

The Charter Right to Rudimentary Shelter in Victoria: Will It Come to Other Canadian Cities?

On December 9, 2009 the City of Victoria lost its appeal in [Victoria \(City\) v. Adams](#).^[2] Victoria had hoped to overturn a 2008 decision of the British Columbia Supreme Court which declared two of the City's bylaws unconstitutional due to a violation of section 7 - "life, liberty, and security of the person" - of the [Canadian Charter of Rights and Freedoms](#).^[3]

The litigation centred on whether homeless people could set up temporary shelter in public parks. Victoria's bylaws prohibited any form of "structural" shelter being erected in public parks. When Victoria enforced its bylaws by removing a tent city in one of its public parks, residents of the tent city challenged the bylaws' constitutionality.

In October 2008, the B.C. Supreme Court declared Victoria's bylaws of "no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter."^[4] Victoria challenged the trial court's judgment, arguing that the judge had erred in finding that the bylaws violated section 7 of the *Charter*.

More importantly, Victoria argued that the trial judge had "improperly" interfered with the city's legislative jurisdiction to regulate how public parks can be used. According to the city, the trial judge's decision amounted to *requiring* the city "to regulate the use of parks for camping or other living accommodation," contrary to the city's preferred policy for addressing homelessness.^[5]

The Court of Appeal disagreed with both of Victoria's arguments. The trial court was exercising its proper jurisdiction when it ruled on Victoria's bylaws. Contrary to the city's view, the trial judge did not "adjudicate on the wisdom of policy decisions of elected officials" - she merely addressed the constitutional question of whether the bylaw violated a *Charter* right.^[6]

The appeal court also found that Victoria's bylaws violated section 7 of the *Charter*.^[7] However, the court disagreed with the trial judge's declaration that the bylaws were arbitrary. According to the Court of Appeal, the bylaws were not arbitrary, but they were overbroad and thus violated the *Charter*.^[8]

The City of Victoria disputed the trial judge's finding that the bylaws did not allow the homeless to shelter themselves sufficiently. The Court of Appeal dismissed this argument as "an attempt to re-argue the case at trial, which is not the purpose of an appeal."^[9] Victoria also tried to argue that the remedy granted by the B.C. Supreme Court gave the homeless a right to camp on public property and thus granted them a property right.^[10] The Court of

Appeal disagreed, saying that the right to rudimentary shelter does not amount to a property right.[\[11\]](#)

Despite upholding most of the trial decision, the Court of Appeal narrowed the remedy granted to the homeless. On appeal, the bylaws were declared of no force and effect “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.”[\[12\]](#)

The judgment of the Court of Appeal does not grant the homeless a right to have shelters built for them. Moreover, it allows the City of Victoria to prohibit overhead shelter in parks when there are enough shelter beds for all the homeless in Victoria. In other words, at a time when there are enough shelter beds for the entire homeless population of Victoria, the bylaws can revert to their original wording and will be considered constitutional.

Victoria is not unique in Canada in having bylaws which disproportionately affect the homeless. For example, Edmonton has [bylaws](#) which prohibit constructing or erecting anything on parkland.[\[13\]](#) Calgary has a [public behaviour bylaw](#) which, among other things, “prohibits panhandling, sleeping on benches or sidewalks, [and] huddling on public property.”[\[14\]](#) Critics of these bylaws call them “anti-homeless.”

Nor is Victoria unique in having its anti-homeless bylaws challenged. Toronto enacted a bylaw which banned “squeegeeing,” the practice of washing the windshields of cars stopped at traffic light in exchange for money. Toronto’s anti-squeegeeing bylaw was challenged on constitutional grounds, but the bylaw was upheld in 2007 at the Ontario Court of Appeal.[\[15\]](#) The effect of Toronto’s bylaw was to prohibit a single form of begging but not all forms of begging, and as such it was constitutional.

Victoria’s anti-homeless bylaws differed from Toronto’s in an important way: they restricted a homeless person’s ability to stay alive and healthy much more directly. Arguably, Edmonton’s and Calgary’s bylaws also directly restrict homeless people’s ability to keep themselves alive, which raises questions about these bylaws’ constitutionality.

The Court of Appeal’s ruling in *Victoria* may spur changes in other cities in British Columbia, but it is unlikely to make cities like Edmonton or Calgary reword their bylaws to make them constitutional. However, if a ruling like *Victoria* is appealed to the Supreme Court of Canada, Canadian cities may be forced to redraft their bylaws so that they comply with section 7 of the *Charter*.

Further Reading

Jim Young, “[Do the Homeless Have a Constitutional Right to Camp in Edmonton?](#)” *Centre for Constitutional Studies* (12 August 2009).

Poverty and Human Rights Centre, “[Victoria \(City\) v. Adams: Advancing the Right to](#)

[Shelter](#)" (11 April 2009).

Jennifer Koshan, "[The Constitutionality of Calgary's Parks and Pathways Bylaws for Homeless Persons](#)" *Ablawg.ca* (5 November 2008).

Terry Romaniuk, "[The Homeless Can Tent Overnight in City Parks](#)" *Centre for Constitutional Studies* (28 October 2008).

Kevin Tilley, "Homelessness and the Charter: *Victoria v. Adams*" *The Court* (23 October 2008).

Dania Young, "[Homeless Dream of a Right to Sleep](#)" *Centre for Constitutional Studies* (8 February 2008).

[1] Sarah Hamill is a doctoral candidate in the Faculty of Law, University of Alberta. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies. [2][Victoria \(City\) v. Adams 2009 BCCA 563](#) . [3][Victoria \(City\) v. Adams 2008 BCSC 1363](#) . [4] *Victoria* (BCSC), *ibid.* at para. 239. [5] *Victoria* (BCCA), *supra* note 2 at para. 6. [6] *Ibid.* at paras. 63-69. [7] *Ibid.* at paras. 125-131. [8] *Ibid.* at paras. 122-124. [9] *Ibid.* at para. 103. [10] *Ibid.* at para. 99. [11] *Ibid.* at paras. 98-101. [12] *Ibid.* at para. 166. [13] City of Edmonton, By-Law No. 12308, [Unauthorized use of Parkland](#). [14] Wendy Tso, "[Public Behaviour Bylaw Passes Despite Charter Issues](#)" *Centre for Constitutional Studies* (1 December 2006). [15][R v. Banks](#), 2007 ONCA 19.