

Anti-Camping Bylaw Found Unconstitutional

On October 14, 2008, the Supreme Court of British Columbia released the decision of Madam Justice Ross in the case of *Victoria (City) v. Adams*, 2008 BCSC 1363. The case concerned the constitutionality of certain provisions in the City of Victoria's Parks and Regulation Bylaw which prohibit a person from taking up a temporary abode overnight in a park, and which also prohibit the erection or construction of tents, buildings or structures within City parks and other public spaces. Also in issue were provisions of the City's Streets and Traffic Bylaw which prohibit the obstruction of City streets and sidewalks.

The Court held that the impugned provisions of the bylaws violate section 7 of the Canadian Charter of Rights and Freedoms, in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice. The Court further held that the provisions were not saved under section 1 of the Charter. The Court also held that the impugned provisions of the bylaws were of no force and effect in so far and only in so far as they apply to prevent homeless people from erecting temporary shelter.

This case has far reaching implications for all levels of government. City of Victoria Council has decided to appeal the Court's decision.

Background to the case

The proceedings were commenced by the City of Victoria in order to enforce the provisions of its Parks Regulation Bylaw, and its Streets and Traffic Bylaw. The action was commenced when a number of persons, including the nine named Defendants, established a "tent city" in one of the City's parks. Eventually, the City obtained an interim interlocutory injunction prohibiting the Defendants and other persons with notice of the Order from taking up a temporary abode overnight in the park, and requiring them to remove any signs, chattels, tents, tarps, and other things which in any way encumbered or obstructed the free use and enjoyment of the park.

After the interim interlocutory injunction was issued, the Defendants complied with the Order and abandoned their tent city. However, they also proceeded to serve the Attorney General of British Columbia with a Notice of Constitutional Question, challenging the constitutional validity of the bylaws.

Evidence and findings of fact

Evidence was submitted at the trial about the City's policy concerning the interpretation and enforcement of its bylaws. The following points were noted in the reasons for judgment:

1. That when City police encountered persons sleeping in a park during daytime hours, and there was no evidence of those persons taking up temporary abode in the park, they were not awakened or asked to move on;
2. That under the Streets and Traffic Bylaw, where City police encounter homeless people sleeping in public spaces between 11:00 p.m. and 7:00 a.m., they do not generally awaken them or request that they move on if they are not obstructing a sidewalk, street or other right of way, or interfering with the use of a public amenity such as a bus shelter; and
3. That in both cases, when concerned about a person's welfare, police may need to awaken the person in order to assess their health condition.

The City also provided evidence that persons were not prohibited from creating shelter for themselves in public places as long as they were not taking up a temporary abode. Homeless persons were allowed to protect themselves from the elements and to stay warm while they were sleeping through simple, individual, non-structural, weather repellent covers that were removed once the person awakened. The City's position was that the Parks Regulation Bylaw prohibited the taking up of a temporary abode overnight, and accordingly, no tents, tarps that were attached to trees or otherwise erected, boxes or other structures were permitted.

Much other evidence was presented to the Court. Based on the evidence, including a report published in October 2007 by the (Victoria) Mayor's Task Force on Homelessness, and expert medical evidence presented on the Defendant's behalf, the Court made the following additional findings of fact:

- (a) that there were at present more than 1,000 homeless people living in the City;
- (b) that there were at present 141 permanent shelter beds in the City, expanded to 326 when the City's extreme weather protocol was in effect;
- (c) that the number of homeless people exceeds the available supply of shelter beds;
- (d) that exposure to the elements without adequate shelter such as a tent, tarpaulin or cardboard box is associated with a number of substantial risks to health including the risk of hypothermia, a potentially fatal condition; and
- (e) adequate shelter for those sleeping outside in the West Coast climate requires both ground insulation and appropriate overhead protection in the form of a tent or tent-like shelter.

