

Lack of Shelter for Homeless People may Breach Right to Life, Liberty and Security

Victoria (City) v Adams 2008 BCSC 1363 (14 October 2008)

The Supreme Court of British Columbia in Canada has made declarations that certain by-laws, enacted by the City of Victoria, violated s 7 of the *Canadian Charter of Rights and Freedoms* as they deprived homeless people of their right to life, liberty and security. The effect of this declaration was that those by-laws are of no effect insofar as they prevent homeless people from erecting temporary shelters.

Facts

The defendants, including Ms Natalie Adams, were a group of homeless people who erected a 'tent city' in a park maintained by the plaintiffs, the City of Victoria. Relying on two by-laws which prevented loitering and taking up a temporary abode in public parks, the City commenced proceedings by way of a civil injunction to enforce the City's by-laws and remove the 'tent city' and sought a declaration that the 'tent city' contravened the relevant by-laws.

The defendants opposed the application and sought to raise the *Canadian Charter* as a defence, claiming that the City's by-laws prohibiting sleeping overnight in any public space in the City violated the defendants' rights pursuant to ss 2(b), 7, 11(d), 12 and 15 of the *Canadian Charter*. The defendants also claimed that the by-laws could not be justified pursuant to s 1 of the *Canadian Charter*.

It was accepted by the parties that the practical effect of the City's by-laws was that homeless people were only permitted to create shelter for themselves using simple, individual, non-structural weather repellent covers that could be removed when the person was awake, and the by-laws prevented the erection of a temporary 'abode' which may consist of a tent, tarps that are attached to trees or otherwise erected, boxes or other structures.

Decision

The Supreme Court of British Columbia made declarations that these by-laws violated s 7 of the *Canadian Charter* as they deprived homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice.

In reaching this conclusion, the Court made the following factual findings:

- there are at present more than 1,000 people sleeping rough in the City;
- the City has approximately 104 shelter beds, expanding to 326 in extreme weather conditions. Consequently, hundreds of people have no option but to sleep outside in the public spaces of the City;
- the by-laws do not prohibit sleeping in public spaces, but do prohibit homeless people from erecting any form of overhead protection including a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis;
- the expert evidence establishes that exposure to the elements without adequate protection is associated with a number of significant risks to health including the risk of hypothermia, a potentially fatal condition; and
- the expert evidence also establishes that some form of overhead protection is part of what is necessary for adequate protection from the elements.

The Court found that the by-laws breached s 7 of the *Canadian Charter* which 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.'

The Court found that the by-law breached the right to life as the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s 7. In particular, the Court relied on the expert evidence of a doctor and a survival expert, which established that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life threatening conditions. The Court found that the by-laws prohibiting the erection of such overhead protection as is necessary to protect an individual from this risk breached s 7 of the *Canadian Charter*.

The Court accepted the defendants' submission that creating shelter to protect oneself from the elements is a matter critical to an individual's dignity and independence. The Court found that City's intrusion in this process interfered with the individuals' choice to protect themselves and was a deprivation of liberty within the scope of s 7.

The Court also found that the by-laws interfered with a person's right to security, both physical and psychological. It was particularly relevant to this case that the City did not have sufficient shelter spaces for the homeless, effectively forcing them to find shelter on public property. The Court found that City's by-law constituted a deprivation of the security of the person.

The City argued that, even if the by-laws infringed on a homeless person's right to life, liberty and security, they were otherwise consistent with the principles of fundamental justice, and therefore, s 7 of the *Canadian Charter* was not breached. Canadian case law has established that this process requires a consideration of the fairness of the balance struck between the interests of the individual and the protection of society. The Court concluded that, in this instance, the by-laws were arbitrary and overbroad and therefore inconsistent with the principles of fundamental justice. In reaching this conclusion, the Court noted that many of the reasons for making the by-laws related to homeless people sleeping in parks, and not specifically to the erection of shelters. Further, the by-laws could have been less restrictive in their operation, for example, by limiting the areas of the City's parks where people could erect shelters, or by limiting the times that people could erect shelters.

The Court then considered whether the by-laws were justifiable under s 1 of the *Canadian Charter* which provides that '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.'

The Court found that although the purpose of the by-law, to protect public parks, was an important objective, by restricting the type of shelter that homeless people were permitted to erect, the by-laws were not rationally connected to their stated objective. Also, the Court found that they did not meet the proportionality requirement of 'minimum impairment'. Rather, by restricting all 'overhead protection including that which could be taken down and removed each morning, the by-laws impaired the rights of homeless people to a greater degree than was required to meet their objectives'.

The Court also concluded that the impact of these by-laws on homeless people would be extensive. The Court again referred to the expert evidence, finding that the prohibition against overhead protection put the lives and health of homeless people at risk. The Court concluded that the impact of these by-laws on the health of homeless people was disproportionate to the

advantages in protecting public spaces and that they were not able to be justified as a reasonable limit on the rights set out in the *Canadian Charter*.

Relevance to the Victorian Charter

This decision may assist in the interpretation of ss 9 and 21 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Section 9 of the *Charter* deals with the right to life, providing that 'Every person has the right to life and has the right not to be arbitrarily deprived of life.' Section 21 of the *Charter* contains provisions relating to the right to liberty and security of person. Section 21(1) provides that 'Every person has the right to liberty and security' and s 21(3) provides that 'A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'. The remainder of that provision relates to arrest, detention or being held in custody. Although there are differences in the relevant Victorian and Canadian provisions, this case is likely to influence the interpretation of ss 9 and 21 in Victoria.

The decision is available at: <http://www.Courts.gov.bc.ca/Jdb-txt/SC/08/13/2008BCSC1363.htm>.

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