VICTORIA
v. ADAMS

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BULLETIN

Victoria (City) v. Adams, 2009 BCCA 563 (December 9, 2009)

The Court of Appeal has upheld the decision of the BC Supreme Court that Bylaws enacted by the City of Victoria to prevent the erection of temporary shelters in City parks by homeless persons was an infringement of s. 7 rights to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*. In coming to this decision the Court focused on the following narrow issue:

> 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 structure – violate their constitutional rights to life, liberty and security of person under s. 7 of the Canadian Charter of Rights and Freedoms?

In answering this question the Court looked at the following issues:

(a) Is the decision of the trial judge an improper intrusion into the policy decisions of elected officials?

(b) Did the trial judge err in finding that the Bylaw provisions in question violate s. 7 of the Charter?

  (i) Is there sufficient state action to engage s. 7 of the Charter?

  (ii) Is the state action the cause of the deprivation?

  (iii) Does the order grant a positive benefit to the respondents?

  (iv) Is the claim about property rights?

  (v) Is there an interference with life, liberty and security of the person?

(vi) Did the trial judge err in the interpretation and application of the principles of arbitrariness and overbreadth?

(vii) Did the trial judge err by failing to hold that the Bylaws are saved by s. 1 as they are a reasonable limit that is demonstrably justified in a free and democratic society?

(c) Did the trial judge err in ordering the remedy she did?

In its reasons the Court of Appeal responded to arguments put forward by the City and supported by the Attorney General of BC, as well as the argument put forward by the Union of BC Municipalities in its capacity as an intervenor. Of note, the Court dismissed the argument that the "historical and functional uses analysis" used in freedom of expression cases should be applied in a s.7 case. This argument was dismissed because the issue was framed as whether "the homeless are entitled to the most basic form of shelter while sleeping outside in some public place" rather than whether "the homeless have a right to shelter themselves in public parks in particular" in which case such an analysis could be relevant. It therefore remains to be seen whether this argument might have traction where there are sufficient shelter spaces and individuals are setting up temporary shelters in public spaces by choice rather than by necessity. This argument may also have traction where, despite the existence of regulations in regard to the use and access of certain public spaces overnight, individuals choose to set up temporary shelters in public parks not included in the scope of those regulations. The comments of the court seem to leave this possibility open.

In all issues, save for the application of the principle of arbitrariness, the Court of Appeal upheld the findings from the lower court decision. The Court of Appeal held that the lower court erred in finding that the limitations imposed by the bylaws were not connected to the objectives of those same bylaws. The difference in application of arbitrariness did not affect the outcome, and the decision was the same as the lower court decision. The resulting remedy was modified in that the Appeal Court more narrowly applied the remedy granted by the lower court. The original remedy ordered that:

> (b) Sections 13(1) and (2), 14(1) and (2), and 16(1) of the Parks Regulation Bylaw No. 07-59 and ss. 73(1) and 74(1) of the Streets and Traffic Bylaw No. 92-84 are of no force and effect insofar and only insofar as they prevent homeless people from erecting temporary shelter.

The revised order states:

> (b) Sections 14(1)(d) and 16(1) of the Parks Regulation Bylaw No. 07-059 are inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria.
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> (c) The Supreme Court of British Columbia may terminate this declaration on the application of the City of Victoria, upon being satisfied that sections 14(1)(d) and 16(1) no longer violate s. 7 of the Canadian Charter of Rights and Freedoms.

The Charter remedy that allows an individual to apply to the courts to seek an exemption from the application of the bylaw, was held not to be an appropriate remedy. The cost of obtaining individual exemptions would be prohibitive for the homeless applicants and the remedy would leave the impugned provisions on the books. The Court held that the alternative remedy, which holds that any law that is inconsistent with the Constitution of Canada is of no force or effect to the extent of that inconsistency, was the more appropriate remedy even though the impugned provisions, in and of themselves, were not shown to be unconstitutional. The Court addressed this, modifying the order to that shown above.

The final issue of importance is in regards to costs. At both the Supreme Court and the Court of Appeal, special costs were awarded against the City. While special costs are normally awarded against a party deserving of rebuke, in this case the award was in the interests of encouraging access to justice. Such awards are dependant on a number of considerations related to the issue and the plaintiffs, including:

- The issue is in the public interest beyond that of the plaintiffs.
- The plaintiffs did not have an interest in the outcome that would economically justify them to proceed.
- The defendants had a greater capacity to bear the costs of the proceedings.

- The plaintiffs have not engaged in vexatious, frivolous, or abusive conduct.

This decision is potentially more important in regards to the *obiter* statements regarding some of the issues. Of note are the Court's comments on whether the Court's order imposes a positive obligation on the City to provide shelter spaces or public spaces for camping. The Court stops short of saying that the order imposes a positive obligation on the grounds that the "decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless." The Court then mentions that from a practical point of view the decision may in fact require the City to take some action in response, such as the creation of additional shelters or regulation of overnight use of parks.

Much of this commentary turns on the trial court's analysis that the numbers of homeless people exceed the number of available shelter beds. If this were not the case, the Court muses that the decision might very well have been different. Related to this issue is the Court's comments in regards to when the inoperative provisions might be rendered operative, and the key seems to be establishing that there are in fact sufficient shelters to meet the needs of the homeless population.

> There is no "bright line" test to determine whether resources to shelter the homeless in Victoria are sufficient to render the provisions of the Parks Regulation Bylaw once again constitutional. We consider the appropriate manner of dealing with this problem is to allow the City to apply to the Supreme Court for a termination of the declaration if it can demonstrate that the conditions that make the Parks Regulation Bylaw unconstitutional have ceased to exist.

The importance of this commentary is in regards to the potential obligations faced by local government in the event of a continued devolution of social service responsibilities to the municipal level without the requisite statutory authority or resources. This line of reasoning is transferable across a number of service delivery areas even though social housing is the current issue faced most frequently by local government.

On the other side, the court's comments suggest that offending bylaw provisions will only be restricted in as much as they actually offend the Charter rights in question, and only for so long as the offence remains. The real challenge will be the ability of local government to accurately determine when such an offence no

longer exists. Unlike the hard issues such as infrastructure that are arguably more tangible to local government, soft issues such as homelessness are notoriously difficult to get a handle on, both in terms of the size of the problem as well as when progress has been made in addressing that issue.

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