November 17, 2015

Is there Space for the Homeless in our City's Parks? A Summary and Brief Commentary of *Abbotsford (City) v Shantz*

By: Ola Malik and Megan Van Huizen

Case Commented On: *Abbotsford (City) v Shantz,* 2015 BCSC 1909

The recent B.C. decision of *Abbotsford (City) v Shantz*) highlights the central issue which seems to arise whenever there is a conflict over the management of public city space – who does this space "belong" to, and who gets to use it? When we answer that question, many of us would agree that this space belongs to those who live in our communities -- parents with strollers, families on an outing, people walking their dogs or playing with their kids. When we think about who belongs in our community, how many of us include the homeless?

The homeless are often excluded from our conception of community. It is easy to ignore the issue of homelessness when it is hidden from view. But as soon as the homeless become visible in our parks and neighbourhoods they are seen as a nuisance requiring a solution. The well-known phrase, "you don't have to go home, but you can't stay here" aptly captures the dilemma the homeless face -- and when you have no place to call home – where do you go?

A Precursor: *Victoria (City) v Adams*

In the previous B.C. case of *Victoria (City) v Adams* (2008 BCSC 1363, 2009 BCCA 563), The City of Victoria sought to remove a tent city comprised of 20 tents which was being used by 70 homeless people in one of its downtown parks. The City of Victoria argued that the tent city was in contravention of its bylaws which prohibited people from temporarily erecting shelters, such as tents or other structures, and sleeping in parks overnight. The City of Victoria commenced civil proceedings and was initially successful in getting the tent city removed pursuant to a temporary civil injunction. However, The City of Victoria lost at trial where its bylaws were challenged on the basis that they infringed upon the homeless campers' section 7 *Charter* rights because of arbitrariness and overbreadth. The trial judge found that The City of Victoria's bylaws were both arbitrary and overbroad and therefore constituted a breach of their section 7 *Charter* interests which were not saved by section 1 of the *Charter*. The City of Victoria appealed to the BC Court of Appeal, which upheld the trial judge's conclusions that the bylaws were overbroad (BCCA, at paras 112-116) but did not find that they were arbitrary (BCCA, at paras 117-124).

It is important to note how the constitutional question in the *Adams* case was framed. The City of Victoria's bylaws allowed a person to sleep in a park during the daytime under a non-structural covering, such as under a blanket, in a sleeping bag, or under a tarp. What the bylaw prohibited was sleeping in parks overnight, and the erection of any structure, howsoever temporary, such as a tent, a tarp strung between trees, or cardboard boxes.

Taken together, the courts' decisions in *Adams* establish that where the number of homeless exceeds the number of available shelter beds, prohibiting the homeless from sleeping overnight in municipal parks and from erecting temporary, adequate overhead shelter constitutes a breach of section 7 of the *Charter*. Erecting a temporary overhead structure in which to sleep invokes one of the basic life choices that go to the core of what it means to enjoy individual dignity and independence. This is because without some form of overhead protection from the elements, the homeless are significantly exposed to the elements and risk health problems such as hypothermia and even death. Consequently, the erection of some overhead structure is a necessary response to a person's health and well being, and is therefore protected by the security interest enshrined in section 7 of the *Charter*.

The BC Court of Appeal agreed with the trial judge's findings that the bylaw restrictions were overbroad: The City of Victoria didn't prohibit sleeping in parks during the daytime, so what was the purpose for banning night-time sleeping? Further, The City of Victoria failed to establish how the erection of temporary, non-invasive structures or an increase in the number of homeless campers would have a more harmful impact on park assets than that caused by other park users.

The courts' decisions in *Adams* leave us with three key issues which, as we shall see, remain relevant after *Shantz*:

- The courts' conclusions regarding the section 7 breach rest on a finding that there were insufficient shelter beds to provide overnight shelter. The courts acknowledged that a decision regarding the homeless' section 7 *Charter* rights would be much more difficult if a municipality could prove that there were enough accessible, safe, shelter beds for the homeless to use (BCSC, at para 191; BCCA, at para 74).