The Court stated that the focus of the constitutional inquiry was directed to the gap between what was permitted by the bylaws and the operational policy of the City and what was prohibited by the bylaws and policy. Sleeping in a park or public place was not prohibited. The "gap" identified by the Court was the ability of a homeless person to erect temporary overhead protection on public property.

Section 7 analysis

The analysis of the trial judge on the constitutional issue was lengthy and occupies eighty pages of the reasons for judgment.

Section 7 of the Canadian Charter of Rights and Freedoms provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Was there a deprivation of a section 7 right?

The City and the Attorney General of British Columbia (who intervened in the case) both argued that the deprivation in issue in the case did not result from any action on the part of the City – the City's bylaws did not cause the Defendants or any other person to be homeless. The City and the Attorney General also argued that section 7 of the Charter could not be invoked to impose a positive obligation on the part of the City to allocate resources towards the homeless condition of the Defendants, or any other persons, and further that the Defendants could not invoke section 7 to assert what was in effect a claim to a right to camp on public property. The Court disagreed with those arguments.

As background to the interpretation of section 7, the Court referred to several international human rights documents that refer to housing as a fundamental right. Canada is a signatory to documents such as the Universal Declaration of Human Rights, which refers

to a right to a standard of living adequate for the health and well being of a person and their family, including housing. While agreeing that those various international instruments do not form part of the domestic law of Canada, the Court held that they should inform the interpretation of the Charter and the scope and content of section 7.

As to the question of whether there was sufficient state action to engage section 7, the Court held that to the extent that the bylaws prohibited certain conduct, and created an offence, and subjected homeless persons to potential penalties, they constituted sufficient state action to fall within the scope of section 7. While agreeing that the City's actions, and in particular the provisions of the bylaw, had not resulted in the homeless state of the Defendants or any other person, the Court found that the bylaws impaired the ability of the homeless to address their need for adequate shelter. In the Court's view, that constituted a deprivation of section 7 rights resulting from state action.

The Court also rejected the argument that the Defendants' claim was for a positive benefit. In the Court's view the Defendants were not seeking to compel the City to provide the homeless with adequate shelter. Rather, the claim was that in circumstances where the number of homeless people exceeded available shelter space, it was a breach of section 7 for the City to use its bylaws to prohibit homeless persons from taking steps to provide themselves with adequate shelter.

The Court also rejected the argument that the Defendants were asserting a property right. In the Court's view, the defendants were not seeking to have public property allocated to their exclusive use – they were simply saying that the City could not manage its property in a manner that interfered with their ability to keep themselves safe and warm.

The Court concluded that the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the section 7 guarantee of the right to life. The right of the Defendants to create shelter to protect themselves from the elements was, in the Court's view, critical to their dignity and independence, and the interference with their ability to protect themselves was also a deprivation of liberty within the scope of section 7.

Finally, in the absence of sufficient shelter spaces for the homeless, the effect of the bylaws was to impose a sanction that deprived the homeless of access to shelter required for adequate protection – homeless persons were left to choose between a breach of the bylaws in order to obtain adequate shelter, or inadequate shelter exposing them to increased risks to significant health problems or even death. This constituted a deprivation of security of the person within the scope of section 7.

Was the deprivation in accordance with the principles of fundamental justice?

The Court went on to hold that the resulting deprivation was contrary to the principles of fundamental justice. In particular, the Court held that the bylaws' prohibitions were overbroad and arbitrary. In particular, and in the face of the City's expressed concerns for the proper management of its park system, and the prevention of damage to parks, park amenities and sensitive ecosystems, the Court held that less restrictive measures were available that could address the City's concerns. As examples, the Court stated that regulations requiring the removal of overhead protection every morning, and the creation of zones in sensitive park regions where sleeping was not permitted, might be alternatives. The Court also found that certain of the City's concerns were not directly or necessarily related to the erection of temporary overhead protection.

