YOUNG ANDERSON
BARRISTERS & SOLICITORS

# THE TOUGH ISSUE OF HOMELESSNESS

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## I. INTRODUCTION

Many local governments are faced with tough decisions relating to people living in places not generally intended or safe for human habitation on public and private land in their communities and the enforcement of their bylaws. People living in such circumstances are often homeless. The issue of homelessness requires local governments to balance interests and to consider matters such as health and safety concerns and rights under the *Canadian Charter of Rights and Freedoms*. This paper will discuss recent cases in this area and the complexity of the law surrounding the issue as it relates to local governments and the enforcement of their bylaws.

## II. THE ISSUE

In *City of Abbotsford v. Shantz*, Oral Reasons for Judgment on December 20, 2013, New Westminster Registry, Mr. Justice Williams summarized the matter before him as "one of considerable complexity" and at its root "a profound social issue". He continued at paragraphs 10 and 11 of his Reasons for Judgment:

> This case raises difficult issues. The defendants are a particular and special group of persons. They are marginalized members of the community. Many of them have drug and alcohol issues and suffer from mental illness. The evidence satisfies me that they are not simply persons who have no homes. They are person whose personal conditions and idiosyncrasies make conventional housing and shelter solutions problematic. The typical shelter alternatives are, for these persons, they say, not really viable options.
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> The fundamental social issue at hand is this: what provision, what accommodation, if any, is society prepared to make for these particular persons and others like them?

In that case, the City of Abbotsford sought an interlocutory injunction to, among other things, require homeless persons to remove themselves and their encampment from Jubilee Park in Abbotsford. For approximately two months, a group of homeless persons had set up a tent camp and occupied the park. The City considered that the activities violated various bylaws and that there were unsafe and unacceptable consequences resulting from the activities.

There were two prior court appearances on the matter, one involving persons appearing before the court to stay any action on the City's eviction notice and one involving the City appearing before the court on short leave for an order for persons to vacate and cease occupying a wooden structure, which violated the City's Building Bylaw, Fire Services Bylaw and Parks Bylaw.

Mr. Justice Williams noted there was evidence that shelter facilities were available and that an agency of the government was prepared to find conventional housing for those who applied. He took the view that an individual could, if they wished, have shelter provided to them. At the same time, he acknowledged that the shelter provided may be unacceptable to various individuals. He noted, for example, that there was evidence that "shelters tend to have rules which make life difficult for persons who have other problems, whether that is a drug dependency, a pet they wish to keep with them or a similar concern".

Mr. Justice Williams granted the City an interlocutory injunction but provided the following concluding remarks at paragraph 51:

> This decision has not been an easy one. My conclusion is, I am confident, in accordance with the applicable legal principles and authorities. However, the circumstances of the defendants are compelling. Many of these persons are truly troubled. They are a very marginalized faction of our society. Their hardships are legitimate and constitute a serious social concern. In my respectful view, those who might be inclined to see them as simple troublemakers and malcontents, people looking for a handout or a free ride, fail to understand that this is a societal problem, one that merits the sincere consideration of members of the public.

On March 6, 2014, the British Columbia/Yukon Association of Drug War Survivors commenced a proceeding against the City of Abbotsford claiming the City employed "displacement tactics" relating to the homeless population that camped at Jubilee Park and raised *Canadian Charter of Rights and Freedoms* challenges to sections of the City's Parks Bylaw, Good Neighbour Bylaw and Street and Traffic Bylaw. The British Columbia/Yukon Association of Drug War Survivors is a society whose purposes include improving the health and social conditions of people who use illicit drugs.

