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BARRISTERS AND SOLICITORS

Victoria (City) v. Adams: A Municipality's right and obligation to maintain orderly, safe and aesthetically pleasing public spaces

November 7, 2014
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"*In essence, this litigation results from an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets*."
– *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992)

I. Introduction

In *Victoria (City) v. Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563 ("*Adams*"), at both trial and on appeal, the courts referred to the above quote in framing the dispute. The primary issue at both levels was whether the City of Victoria's bylaws prohibiting the erection of temporary shelter on public property violated the rights of homeless persons to "life, liberty and security of the person", pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The protracted legal dispute in *Adams* arose after 70 homeless people set up a "tent city" in a public park in the City of Victoria. The trial judge declared unconstitutional those portions of the City's parks and streets bylaws that prohibited homeless people, who were legally sleeping in parks at night, from erecting temporary overhead shelter in the form of tents, tarps attached to trees, and cardboard boxes. The trial decision was upheld on appeal.

The question this case brief seeks to address is: what effect has *Adams* had on a municipality's ability to pass and enforce bylaws which may affect homeless persons living in the municipality? Or, as set out in *Pottinger* above, what effect does *Adams* have on a municipality's ability to carry out its responsibility to maintain orderly, aesthetically pleasing public parks and streets?

II. Summary

Adams has had little practical effect on municipalities' ability to pass and enforce bylaws which may disproportionately affect the homeless. Litigants in subsequent litigation have sought to rely on *Adams* for broad statements of law and policy, but each time the Supreme Court and the Court of Appeal have narrowly confined the legal principle arising out of *Adams*. In particular, British Columbia Courts have emphasized that *Adams*:

1. did <u>not</u> create a "right" for anyone to do anything – including the right for homeless persons to erect temporary shelter in public parks;
2. did not declare the City's bylaws to be unenforceable for all purposes;
3. did not create a presumed s. 7 *Charter* breach for bylaws that aim to regulate the use of public parks during the daytime; and
4. was based on its own unique and particular facts <u>and</u> was decided on the very particular evidence adduced at the trial.

Overall, *Adams* did not bring in the sweeping changes that advocates for the homeless might have hoped for. Nor did it usher in a new *Charter* era imposing positive obligations on the

government to provide a minimum standard of living or to provide affordable, adequate, accessible housing to all its citizens. Rather, the Court of Appeal has limited this case to such an extent that it appears to stand only for the following proposition: in circumstances where the number of homeless people exceeds the available nighttime shelter space, municipalities may be prohibited from using bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter in parks and may be required to allow temporary shelters to remain in place overnight.

III. Discussion

A. Background

In October 2005, a group of up to 70 homeless people built a tent city in Cridge Park, setting up more than 20 tents and two large kitchen areas.

Relying on its *Parks Regulation Bylaw* and *Streets and Traffic Bylaw*, the City of Victoria applied for an injunction to remove the tent city. The bylaws prohibited, among other things, loitering and taking up a "temporary abode overnight" in a park. According to the City's operational policy, the bylaws did not prohibit people from sleeping in parks or from protecting themselves from the elements while sleeping in parks, through simple, individual, non-structural, weather repellent covers that are removed once the person is awake (e.g. sleeping bags, blankets, and tarps covering their faces). However, the bylaws did prohibit overhead protection in the form of tents, tarps attached to trees or otherwise erected, boxes and other structures.

The injunction was granted and the tent city was cleared.

The City subsequently filed a statement of claim against several defendants. In their statement of defence, the defendants asserted that the provisions of the bylaws that prohibited sleeping overnight in any public space in the City violated various *Charter* rights and freedoms, including their freedom of expression and their right to life, liberty and security of the person.

The matter eventually proceeded to trial. At trial, the defendants sought a declaration that the bylaws violated the *Charter* and were of no force and effect, to the extent that they prohibit homeless people from engaging in life-sustaining activities in public, including the ability to provide themselves with shelter.

B. *Adams* – At Trial

At trial, the constitutional argument was restricted to whether the bylaws violated the defendants' right to life, liberty and security of the person under s. 7 of the *Charter*.

The City first argued that s. 7 was not engaged because there was insufficient state action to trigger the provision. In reviewing the applicable case law, Ross J. found that s. 7 can extend beyond the sphere of criminal law where there is state action which directly engages the justice system and its administration: *Victoria (City) v. Adams*, 2008 BCSC 1363 at para. 102 ("*Trial Reasons*"). She concluded that since the bylaws prohibited certain conduct and provided that a person who contravened the provisions committed an offence and was liable to penalties imposed by the bylaw and the *Offence Act*, R.S.B.C. 1996, c. 338, they constituted state action that directly engaged the justice system and fell within the scope of s. 7.