Section 1 analysis

Finally, the Court held that the infringement on the Defendants' section 7 rights was not saved under section 1 of the Charter. Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Applying the tests that have been adopted by the Courts under section 1, the Court accepted that the City's object in preservation of its parks was an important objective.

However, the Court held that the concerns the City expressed in relation to the establishment of homeless encampments or tent cities - such as drug use and drug sales, public elimination of bodily waste, vandalism, litter, crimes by and against homeless people – were not matters that related to the sort of shelter homeless persons should be permitted to erect. A provision prohibiting the erection of a temporary overhead shelter was not rationally connected to the City's objective, in the Court's view.

The Court found that the bylaws did not minimally impair the Defendants' rights. In particular, while the City's concern was for preservation of parks, the bylaws applied to all public land. Also while the City's concern was for structures that provided for a degree of permanence, all overhead protection, including that taken down every morning, was prohibited.

Finally, the Court held that the impact on the Defendants' section 7 rights was disproportionate to the City's objectives in adopting the bylaw measures.

What now?

Firstly, on the face of it the Courts' ruling is of limited effect. The City's bylaws were held only to be ineffective in so far as they apply to prevent homeless people from erecting temporary shelter.

Given several statements of the Trial Judge in her reasons for judgment, it appears reasonable to conclude that "temporary shelter" can be limited to tarps, tents, cardboard boxes or similar structures that can be readily disassembled and removed, and that the exception created would only apply to the placement of such structures overnight. In our opinion, the creation of "tent cities" and permanent encampments on public lands is not permitted under the terms of this judgment.

It is also important to recognize that the Court's conclusions stem from a finding that insufficient shelter beds were available in the Victoria area to provide overnight shelter to all homeless persons. In the event that situation changed, and sufficient shelter beds were available, arguably the Court's ruling would no longer apply.

At the same time, the judgment creates some significant problems:

1. The judgment does not define what is meant by "homelessness". Police and bylaw enforcement officers may find it difficult to differentiate between those who are truly homeless, as a result of one or more of the variety of social and economic problems referred to in the judgment, and those who may have sufficient means of shelter available but who choose not to use those resources.
2. The judgment does not define what "temporary" shelter is, although as noted above, when read in context it seems reasonable to conclude that this can be limited to overnight shelter.

Similar bylaw provisions are found in many municipal and other local government parks regulation bylaws throughout the province and elsewhere in Canada. In our opinion, all such bylaws are now vulnerable to similar challenges, in the event that the resources in the area are not adequate to provide overnight shelter for the homeless population.

Moreover, in our view this judgment has the potential to affect not just local governments, but also all public bodies that are subject to the Charter of Rights, and which own or manage property that is available for public use. Any form of regulation that limits or restricts overnight camping on public land may be vulnerable to challenge in the event that adequate emergency resources are not available to service the homeless population in the area.

Until the Court of Appeal settles the matter, in our view it is premature to consider amending local government bylaws in response to this judgment. On the other hand, for local governments that have a large homeless population and inadequate shelter resources, consideration could be given to revising enforcement policies, at least on an interim basis, if there is a concern that existing bylaws might be vulnerable to a similar challenge.

As of the date of this article, the City of Victoria has adopted a bylaw enforcement policy in response to the judgment to the effect that its bylaws will not be enforced against homeless persons who erect temporary overhead protection.

The City's policy also requires that:

- a) the temporary overhead protection may only be erected during certain hours and must be removed each morning;
- b) temporary overhead protection may not be erected in environmentally sensitive areas, and may only be erected on grassy open areas on certain City lands;
- c) all other provisions of the City's Parks Regulation Bylaw and Streets and Traffic Bylaw must be adhered to.

Peter Johnson
October 17, 2008

2nd Floor
837 Burdett Ave.
Victoria, BC
V8W 1B3

tel 250.380.7744
fax 250.380.3008

www.sms.bc.ca
logolaw@sms.bc.ca