In *British Columbia/Yukon Association of Drug War Survivors v. City of Abbotsford*, 2014 BCSC 1817, the City applied to the court to have the claim dismissed or portions of the claim struck on various grounds and raised the issue of standing of the society to bring the claim. One of the City's arguments was that the claim was unnecessary because some of the individuals that had occupied the park had commenced proceedings in Small Claims Court regarding the City's alleged destruction of their possessions. In addition, the defendants have raised *Canadian Charter of Rights and Freedoms* challenges to the City's bylaws and the City's displacement tactics in response to the City's injunction proceedings, which has yet to proceed to a trial. The City was largely unsuccessful at this early stage of the claim.

Most recently in *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926, the Park Board sought an interlocutory injunction to enforce the City's Parks Control Bylaw relating to 200 tents in Oppenheimer Park. The tents were occupied by homeless individuals for over two and half months. Madam Justice Duncan was satisfied that an injunction should be granted

but considered that it was important to set out the background of the matter and the stories of the individuals who would be affected by the order.

She noted that one individual uses a wheelchair and that accommodations are not wheelchair accessible. In the past, the individual has left his wheelchair downstairs at establishments with the result that it was damaged and vandalized. He was banned from staying at one place due to a dispute. Another location provides mats on the floor which is not suitable for him given his mobility challenges. He prefers to stay at the park to sleeping at a shelter.

Another individual needs his space and becomes frustrated with shelters. He feels he cannot go to a shelter because there are too many rules and he cannot have the space he needs. For example, shelters require people to stay in at night and sometimes he needs to be up and about.

Another individual is a veteran that served in Afghanistan and now suffers from Post-Traumatic Stress Disorder. He does not cope well in crowded, noisy environments.

Madam Justice Duncan noted the City's efforts to identify how many people require housing and how many people have been offered housing or shelter space at the park. She acknowledged the difficulties in determining the number of people who require housing with any precision. The evidence of the Park Board indicated that the number of shelter beds reserved at several shelters roughly equaled the number of people living in the park. She commented that the opinion of the Park Board that people have refused to leave the park for these shelters was not unreasonable based on the evidence.

These matters are indeed complex social issues. The question is what is the role of the courts in such issues? And what is a local government to do when faced with such difficult issues that require balancing various interests and considering the health and safety of individuals?

## III. LOCAL GOVERNMENTS CONCERNS

Local governments are faced with difficult decisions relating to people living in places not generally intended or safe for human habitation and the enforcement of their bylaws.

The B.C. Building Code and the B.C. Fire Code set provincial standards for buildings and structures as to what is considered safe for human habitation. In addition, a local government may have various bylaws that set out health and safety standards such as a building bylaw, fire bylaw and floodplain bylaw. The defendants in enforcement proceedings often downplay or minimize health and safety risks. However, local governments have the jurisdiction and expertise in such matters. It is difficult for local governments to "just look the other way".

It is the task of local governments to determine where the public interest lies in enacting bylaws on public and private land in their communities and ensuring that public land is available to all members of the public and that private land is used for the purpose permitted. A local

government may have various bylaws regulating the use of land within their boundaries such as a zoning bylaw, parks bylaw, streets and traffic bylaw and nuisance bylaw. Homeless issues require a balancing of various interests.

The *Williams* and *Shantz* cases are illustrative of a local government's concerns.

In a previous court appearance, in the *City of Abbotsford v. Shantz*, 2013 BCSC 2426, the City brought an application on short leave to require homeless persons to vacate and cease occupying a wooden structure that was built on the parking lot adjacent to the park. The structure violated the City's building, fire and parks bylaws and the City considered the structure to be unsafe for human habitation.

The City of Abbotsford Fire Department observed various fire hazards including a gas generator, a five-gallon container of gasoline and other combustible materials inside the structure. The Fire Department considered the structure to be unsafe for habitation. The Deputy Fire Chief expressed concern that due to the propane stoves being used in the structure, there could be a buildup of carbon monoxide in the structure which could kill or make people sick. Furthermore, he expressed concern that if there is a leak of propane or gas, the propane or gas could ignite and cause an intense fire or explosion resulting in death or serious injury due to the contained area.