- Finding in favour of a section 7 *Charter* breach should not be viewed as constituting an interference with a municipality's discretion in how it chooses to address homelessness, nor does it impose an obligation on a municipality to provide the homeless with adequate shelter (for more of a discussion on this, see Joshua Sealy-Harrington's blog here where he discusses the Ontario Court of Appeal's decision in *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 which upheld a motion court's decision to strike an application brought under section 7 of the *Charter* which sought to require the federal government and Ontario provincial government to provide for "affordable, adequate, accessible housing"). What the section 7 analysis is concerned with is whether government action *deprives* someone of their liberty rights, not with the imposition upon government of positive obligations to fix the problem. How government chooses to remedy a section 7 *Charter* breach is for government to decide, not the courts (BCSC, at paras 114-123; BCCA, at paras 90-96).

- *Adams* does not grant the homeless with a vested property right, or a "free-standing constitutional right" to camp in a municipality's parks. In *Adams*, both the trial judge and BC Court of Appeal were careful to point out that the homeless were not being granted an exclusive use of municipal park space. While overnight camping under temporary structures was allowed, there was nothing in the courts' decision which opened the door (at least on the facts before them) for the establishment of permanent or semi-permanent homeless encampments or "tent cities" (BCSC, at paras 126-132; BCCA, at paras 98-101).

The Present: ***Abbotsford (City) v Shantz***

In the case of *Shantz*, The City of Abbottsford had been dealing with the erection of various homeless camps. In the case of one camp, The City of Abbotsford obtained an interim injunction, requiring the removal of all structures of shelters and tents which had been erected (including a wooden structure) as part of a homeless camp. The City of Abbotsford brought an application to make the injunction permanent. The BC/Yukon Association of Drug War Survivors ("DWS") responded by challenging the constitutional validity of The City of Abbotsford's various bylaws pursuant to sections 2 (rights to freedom of expression, peaceful assembly, and association), 7 and 15 of the *Charter*.

In contrast to The City of Victoria's bylaws under consideration in *Adams* which imposed a blanket prohibition on overnight camping and the erection of temporary shelters in its city parks, the City of Abbotsford's bylaws subjected this very same activity to a permitting scheme. In order to camp overnight or erect a temporary structure such as a tent, building, shelter pavilion or other construction, you were required to obtain permission from the general manager of parks. A valid credit card was required to make the booking. The cost per night was $10.00 per tent or vehicle. Insurance was also required (at paras 22-23).

Would The City of Abbotsford's permitting regime survive a *Charter* challenge?

In *Shantz*, the court arrived at the same ultimate conclusions as those arrived at in *Adams*: the homeless have a constitutionally protected liberty right under section 7 of the *Charter* to sleep overnight in parks under temporarily erected overhead shelters where a municipality does not have sufficient accessible shelter space to accommodate them. The permitting scheme which The City of Abbotsford had set up was not practically accessible by the homeless, and effectively acted as a prohibition.

It is important to note that in *Shantz*, The City of Abbotsford had engaged in various efforts to shut down some of the homeless camps and keep the homeless moving. These efforts included spreading chicken manure over one camp, spraying pepper spray into empty tents, and cutting tent straps and tents. The court was condemnatory of these tactics which affected the homeless psychologically and made it more difficult for The City of Abbotsford's homeless providers to locate them and provide help (at para 209).

The court dismissed DWS's *Charter* challenge brought forward for breaches of sections 2 and 15 (these won't be discussed here) but otherwise concluded that The City of Abbotsford's regulatory scheme infringed upon the homeless campers' section 7 liberty interests and that the impact of the bylaws was overbroad and grossly disproportionate, thereby violating principles of fundamental justice.

With respect to overbreadth, the court (at para 200) cited the definition of overbreadth from (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, ("*Bedford*") and found that The City of Abbotsford's permitting scheme was overbroad (at paras 200-203). The court indicated that less intrusive measures could have been imposed that would still have supported The City's objectives of effectively managing its parks for all of its park users. Similar to the analysis of overbreadth, the court concluded that imposing a permitting scheme which the homeless could not satisfy and displacing the homeless from their camps was grossly disproportionate to these objectives (at paras 209, 221, 223-224).

Finally, the court found that the section 7 breaches were not saved by section 1 of the *Charter* (at paras 237-247). This is unsurprising as it is extremely rare that a court, having concluded that a law which infringes upon those fundamental personal rights protected by section 7 and a manner which in some way violates the principles of fundamental justice can ever be saved by more compelling societal interests.

In the result, the court declared that the bylaw provisions which prohibited overnight sleeping and the erection of temporary shelters violated section 7 and were of no force and effect, pursuant to section 52 of the *Charter*. Further, the court concluded that a minimally impairing bylaw would allow overnight shelters in The City of Abbotsford's public parks between the hours of 7:00 pm and 9:00 am the following day.