Next, the City argued that s. 7 was not engaged because the defendants' deprivation was not caused by the bylaws, but rather by the defendants' homelessness. The trial judge rejected this argument. The fact that the bylaws impaired homeless persons' ability to address their need for adequate shelter satisfied the need for the deprivation to have been caused by state action: *Trial Reasons* at para. 108.

Third, the City submitted that the essence of the defendants' argument was that the government owed a positive duty to provide adequate alternatives to sleeping in the street. It further submitted that development of a governmental response to complex issues such as homelessness fell into the sphere of the legislature. The Court rejected both arguments. With respect to the former argument, Ross J. held that the claim, as framed, was that the bylaws breached s. 7 of the *Charter* because they prohibited homeless people from taking steps to provide themselves adequate shelter: *Trial Reasons* at para. 119. As for the latter argument, she concluded that just because a matter may engage complex policy decisions, it does not follow that the legislation is immunized from review by the courts.

Having concluded that s. 7 was engaged in the circumstances, Ross J. then turned to whether there was a breach. Based on all the evidence before her at trial, Ross J. made five "critical" findings of fact which established the need for homeless people to sleep outside in public places due to a shortage of shelter beds in the City, and that harm resulted from sleeping while exposed to the elements without any form of overhead protection:

1. There were more than 1,000 homeless people living in the City at the time of trial.
2. Meanwhile, the City had 104 shelter beds, or 326 in extreme conditions, and so hundreds of the homeless had no option but to sleep outside in public spaces.
3. The bylaws did not prohibit sleeping in public spaces, but rather prohibited taking up a temporary abode, which in practical terms meant that the City prohibited the homeless from erecting any form of overhead protection even on a temporary basis.
4. The expert evidence established that exposure to the elements without adequate protection is associated with a number of significant health risks.
5. The expert evidence also established that some form of overhead protection is necessary for adequate protection from the elements.

Based on these findings, Ross J. concluded that the bylaws' prohibition on taking up a temporary abode constituted a deprivation of the right to life, liberty and security of the person of the homeless by: (i) prohibiting the erection of overhead shelter, leading to a risk of a number of serious and life-threatening conditions; (ii) interfering with the ability of the homeless to choose to protect themselves from the elements; and (iii) depriving homeless persons of access to shelter, which exposed them to a risk of significant health problems or death: *Trial Reasons* at paras. 145, 148 and 153-154.

She further concluded that the bylaws were both arbitrary and overbroad, and hence not consistent with the principles of fundamental justice, on several bases.

The bylaws were overbroad in both time and geographical ambit and did not represent the least restrictive alternative that would further the City's concerns. The City could have, for example, required that overhead protection be disassembled every morning, or it could have created park regions where sleeping was not permitted.

To the extent the bylaws were meant to prohibit tent cities, they were clearly overbroad, as they prohibited <u>any</u> form of erected structure, "even a cardboard box that is removed in the morning": *Trial Reasons* at para. 189.

There was no evidence that people would flock to sleep in parks once they were allowed to cover themselves at night with temporary structures: *Trial Reasons* at para. 192.

The evidence of the harm caused to the parks was arbitrary, in that it was not related to the conduct prohibited by the bylaws. There was no evidence that any damage caused to parks would be increased if homeless people were allowed to cover themselves with temporary structures while they slept: *Trial Reasons* at para. 193.

Finally, the Court found that the infringement was not saved under s. 1 of the *Charter*.

The trial judge ordered that the impugned bylaws were of no force and effect only insofar as they applied to prevent homeless people from erecting temporary shelter: *Trial Reasons* at para. 239. As later described by the Court of Appeal, the order allowed homeless people to erect temporary overhead shelter while sleeping outside in the City.

C. *Adams* – On Appeal

The Court of Appeal was quick to narrow the scope of the issue on appeal to the following question: "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 … *Charter* …?": 2009 BCCA 563 at para. 1 ("*Appeal Reasons*").

The Court of Appeal largely upheld the *Trial Reasons*, although it varied the order to read more narrowly so that the impugned provisions of the bylaws were 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": *Appeal Reasons* at para. 166 (emphasis added).