The City's Chief Building Inspector also expressed concerns with the safety of the structure including the ability of people to exit from the structure in the event of an emergency.

The defendants in their submissions sought to minimize the risks. The Court granted the City its order requiring the occupants to vacate the structure and not to construct any other structures.

In *Williams*, numerous fire hazards were observed by the Vancouver Fire Department such as candles in tents, smoking inside tents, ceremonial fires, open flames and a volume of combustible materials near possible ignition sources. The Assistant Chief of Emergency Management for the Fire Department expressed the concern that tents were in such close proximity to each other that there was a real potential for a fire to move quickly from one tent to another. Madam Justice Duncan noted one example of the real danger posed by the encampment was that a sleeping man was pulled out of a tent billowing with smoke. In the tent, a candle had caused cardboard and wood to smoulder and burn.

In a prior court application, Madam Justice Duncan issued an interim order that the orders of the Fire Department be obeyed but continuing violations were noted at the hearing of the interlocutory injunction.

The Fire Department further observed many fights taking place, an individual swinging a weapon, buckets of urine and feces in tents and rats in and around the tents.

The Police Department observed infractions of the *Liquor Control and Licensing Act* and criminal offences involving drugs and possession of firearms at the park. Officers would not go into the camp without backup and overtime policing costs attributable to the park were close to $100,000.

In addition, the City had to cancel several community events in the park including a summer carnival for residents in the Downtown Eastside, an annual celebration of Japanese culture which is deeply ingrained in the history surrounding the park and a health fair designed to assist people living in the Downtown Eastside.

## IV. THE TEST FOR AN INTERLOCUTORY INJUNCTION

These cases often end up initially with the local government seeking an interlocutory injunction to enforce its bylaws pending a trial on the merits. The courts have recently grappled with which test applies to the granting of an interlocutory injunction when a local government is seeking to enforce its bylaws in cases where homeless issues and *Canadian Charter of Rights and Freedoms* arguments are raised.

### A. The Thornhill Test

Section 274 of the *Community Charter* provides that a municipality may enforce its bylaws, the *Community Charter* or the *Local Government Act* by injunctive proceedings in the B.C. Supreme Court. When a local government is seeking an injunction to enforce its bylaws, it therefore seeks a statutory remedy, not one based on equity. The *Vancouver Charter* has a similar provision for the City of Vancouver.

In determining whether to grant an equitable injunction, the court generally exercises its discretion in determining whether an injunction should be issued on equitable grounds. However, in cases of a breach of a bylaw or statute, the court will generally consider the public interest in enforcing public law as paramount, and the discretion to refuse injunctive relief to enforce a public enactment is limited to exceptional circumstances.

In *Maple Ridge (District) v. Thornhill Aggregates Ltd*., [1995] B.C.J. No. 3051, the B.C. Supreme Court set out the test for a statutory injunction as follows at paragraph 34:

> In my view, there is no defence to the claim of Maple Ridge for an injunction, because the public interest is at stake in the enforcement of a zoning by-law. It is the task of Council, not this court, to determine where the public interest lies. If the public interest is engaged and a permanent injunction is being sought, the court's only role is to determine whether a defendant has breached the by-law the municipality seeks to enforce.

Since *Thornhill*, the courts in British Columbia have recognized that a very narrow discretion may exist in exceptional circumstances. The Court of Appeal in *Vancouver (City) v. Maurice*,

2005 BCCA 37 summarized the test in the context of an interlocutory injunction as follows at paragraph 34:

> Contrary to the submissions made by the appellants, where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances.

