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The Constitutionality of Calgary's Parks and Pathways Bylaw for Homeless Persons

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Cases Considered: *Victoria (City) v. Adams*, 2008 BCSC 1363

The recent decision of the B.C. Supreme Court finding municipal bylaws unconstitutional for prohibiting certain practices associated with homelessness in parks has received a great deal of media attention in Alberta and nationally. In *Victoria (City) v. Adams*, Justice Carol Ross considered bylaws in the City of Victoria that prohibit persons from "tak[ing] up temporary abode over night" and erecting or constructing "a tent, building, or structure, including a temporary structure" in city parks (*Parks Regulation Bylaw* No. 07-059, ss. 14(d) and 16(1)). Justice Ross found that these provisions violated the rights of homeless persons to life, liberty and security of the person under section 7 of the *Charter*, and that the violation was not in accordance with the principles of fundamental justice or a reasonable limit under section 1 of the *Charter*. This post will consider the implications of the case for Alberta, and in particular Calgary.

The history of the *Adams* litigation is complex, and will not be addressed here. It is sufficient to note that Justice Ross's decision concerned an application by homeless persons in Victoria to have the bylaw declared unconstitutional. Her decision turned on several important findings of fact. First, she found that there are over 1000 homeless persons living in Victoria, but there are only 141 shelter beds available most times of the year (increasing to 326 beds in extreme conditions (at para. 4)). Although there was evidence that a small number of homeless persons choose not to utilize shelters, Justice Ross concluded that "a significant number of people in the City of Victoria have no choice but to sleep outside" (at paras. 5, 58). Further evidence showed the demographic realties of homelessness: at least 40% of Victoria's homeless are mentally ill, at least 50% have substance abuse problems, and 25% struggle with both (at para. 44). A disproportionate number of Victoria's homeless are Aboriginal, particularly homeless youth (at para. 61). While a majority of homeless persons are male, women were more likely to be homeless because of domestic violence (at para. 60). Justice Ross also accepted expert evidence which showed that the kind of overhead protection banned by the bylaw was necessary to protect people sleeping outside from the elements, and that without such protection they faced significant risks to life and health, including hypothermia, skin and respiratory infections (at para. 67).

Justice Ross then turned to an examination of section 7 of the *Charter*. She noted that in order to prove a violation of section 7, the claimants must show (1) a deprivation of the right to life, liberty or security of the person, and (2) that the deprivation violated the principles of fundamental justice (at para. 76). She cited a range of international human rights instruments and reports providing for the right to adequate housing (see e.g. the *Universal Declaration of Human Rights*, GA Res. 217(III), U.N. GAOR, (3d) Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71, Article 25(1); the *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360, Article 11.1), and noted that these instruments could be used as an aid to interpreting the scope of section 7 of the *Charter*, relying on a number of Supreme Court of Canada decisions to this effect (see e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *United States v. Burns*, [2001] 1 S.C.R. 283). In the end, however, not much use was made of these international instruments in light of the fact that this was a case involving government action as opposed to inaction. There was no need, therefore, to explore whether section 7 of the *Charter* imposes a positive obligation on the state to provide adequate housing, since the alleged violation in this case was the City's prohibition of certain activities and the impact of those prohibitions and their associated penalties on homeless persons in Victoria. The government's argument (at para. 81) that "the Bylaws do not cause the Defendants to be homeless; hence, the condition in which they find themselves is not the result of state action" was accordingly rejected.

Justice Ross also rejected the government's contention that what was being asserted here were property rights, which are not protected under section 7 of the *Charter*. She held that "the use of park space by an individual does not necessarily involve a deprivation of another person's ability to utilize the same "resource"" (at para. 130). Further, "[p]ublic properties are held for the benefit of the public, which includes the homeless. The government cannot prohibit certain activities on public property based on its ownership of that property if doing so involves a deprivation of the fundamental human right not to be deprived of the ability to protect one's own bodily integrity" (at para. 131).

Deprivation of bodily or psychological integrity is the very definition of security of the person under section 7 of the Charter (see e.g. *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). Justice Ross found that the bylaws violated not only security of the person, but also the right to life itself by exposing homeless persons to the risk of serious health problems and death. Put another way, "the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death" (at para. 153). The first requirement under section 7 of the *Charter* was thus made out.

Turning to the principles of fundamental justice, Justice Ross noted that laws which are overbroad or arbitrary will not comport with these principles (citing *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 71; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791; and *Rodriguez*, supra). She examined the rationale offered for the bylaws, which included protecting parks from damage or harm, ensuring that parks are available for public use and enjoyment, and public health considerations (at para. 172). Justice Ross found

that these rationale were not furthered by the bylaws in question, as "[t]here is no evidence and no reason to believe that any of the damage described would be increased if homeless people were allowed to cover themselves with cardboard boxes or other forms of overhead protection while they slept" (at para. 193). Concerns about litter and drug paraphernalia were also seen to be unconnected to the ban on temporary shelters. The bylaws were thus held to be arbitrary. Further, "there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted" (at para. 185). The bylaws were thus held to be overbroad.

Having found a violation of the principles of fundamental justice, Justice Ross noted that only in rare or extraordinary circumstances would such a violation be justified as a reasonable limit under section 1 of the *Charter*. While finding that preservation of parks was a sufficiently important objective, the earlier findings of overbreadth and arbitrariness meant that the bylaws were not minimally impairing of the rights of homeless persons, as required by *R. v. Oakes*, [1986] 1 S.C.R. 103.