The following points can be drawn from the *Appeal Reasons*:

(a) Section 7 of the *Charter* will be engaged where bylaws are shown to "constitute state action that directly engages the justice system", including by imposing criminal sanctions or penalties: *Appeal Reasons* at paras. 82-85.

(b) In order for s. 7 to be engaged, the impugned state action need not be the sole cause of the deprivations at issue: *Appeal Reasons* at para. 87. It may be sufficient if an individual's ability to care for himself is impaired by the bylaw.

(c) There is no free-standing right to erect a shelter in public parks: *Appeal Reasons* at para. 74. The question of constitutionality of a bylaw will be directly linked to the extent of the effect on the health and safety of those allegedly adversely affected by the bylaw. Where the bylaw will not necessarily lead to a threat to the health and safety of anyone in particular, or otherwise impair an individual's ability to provide themselves with adequate shelter, then even a blanket prohibition of overhead protection might be constitutional.

(d) In that regard, it is clear that any future litigants wishing to attack a bylaw's constitutionality will need to provide evidence – likely in the form of expert opinion evidence – that the bylaw poses significant and potentially severe health risks to particular individuals or to a particular group of individuals.

(e) While this decision, from a practical point of view, required the City to take some action in response, *Adams* does not place a positive obligation on any level of government to provide adequate alternative shelter, or to take any positive steps to address homelessness: *Appeal Reasons* at paras. 95-96.

(f) The fact that a claimant has not chosen his or her underlying situation (e.g. homelessness) does not mean that a decision taken in response to it (e.g. building shelter) is not protected by s. 7: *Appeal Reasons* at para. 107.

(g) When drafting a bylaw, a municipality must implement the least restrictive alternative that will further its particular concerns, or risk facing a constitutional challenge on the bases of overbreadth or arbitrariness, or both: *Appeal Reasons* at para. 116.

D. Cases Considering *Adams*

Homeless litigants and political demonstrators have attempted to rely on *Adams* to challenge municipal bylaws, without much success. On a review of these cases, it appears *Adams* has no application whatsoever in cases involving political demonstrators and has not restricted municipalities' ability to evict political demonstrators from public spaces. Moreover, in respect of the homeless, the Courts have made it clear that *Adams* is of narrow application and will assist only in particular circumstances.

(a) Cases Involving Challenges Brought by the Homeless

The Court of Appeal revisited *Adams* in *Johnston v. Victoria (City)*, 2011 BCCA 400. In response to *Adams*, the City of Victoria amended its bylaw to prohibit the erection of temporary shelters in public parks during daytime hours. The appellant in *Johnston* was convicted under the amended bylaw and brought an appeal from the dismissal of an application to set aside his summary convictions.

At trial and on appeal to the Supreme Court, the appellant relied on s. 7 of the *Charter*, arguing that some homeless were unable to sleep at night and thus required temporary shelters on public land during the day. The trial judge rejected this argument on two bases: (i) *Adams* related to the plight of the homeless in nighttime conditions, when insufficient shelter beds were available; and (ii) there was no evidentiary basis to argue that *Adams* should be extended to daytime hours.

On further appeal to the Court of Appeal, the appellant submitted that the amended bylaw violated s. 7 of the *Charter*, as being overbroad. Mr. Justice Donald, speaking for the Court, dismissed the appeal. He explained that *Adams* was very limited in scope. It did not create a "right" to do anything, nor did it declare the bylaw unenforceable for all purposes: *Johnston* at para. 10. Rather, *Adams* was "confined" to issues with shelter availability at night: *Johnston* at para. 16. Thus, the effect of *Adams* was "to prevent interference with the efforts of the homeless in sheltering themselves at night on City property", and so *Adams* "does not set up a presumed s. 7 breach for daytime regulation": *Johnston* at para. 13. In that regard, according to the Court of Appeal, there is little or no basis to argue a breach of s. 7 of the *Charter* arising out of daytime regulation, as there is no legitimate claim for necessity.

Further, Donald J.A. made it clear that if a homeless litigant intends to argue that a bylaw is an affront to human dignity, then he or she must support his or her claim with "social science and proof of facts demonstrating the harm alleged", presumably by way of expert opinion: *Johnston* at para. 17. Without such evidence, courts will be quick to reject a homeless person's *Charter* claim.