In *Vancouver (City) v. Maurice*, 2002 BCSC 1421, the City of Vancouver sought an interlocutory statutory injunction to enforce its Street and Traffic Bylaw against a group of 200 people living in front of the Woodwards building. Mr. Justice Lowry found that poverty and the consequences of poverty are not exceptional circumstances to refuse to grant injunctive relief to enforce a breach of a bylaw. He commented on the court's limited discretion to refuse to grant statutory injunctions at paragraphs 19, 22 and 23 as follows:

> Poverty and the consequences of poverty are not, however, exceptional circumstances within the meaning that expression has been given. No authority can be cited that would support the contention that personal circumstances should permit the impoverished to engage in unlawful conduct so that the court should refuse the City's attempt to put an end to upwards of 200 people breaking the law. The governing authority is to the contrary.
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> …
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> Poverty and the consequences of poverty are serious social and political issues with which this, and other large cities in particular, must struggle. They are not, however, legal issues in the sense that they could constitute justification for the unlawful conduct of large numbers of people. The laws of this province and this city are to be obeyed by all. The personal hardship that may be suffered by those affected by the injunction being sought is, on the authorities that govern the exercise of this court's narrow discretion, outweighed by the public's interest in having the law enforced. There are no circumstances here that are sufficiently exceptional to justify the court's refusal to grant an injunction in favour of permitting the unlawful conduct of as many as 200 people, and perhaps more to come, to continue unabated.

Could it be said that despite the City's responsibility to enforce the by-laws enacted for the public's orderly use of the streets and sidewalks in the city, the court ought to refuse to grant a statutory injunction the City seeks to bring an end to an obstruction of sidewalks in a busy part of the city that has persisted for two months and that is attributable to the unlawful conduct of large numbers of people? To ask that question must be to answer it.

## B. The RJR-MacDonald Test

In *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647, relating to the Occupy Vancouver protest movement, Madam Justice MacKenzie noted that there is an issue as to which test applies on an application for an interlocutory statutory injunction pending a trial on the merits.

The test set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 applies to applications for interlocutory equitable injunctions. The test requires an applicant for an interlocutory injunction to demonstrate the following:

a. There is a serious issue to be tried;

b. Irreparable harm will result if the injunction is not granted; and

c. The balance of convenience favours granting the injunction.

Madam Justice MacKenzie in *O'Flynn-Magee* noted at paragraphs 27 and 28:

> There is a difference in principle and rationale between an equitable interlocutory injunction one based upon statutory authority. The rationale for not requiring the equitable injunction test where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large…
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> Therefore the irreparable harm and balance of convenience factors are pre-emptively satisfied in ensuring complying with law that is in the public interest… To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed…

She concluded that it was unnecessary to resolve the issue of which test applied because either way, the City's application for an interlocutory injunction must succeed.

In *O'Flynn-Magee*, the defendants had erected and occupied structures, tents and shelters at the Vancouver Art Gallery. The City sought an interlocutory injunction to enforce compliance with the City's Land Regulation Bylaw. The City's Fire Chief had also issued a Fire Order pursuant to the Fire Bylaw.

Applying the *Thornhill* test, Madam Justice MacKenzie followed *Maurice* and re-iterated that "although an interlocutory injunction may result in inconvenience to the defendants, personal hardship is not an exceptional circumstance" to justify a refusal of an interlocutory statutory injunction.

Applying the *RJR-MacDonald* test, she agreed with the City that as the representative of the public, it will suffer non-compensable irreparable harm to use of public property if the injunction is not granted. She found that the balance of convenience favoured the City given the public interest in open access to public space and the promotion of health and safety in respect of public space. She noted that the City has an obligation to regulate City lands to maintain safety. It is liable for the activities on City lands and must therefore have control over such lands.

In *Shantz*, Mr. Justice Williams noted that in granting an interlocutory injunction "there are two lines of authority, each with a specific and different approach as to how the analysis should be conducted". He recognized that the City sought an interlocutory statutory injunction but also noted that it is relevant that the core issue in the litigation is a challenge to the legislation's effect as a breach of the defendants' rights under the *Canadian Charter of Rights and Freedoms*. In the absence of the *Charter* dimension, he commented that he was prepared to accept that the appropriate test to apply would be the test set out in *Thornhill* and *Maurice*. However, he found that "the authorities have generally elected not to apply this test where Charter arguments are meaningfully raised in the application". It is interesting to note that in the *Maurice* case *Charter* arguments were raised but he did not comment on this.