The issues which we identified in *Adams* continue to be of interest following the court's decision in *Shantz*.

- For the court in *Shantz*, assessing whether The City of Abbotsford had sufficient overnight shelter accommodations invokes both quantitative and qualitative assessments (although this was not expressly articulated in this way). The quantitative question asks whether there are enough available shelter beds to meet demand. The qualitative question is more difficult and examines the nature of barriers that would prevent someone from accessing normally available shelter space. Examples of barriers include shelter open hours, restrictions pertaining to sobriety and drug abstinence, unaffordable rental fees, and, in some cases, the poor living conditions found in some of the market housing (at paras 47-68). In *Shantz*, the court essentially concluded there was both insufficient (quantitative) and inaccessible (qualitative) shelter space (at para 82).

  As in *Adams*, the court in *Shantz* addressed The City of Abbotsford's argument (at paras 76-77) that some homeless people prefer to camp outside despite the presence of available shelter beds. The City of Abbotsford tried to make the point that it was caught in an intractable bind -- irrespective of how much accessible shelter space there was, there are homeless people that simply prefer to camp outside.

  In *Shantz*, the court addressed this issue (at para 78) by referring to the *Bedford* decision where the Supreme Court of Canada expressly addressed the issue of "choice" for those engaging in risky activities at paras 86 and 87:

  > First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself". As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population...Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice -- what the Attorney General of Canada called "constrained choice" -- these are not people who can be said to be truly "choosing" a risky line of business.
  >
  > Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution -- the exchange of sex for

> money -- is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

It's important to point out how the courts in *Adams* and in *Shantz* address this question of "choice" as it pertains to section 7 interests. All of us have heard the arguments that only those who make poor life choices or are otherwise irresponsible end up homeless. This is a convenient argument which releases us from any further obligation to render assistance because they have "chosen" how to live their lives, just as we have ours.

But making a Sophie's Choice is not a free choice. In the same way in which court decisions such as *Bedford* and *R v Parker* ((2000), 49 O.R. (3d) 481, referred to in the *Adams* decision, BCCA, at para 106)) have refined the section 7 interests in respect of prostitutes and epileptics, the courts in *Adams* and *Shantz* have now examined these interests in respect of the homeless. This is how the court framed this issue in *Shantz* (at paras 81-82):

> ...[T]o assert that homelessness is a choice ignores realities such as poverty, low income, lack of work opportunities, the decline in public assistance, the structure and administration of government support, the lack of affordable housing, addiction disorders, and mental illness. I accept that drug and alcohol addictions are health issues as much as physical and other mental illnesses. Nearly all of the formerly homeless witnesses called by DWS gave evidence relating to some combination of financial desperation, drug addiction, mental illness, physical disability, institutional trauma and distrust, physical or emotional abuse and family breakdown which led, at least in part, the witness becoming homeless.
>
> Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impracticable for many of the City's homeless. They simply cannot abide by the rules required in many of the facilities that I have discussed above, and lack the means to pay the required rents at others. While some of those who are amongst the City's homeless have declined available shelter, I am satisfied that at present there is insufficient accessible shelter space in the City to house all of the City's homeless persons.

It appears that this issue of "choice" has now been put to rest. However, we wonder from a practical perspective whether a municipality would *ever* be able to demonstrate that it had sufficient accessible shelter beds to meet its homeless population. Providing the quantity of overnight shelter beds is, in itself, a difficult challenge for any municipality to meet. Now add to that the additional challenge of having to ensure that overnight shelter beds qualitatively meet the broad range of challenges by imposing suitably low barriers to admission. Can a municipality realistically ever prove that it has made available sufficient shelter space to meet a vast range of current, individualized needs? Can the test, which requires a municipality to show that it has both sufficient and accessible shelter space ever be met?

- In *Shantz*, the court confirmed that the section 7 analysis should only focus on the effect of how laws *deprive* someone of their section 7 interests (at paras 181-182). Neither in *Adams* nor in *Shantz* did the courts affirm that section 7 of the *Charter* grants the homeless with a

constitutionally protected right to adequate food, shelter or any other basic necessities of life. To do so, would constitute the granting of positive social and economical interests which the court in *Shantz* expressly declined to do based on previous case law (at paras 176,177 and 181).

However, in *Shantz* (at para 178), the court quoted from an article written by Martha Jackman titled *The Protection of Welfare Rights Under the Charter* ((1988) 20 Ottawa Law Review 257), which was cited by the trial judge in *Adams*:

> ...[A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the Charter presuppose a person who has moved beyond the basic struggle for existence. The Charter accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income...