The B.C. Supreme Court also considered *Adams* in the context of homeless rights to adequate shelter in *Abbotsford (City) v. Shantz*, 2013 BCSC 2426. In *Shantz*, homeless people engaged in a 50-day occupation of a public park. As part of the occupation, a large wooden structure was

constructed in an adjacent parking lot. The city sought an injunction to remove the tent camp, arguing in part that the structure violated building, fire service and parks bylaws. The defendants submitted that this was an occupation by chronically homeless people who faced profound barriers to obtaining proper living conditions.

While defendants' counsel conceded that *Adams* was factually different, given that a structure had been constructed on public land, she argued that there was a live issue as to what "access to shelter" meant and the breadth of the constitutional window that was created in *Adams*. The Court did not accede to this argument. It held that *Adams* did not apply in the circumstances because *Shantz* involved a question of a broader right to build a structure or accommodations:

> [22] Counsel for the City emphasized that the issue before me is not the question of the ability of these people to occupy a public place because they have nowhere else to live, but instead is the question whether they can assert that right or alleged right to the point of creating wooden structures on public property.
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> [23] I agree that this distinguishes this case from other cases in which the issue centres only on an ability to stay somewhere. Here it is a question of not only staying somewhere, but building a structure or accommodations in addition to the asserted right of staying on public land.

Also of note, the Court in *Shantz* held that where *Charter* arguments are "meaningfully raised", the appropriate test for an injunction is that set out in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311, which test involves a balancing of convenience and arguably a higher level of Court scrutiny.[1]

The most recent case of interest in respect of homeless rights is *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 [*Williams Injunction Reasons*]. In this case, a group of individuals, many of them homeless, took up shelter in Oppenheimer Park in Vancouver. The Vancouver Board of Parks (the "Park Board") applied for an interlocutory injunction requiring these individuals to comply with the provisions of the *Parks Control Bylaw* and to remove all structures, tents, shelters, objects and things owned, constructed, maintained, placed, or occupied by them forthwith.

This case is notable because: (i) it underlines the importance for both sides to develop a fulsome evidentiary record in order to assist the Court; (ii) for municipalities, it

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[1] The test for an injunction in the context of a breach of a bylaw is set out in *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 54 B.C.L.R. (3d) 155 (C.A.), as follows:

1. Is there a breach of the bylaw?
2. Are there exceptional circumstances that should prevent enforcement of the bylaw?

The *RJR- MacDonald* test, as it is known, entails examining the case in the context of three questions:

1. Has the applicant demonstrated that there is a fair question to be tried?
2. Will the applicant suffer irreparable harm if an injunction is not granted?
3. Does the balance of convenience favour the granting of an injunction?

highlights the importance of demonstrating to the Court, as best as possible, that the enforcement of the bylaw will not translate to ousting disenfranchised homeless people onto the streets, placing them in further danger; (iii) it confirms that the *RJR-MacDonald* test is the appropriate test for granting an injunction where *Charter* breaches are alleged (para. 60); and (iv) it further confirms the question of the constitutional validity of bylaws is not to be decided at the interlocutory injunction stage.

As to the first point, from the beginning the Court was attuned to the importance of having a complete evidentiary record before it. In fact, the Court granted an adjournment to the defendants so they could marshal evidence regarding the impact of granting the injunction and the availability and viability of shelter space offered by the City of Vancouver: *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1871 at para. 30 [*Williams Adjournment Reasons*].

In addition, on the injunction application, in reaching its decision, the Court thoroughly canvassed the evidence adduced by both sides. Extensive evidence was adduced by the people who lived in the park and service providers explaining why these individuals were unable or unwilling to use shelters: *Williams Injunction Reasons* at paras. 18-36. The Park Board, on the other hand, adduced evidence of events having to be cancelled as a result of the ongoing use of the park; the creation of fire hazards and accompanying danger; health hazards and unsanitary conditions arising at the park; fights, violence, drug use, public drunkenness and crime occurring at the park; and the substantial policing costs attributable to the park: *Williams Injunction Reasons* at paras. 8-17.

The Park Board also appears to have made best efforts to provide evidence substantiating its contention that the number of shelter beds equaled, at least roughly, the number of people living at the park, thus providing some comfort to the Court that the people would be transitioned out of the park in an orderly and sensitive fashion: *Williams Injunction Reasons* at paras. 37-45, 61. In the end, the Court was satisfied that the Park Board's evidence supported granting an injunction on terms that would allow such an orderly transition.