In *Williams*, Madam Justice Duncan applied both tests and found that either way, the Park Board is entitled to an interlocutory injunction, for much the same reasons as in *O'Flynn-Magee*. She agreed with the approach taken in *Shantz* commenting at paragraph 60:

> I am inclined to the view that the *RJR-MacDonald* test is the appropriate one to be applied in the circumstances before me. The evolution of the type of litigation in question here favours an approach which takes into account *Charter* issues rather than the consideration of a pure statutory breach approach to injunctive relief. But whether one applies the *Thornhill* test or the *RJR-MacDonald* test, the Park Board is entitled to an injunction. Its bylaws have been clearly and continuously breached despite notice to cease. Under either test for injunctive relief, the Park Board is entitled to an interlocutory injunction.

## V. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The issue that arises in many of these cases is whether an individual's rights under *the Canadian Charter of Rights and Freedoms* are infringed. In response to a local government enforcing their bylaws, individuals may seek to have the bylaw or portions of the bylaw declared unconstitutional and therefore of no force and effect. Individuals may also seek to argue that the court ought not to grant relief inconsistent with *Charter* values.

## A. Bylaw Constitutionally Invalid

In *Victoria (City) v. Adams*, 2009 BCCA 563, the Court of Appeal considered the validity of a bylaw as it relates to *Charter* rights of homeless persons. The Court of Appeal summarized the narrow issue before them as follows:

> When homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structures – violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?

The City appealed the decision of Madam Justice Ross declaring unconstitutional sections of its Parks Regulation Bylaw and Streets and Traffic Bylaw which prevented homeless persons from erecting shelters in public places. The City did not oppose the use of personal protection to sleep in public parks (sleeping bags, blankets and tarps to cover the face) but did oppose the erection of structures in the park (overhead protection in the form of tents, tarps attached to trees or otherwise erected).

Madam Justice Ross considered that the City did not have adequate beds for its homeless population and expert evidence that individuals were at risk of serious health problems from sleeping outside unprotected. She referred to international human rights instruments to which Canada is a signatory which recognizes housing as a fundamental right. She concluded that although not part of domestic law such instruments should aid in the interpretation of the *Canadian Charter of Rights and Freedoms* and the scope and content of s. 7; the right to life, liberty and security of the person.

She found that the City's bylaws deprived the homeless of their ability to address their need for adequate shelter, interfered with the liberty of persons to protect themselves from the elements and deprived them of access to shelter. She concluded the bylaws were overbroad and arbitrary and declared portions of the bylaws to be unconstitutional.

On appeal, the City argued, among other things, that Madam Justice Ross improperly intruded into the City's legislative jurisdiction to make complex policy decisions concerning the allocation of scarce parkland and other public resources. It argued that the effect of the decision is to require the City to regulate the use of parks for camping or other living accommodation, which elected officials have not chosen to include in the initiatives undertaken to deal with the City's problem of homelessness.

The Supreme Court of Canada confirmed in *Gosselin v. Quebec (Attorney General),* 2002 SCC 84 that there is no positive obligation on government to put in place programs that are directed to overcoming concerns for "life, liberty and security of the person".

The Court of Appeal upheld Madam Justice Ross' decision. The Court found that the political concerns raised by the case did not oust the Court's jurisdiction to determine the constitutionality of the bylaws. The Court found that it did not grant the homeless a positive benefit in the form of a requirement that the City provide them with shelter. The Court noted that the objective of preserving the park for public use could have been met by some lesser restriction on the ability of the homeless to protect themselves from the elements such as requiring them to take down their structures in the daytime.