Overall, then, Justice Ross found a violation of section 7 of the *Charter* that could not be justified by the City. She granted a declaration "that the Bylaws are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter" (at para. 237), and declined to suspend this remedy, giving it immediate effect.

How would this case apply in Calgary? The facts relating to homelessness in this city are, sadly, similar to those evidenced in *Victoria v. Adams*. A biennial count of homeless persons is conducted in the City of Calgary; the last available count was on May 10, 2006 (*2006 Count of Homeless Persons*, City of Calgary Community & Neighbourhood Services, 2006, available at http://intraspec.ca/2006_calgary_homeless_count.pdf). A total of 3,436 homeless persons were counted on that date, including those residing in emergency and transitional facilities, those being served by agencies such as hospital emergency departments, police, transit, and emergency social services, and those living on the streets. According to the report, 82 percent (2,823) of homeless persons enumerated were staying in shelters and 12 percent (429) were staying on the streets on the night in question (with the remaining 5 percent (184) being served by other agencies). For over 400 people, then, there was insufficient shelter space available and they were forced to sleep outside, putting their lives and security of the person at risk.

The next question is whether the potential harms associated with sleeping outside are attributable to government action. As in *Victoria v. Adams*, the City of Calgary has a *Parks and Pathways Bylaw* (Bylaw Number 20M2003), which provides in section 9 that "No Person shall, unless allowed by a Permit, (a) camp in a Park; or (b) erect a tent or other structure in a Park." "Camp" means to live or take up quarters in a Park (section 2(d)). "Structure" is not defined.

This bylaw differs from that at issue in *Victoria v. Adams* in a couple of respects. First, the Calgary prohibition is not absolute, as a permit could be obtained to allow camping, tenting or the erecting of structures. It seems unlikely that such a permit would be granted to homeless

persons, however. Second, the Calgary bylaw is not restricted to temporary camping or structures. As a matter of statutory interpretation, though, it seems that any camping, tenting, or erecting of structures, whether temporary or longer term, would be captured by the Calgary bylaw. Much would depend on the definition given to "structure." If (as in *Victoria v. Adams*) the bylaw is interpreted to include the use of cardboard boxes and other structural means of protecting oneself from the elements, then the bylaw would capture the same sorts of activities as in that case.

It could be argued that homeless persons in Calgary are offered the same choice between breaching the bylaws in order to obtain adequate shelter or using inadequate shelter and exposing themselves to increased risks of significant health problems and death. One might reasonably assume that these risks are even graver in Calgary than in Victoria, given the harsher climate of our city (although if the bylaw was challenged expert evidence on this point would be important). This indicates that Calgary's bylaws may cause a deprivation of life and security of the person for homeless persons, contrary to section 7 of the *Charter*.

It appears that the rationale for Calgary's bylaws is also similar to that of Victoria. The preamble of the Parks and Pathways Bylaw states that the aim of the bylaw is to protect the "value and quality" of Calgary parks (and pathways), and to ensure they "remain safe and accessible for the enjoyment of all Calgarians." The preamble also speaks of "aesthetics" and "environmental stewardship".

It may be more difficult to argue that section 9 of Calgary's Parks and Pathways Bylaw is arbitrary than was the case in Victoria v. Adams. The problem there was that the temporary ban was not seen to further the rationale behind Victoria's parks bylaw. In Calgary, however, the broader ban against camping, tenting and erecting structures does seem to further the objectives of maintaining the accessibility, aesthetics, and environmental quality of parks. Even if section 9 is not arbitrary, however, it might still be seen as overbroad. As in Victoria v. Adams, "there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted" (at para. 185). This approach would also call into question section 4 of the Parks and Pathways Bylaw, which provides that Calgary parks (with a couple of exceptions) are closed between 11:00 p.m. and 5:00 a.m. each day, and no one shall enter or remain in a park while it is closed.

If section 9 (and perhaps section 4) of the Parks and Pathways Bylaw was found to be overbroad, it is difficult to see how this violation of section 7 of the Charter could be justified by the City as a reasonable limit on the rights of homeless persons. Again, the minimal impairment requirement would seem to defeat the City's position at this point.

Does this mean that the City of Calgary is prevented from attempting to protect its parks from any damage that might be caused by homeless persons sleeping there? Justice Ross's decision provides municipalities with several alternatives for dealing with homelessness that are less intrusive of Charter rights, as described in her overbreadth analysis. For example, the City of

Calgary could permit the use of temporary structures overnight, and ensure these were taken down in the morning. The City could also rely on existing provisions of its Parks and Pathways Bylaw to deal with some of its more specific concerns, including section 27 (which prohibits littering in parks) and section 17 (which prohibits various kinds of environmental damage).

The City could, of course, also respond by providing adequate housing for homeless persons in Calgary to negate their need to sleep in parks. In 2007, the City announced that it would be developing a 10-Year Plan to End Homelessness in Calgary (see http://content.calgary.ca/CCA/City+Hall/Business+Units/Community+and+Neighbourhood+Services/Social+Research+Policy+and+Resources/Affordable+Housing+and+Homelessness/Homelessness+From+Prevention+to+Cure+.htm). A number of background research documents have been prepared, but the plan itself has not yet been unveiled. This is clearly a long term (and vitally important) effort, but the question remains how homeless persons will be accommodated in the meantime. If they are criminalized through the use of the Parks and Pathways Bylaw, the City should prepare itself for a constitutional challenge.