There appears to be a growing consensus within the legal academy and the courts that our laws are not being carefully crafted enough to recognize their effects and impact upon those who live on the margins of our society. That conclusion should perhaps come as no surprise given that issues of poverty, homelessness, mental illness, drug addiction, and crime are complex and require deeper understanding. (For anyone writing on the intersection between laws and the homeless, we would strongly recommend two excellent articles written by Jeremy Waldron: *Homelessness and Community*, (2000), 50 University of Toronto Law Journal, 372-406; and *Homelessness and the Issue of Freedom*, 39 UCLA L. Rev. 295-324, (1991-1992)).

We're curious to see how far the application of section 7 rights will extend to the rights of the homeless although we're sure we're at the start of what could be an enlargement of section 7 jurisprudence in this regard. That poses a challenge for municipalities to ensure that they carefully consider the interests of the marginalized who are often disproportionately impacted by municipal enforcement (for example, see Justin Douglas: *The Criminalization of Poverty: Montreal's Policy of Ticketing Homeless Youth for Municipal and Transportation Bylaw Offences* (2011) 16 Appeal 49-64) and who very often don't have sufficient input into the political or administrative process regarding the drafting of municipal bylaws.

- In *Adams*, one of the questions which the courts considered was whether, in successfully establishing that they had they had a right to camp overnight in city parks, the homeless were being granted a property right in appropriating public park space. This is critically important for municipalities who fear this would create permanent tent cities. As you might recall, this was one of the central arguments which Canadian municipalities articulated in their efforts to rid their parks of the Occupy protest encampments which swept across Canada in late 2011.

> In *Adams*, the trial judge suggested that The City of Victoria's concerns regarding the environmental impact of overnight camping could be alleviated by requiring the overhead structures to be dismantled each morning and to delineate which ecologically sensitive park areas were off limits for sleeping and camping (BCSC at para 185). In *Shantz*, the court raised the idea that overnight camping be allowed in a roster of rotating, non-developed parks, closer to homeless facilities and perhaps more appropriate (from an ecological standpoint) for overnight camping (at para 278). As discussed above, the court disapproved of the displacement tactics which The City of Abbotsford used to move the homeless on because of their destabilizing impact on an already vulnerable group.
>
> We might suggest that where there is any doubt as to what the correct strategy ought to be, municipalities are far better served redressing the issue of established homeless encampments through formal court proceedings or pursuant to trespass legislation rather than asking enforcement officials to exercise their individual discretion. While seeking court remedies takes much longer time, municipalities who avail themselves of the legal process will far often be seen as having acted properly, through the appropriate legal channels and in good faith, as compared to those who exercise questionably harsh tactics (as in *Shantz*). Further, effectively dealing with the homeless requires the assistance of specialized agencies, social workers and homeless advocates who understand the challenges of homelessness and who can suggest appropriate resources for follow-up help.

For many municipalities, the effect of the 2011 Occupy protest movement was to focus the mind on how to balance competing interests and demands brought to bear on public park space. To find the appropriate balance was novel for many municipalities who didn't quite know how to balance the rights of those engaging in legitimate political protest with those who were concerned that their parks were being appropriated and rendered unusable by other park users.

In much the same way, the *Adams* and *Shantz* decisions challenge us to think about how we make our public spaces available to the homeless. What Jeremy Waldron argues in his article *Homelessness and the Issue of Freedom*, is that the homeless are unfree in virtually every activity they undertake and which the rest of us take for granted: the homeless can, like the rest of us, *be* in all of our public spaces. Yet none of those spaces *allow them to do* what you and I can do in our homes, our friends' homes, bars, restaurants or nightclubs – sleep, eat, cook, wash, go to the bathroom, attend to personal hygiene or simply stand around. Because the homeless have no place to call their own, they can only engage in these basic human activities in public places which prohibit them from doing so (which the court in *Shantz* recognizes, para 278). To return to our initial question: When you have no place to call home – where do you go?

We suspect that the outcome of *Shantz* is that municipalities across Canada will (or at least should) re-assess their parks and other bylaws and their impact upon the homeless and marginalized. Yes, our public parks belong to parents with strollers, families on an outing, people walking their dogs or playing with their kids. *And they also belong to our homeless.*

This blog does not necessarily represent the views of The City of Calgary.