With respect to costs, Madam Justice Ross awarded public interest litigation special costs (actual legal costs) against the City. Madam Justice Ross noted that the case involved issues that extended beyond the immediate interests of the named parties. The case had significance for the entire homeless population in the City and the City and its residents with respect to public space. The Court of Appeal upheld the decision to award public interest litigation special costs.

After *Adams*, the City amended its Parks Bylaw to prohibit the erection of temporary shelters in public parks during daytime hours. In *Johnston v. Victoria (City)*, 2010 BCSC 1707, the appellants sought an order to set aside convictions under the Parks Bylaw for setting up a cardboard shelter in a park during daytime hours. The appellants relied on *Adams* for the proposition that s. 7 of the *Canadian Charter of Rights and Freedoms* protected the rights of homeless people to erect temporary shelters on public property. Mr. Justice Bracken noted that the *Adams* decision contemplated that a restriction short of absolute prohibition was possibly acceptable. He dismissed the application finding that there was no proven shortage of daytime shelter for the homeless and that the amended bylaw was a reasonable restriction under s. 1 of the *Canadian Charter of Rights and Freedoms.*

### B. Regard for Charter Values

In Maurice, the defendants did not seek to invoke the *Canadian Charter of Rights and Freedoms* to have the City's by-law or the applicable provisions of the *Vancouver Charter* struck down or read down as being constitutionally invalid. Rather, they argued that the court could not grant an injunction to stop the unlawful conduct because to do so would be inconsistent with the *Canadian Charter of Rights and Freedoms* values. B.C. Civil Liberties Association was granted intervenor status in the case. The Association argued that Charter values must be taken into account when exercising the court's discretion in determining the scope of the injunction the court may see fit.

The defendants and the Association argued that the following provisions of the *Canadian Charter of Rights and Freedoms* are engaged: s. 2(b), the freedom of expression; s. 2(d), the freedom of association; s. 7, the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice; and s. 15(1), the right to equality free of discrimination before the law.

Mr. Justice Lowry noted that the defendants cited no authority that would support the proposition that the *Charter* serves to render valid legislation unenforceable. With respect to the Association's argument, he did not consider that any of the *Charter* provisions raised were engaged but noted that even if they were engaged they would not "lead to the imposition of an injunction that would permit the unlawful conduct of 200 people to continue for a period of weeks or months, even if the sidewalks were to be only partially obstructed". The case was appealed to the Court of Appeal only on procedural grounds.

In *O'Flynn-Magee*, the defendants argued that their *Canadian Charter of Rights and Freedoms* rights were relevant and engaged such that the City's Land Regulation Bylaws was "constitutionally suspect" based on the *Adams* case. They relied mainly on s. 7, the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice; and s. 15, the right to equality based on gender.

The defendants specifically addressed the challenges facing homeless women in Vancouver, pointing to reports that they claimed reflected a shortfall of approximately 500 shelter spaces in the City. They argued that women who do find shelter space face unsanitary conditions and risk of theft, harassment, and assault. They claimed that conditions in the shelters are far worse than at the Occupy Vancouver site.

The court noted that an interlocutory injunction application is not the appropriate time to address constitutional arguments. Rather, constitutional arguments are properly examined at the trial of the matter to provide the parties sufficient time to prepare and allow the Attorney General the opportunity to intervene pursuant to the *Constitutional Question Act.*

*Canadian Charter of Rights and Freedoms* arguments were also raised in *Shantz* and *Williams* but it remains to be seen whether persons in those cases will proceed to challenge the validity of the bylaws on Charter grounds.

## VI. CONCLUSION

Homeless issues are complex social issues. There are no easy answers. They engage various levels of government and various organizations and interests. Each individual has its own unique set of circumstances. Local governments have legislative jurisdiction to make complex policy decisions concerning the allocation of scarce public resources. They must also balance various interests and consider matters such as health and safety concerns and rights under the *Canadian Charter of Rights and Freedoms*. The law in this area is complex but the first step is understanding the context.

## NOTES