As for the last point, on both the adjournment application and the injunction application, the Court was of the view that the question of constitutional validity of the bylaws in question should not be decided at the interlocutory injunction stage. Rather, this issue could be determined only after a full trial with proper evidence and notice to the Attorney General under the *Constitutional Question Act*: *Williams Injunction Reasons* at paras. 53 and 55-57; *Williams Adjournment Reasons* at paras. 19-20. Accordingly, at the interlocutory injunction stage, it appears that *Adams* can be relied on only to argue that the strength of the constitutional case should weigh in favour of the homeless people's position that an injunction should not be granted. Even then, this argument was unsuccessful in *Williams*. From a practical standpoint, therefore, the applicability of *Adams* appears to be limited even further to trials only.

Based on the foregoing, *Adams* will likely not apply unless the question is whether the homeless litigants have the right to erect <u>temporary</u> structures on public property, in

circumstances where there is evidence to establish that there is insufficient alternative sheltering and that the litigants are facing real risks to their health and safety as a result. Lastly, it appears *Adams* is effectively irrelevant at the interlocutory injunction stage and will assist only during a trial.

(b) Cases Involving Challenges Brought by Political Demonstrators

In 2011, the "Occupy" protest movement came to Vancouver. The defendants constructed, erected, maintained and occupied structures, tents and shelters around the Vancouver Art Gallery. The City of Vancouver brought an application for a statutory interlocutory injunction requiring the defendants to comply with the provisions of the *City Land Regulation* bylaw and to remove the structures that had been constructed, erected or placed on those lands.

The defendants argued, in part, that the bylaw violated the protestors' s. 7 *Charter* rights. Associate Chief Justice MacKenzie (as she then was) rejected this argument, holding that: (i) it was inappropriate to bring a constitutional challenge at an interlocutory injunction application; and (ii) even if it were appropriate at such an early stage, *Adams* would not assist, as that decision "only permitted temporary overnight shelter when the number of homeless people in Victoria exceeded the number of available shelter beds": *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647 at para. 42.

Associate Chief Justice MacKenzie concluded that the test for interim injunctions had been met. While Occupy Vancouver may not have intended to exclude the use of the park by other groups, the positioning of its tents throughout the park prevented others from using the space. Furthermore, as the City of Vancouver had an obligation to regulate its parks to maintain safety, it could be held liable for the activities occurring there. Accordingly, the balance of convenience was in the City's favour and the interim injunction was granted. Put bluntly, *Adams* made no difference to MacKenzie A.C.J.'s ruling.[2]

IV. Conclusion – Implications for Municipalities

The narrow rule from *Adams* is that bylaws cannot entirely prohibit homeless people from erecting temporary overhead shelter at night in circumstances where there are insufficient alternative shelter opportunities.

Even though *Adams* has been narrowly construed by the Courts, however, there are broader lessons to be derived from the *Trial Reasons* and the *Appeal Reasons*. In particular, this case stands as a reminder that while bylaws can target the conduct of specific groups of people, even

[2] For further discussion regarding a municipality's ability to enforce its bylaws where protestors have set up camp in public, see: *Batty v. City of Toronto*, 2011 ONSC 6862 (reasons re: Occupy Toronto, *per* Brown D.M. J.); and *Calgary (City) v. Bullock (Occupy Calgary)*, 2011 ABQB 764 (reasons re: Occupy Calgary, *per* Wittmann C.J.).

that of the most vulnerable and marginalized individuals in our society, they must not do so in an arbitrary or overbroad manner. Municipalities must therefore take care in drafting their bylaws to ensure that the least restrictive alternatives that would further their concerns are chosen – particularly where the bylaw may adversely affect the livelihood of homeless persons.

Nonetheless, this does not mean that a municipality should shy away from implementing bylaws that are meant to regulate public spaces frequented by the homeless. Municipalities have not only the right, but the obligation to maintain orderly and safe public places.

Should a municipality's bylaw come under legal challenge, however, *Adams* underlines the importance for both sides to develop the evidentiary record in support of their respective positions. For its part, a municipality must provide evidence to establish both a clear breach of a bylaw and the bylaw's constitutionality. That is, it must adduce evidence that the bylaw is not arbitrary, in that it relates to the conduct prohibited by the bylaw, and that the bylaw represents the least restrictive alternative that would further the municipality's concerns. Without providing an evidentiary record, a municipality may run the risk of having its carefully drafted bylaws declared unconstitutional, rendering it less able (at least for some time) to maintain orderly, safe and aesthetically pleasing public parks and streets.

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