. The City also argued that the Trial Judge erred in finding that the bylaws violated the rights of the Respondents under section 7 of the Canadian Charter of Rights and Freedoms. Finally, the City appealed from the Order of the Trial Judge that the Defendants be awarded special costs of the trial.

The Court of Appeal held that although the issues involved in the case raised political concerns, the question of whether the bylaws violated the respondent's Charter rights was a proper question for the court to consider. The Trial Judge's finding that the bylaws violated the rights of the Respondents under section 7 of the Charter was upheld. Additionally, the Court of Appeal upheld the Trial Judge's award of special costs to the Respondents, and further ordered that the Respondents were entitled to special costs of the appeal.

The City's appeal was allowed in part, to the extent that the Court of Appeal narrowed the Trial Judge's order, particularly by making it clear that the order only permitted the erection of structures on a temporary, overnight basis.* Additionally, the Court of Appeal added to the order a provision under which the City may apply to the Supreme Court of British Columbia to terminate the order, if the Court is satisfied that the bylaws no longer violate section 7 of the Canadian Charter of Rights and Freedoms.

The Court of Appeal confirmed that the Trial Judge's decision does not give rise to an unrestricted and freestanding constitutional right to erect shelters in public parks. The Court of Appeal confirmed that the finding of the Charter violation was expressly linked to the Trial Judge's factual finding that the number of homeless people exceeded the number of available shelter beds in Victoria. As noted, the court order was modified so that the City may in future apply to the Supreme Court to have the declaration set aside, if those circumstances change.

In response to the suggestion that there may be difficulty in determining who is a "homeless person" for the purposes of the Trial Judge's order, the Court of Appeal stated that a good working definition for the purposes of the order would be "a person who has neither a fixed address nor a predictable safe residence to return to on a daily basis".

This case may set a precedent for other areas of the Province, where the same combination of circumstances exists (the homeless population exceeding the number of available shelter beds). In practical terms, the effect may only be to temporarily suspend a

local government's ability to impose a total prohibition on camping in public places until the shortage of shelter beds is alleviated. Local governments facing the same circumstances could consider bylaw amendments to provide exceptions to "no camping" rules in order to accommodate those circumstances.

The aspect of the decision that has the most significant implications for local government is the Court of Appeal's ruling on the costs issue. Drawing upon a line of authority dealing with public interest litigation, the Court of Appeal held that it was appropriate that a successful public interest litigant be awarded special costs (here against a local government) where

- a) the case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
- (b) the successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
- (c) as between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and
- (d) the successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.

While the Court of Appeal stated that such awards would be made in only the most extraordinary of situations, it remains to be seen how this test will be applied in future cases.

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* The Court of Appeal noted the fact that there had been a disagreement as to whether the word "temporary", as used in the order, referred to the nature of the shelter's construction, or to the length of time that it was able to remain in place. The Court stated that the evidence in the case was directed at the need for homeless persons to erect temporary overnight shelter, in order to be able to sleep outside. Accordingly, the declaration was modified in order to clarify the intention that the City is required to allow shelters to remain in place only for the overnight period.