

Victoria (City) v. Adams: Advancing the Right to Shelter

LAW SHEET

**the POVERTY and
HUMAN RIGHTS
CENTRE**

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Introduction

The notice which the City of Victoria delivered to the people at Tent City says that we are not permitted to move ourselves or our belongings to any other City park or public access way in the City of Victoria. But there is no where else for us to go. The shelters that they tell us to go to are usually full or have only a very few beds available. And many people, myself included, do not feel safe in the shelters. Also if I were to go to a shelter I would be forced to be separated from my husband.

– ALYMANDA WAWAI IN AN AFFIDAVIT FROM THE *ADAMS* CASE

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

– UNIVERSAL DECLARATION OF HUMAN RIGHTS

This Law Sheet, produced by the Poverty and Human Rights Centre, discusses the role played by Canada's international human rights obligations in the British Columbia Supreme Court decision in *Victoria (City) v. Adams* ("*Adams*").¹

Adams, a case about the rights of homeless people, is an important step towards the domestic recognition of a right to adequate shelter, and towards absorbing international human rights protections into Canadian law. *Adams* also confirms that Canadian courts and tribunals can, through their interpretation of the *Canadian Charter of Rights and Freedoms*,² provide a significant forum for adjudication and enforcement of Canada's obligations under international human rights law.

In *Adams*, the Court recognizes that creating shelter to protect oneself from the harshness of the weather and the environment is critical to an individual's dignity and independence. The Court also recognizes that there are constitutional limits on governments' powers to stop people from trying to shelter themselves.

1 2008 BCSC 1363. The decision is available free online:
<http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1363/2008bcsc1363.html>.

2 *Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.

How the Case got to Court

In October 2005, the City of Victoria went to court to obtain an injunction to enforce its bylaws regarding parks and public areas after a number of homeless people, including Natalie Adams and others, set up a tent city in Victoria's Cridge Park.

In their defence, Natalie Adams and the other homeless defendants argued that the Parks Regulation Bylaw and the Streets and Traffic Bylaw,³ which at the time collectively prohibited sleeping overnight in any public space in the City, violated the *Charter*.

In August 2007, the City amended the City's Parks Regulation Bylaw⁴ to prohibit taking up a "temporary abode", rather than sleeping overnight in parks. City of Victoria police, in enforcing the bylaws, prohibited homeless people from erecting any form of overhead protection including tents, tarps, and cardboard boxes, even on a temporary basis. The defendants maintained that the amended bylaws, and the operational policy of the City in enforcing them, violated their *Charter* rights.

What the Court Decided

In *Adams*, the Court confirmed that homeless people have the right to erect shelter to protect themselves from the elements when sleeping outside. Madam Justice Ross, who made the decision, found the City of Victoria did not have sufficient shelter spaces to house the more than 1,000 homeless people in the City, and that a bylaw preventing them from having minimal shelter violated section 7⁵ of the *Charter* and was not saved by section 1.⁶

Ross J. found the prohibition in the bylaws, which was in effect at all times in all public places in the City, against erecting even the most rudimentary temporary shelter exposed homeless people to a risk of significant health problems or even death. She concluded the effect of the prohibition was to impose on homeless persons significant and potentially severe additional health risks. In addition, Ross J. concluded sleep and shelter are necessary preconditions to the security, liberty, and human flourishing protected by section 7 of the *Charter*.

3 No. 92-84.

4 No. 07-059.

5 Section 7 reads: "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". Most often, section 7 is interpreted as requiring a two-part legal analysis to determine whether there has been a violation. First, a court will consider whether there has been a violation of any of the individually protected rights of life, liberty, and security of the person. If so, the court will then consider whether the deprivation was in accordance with the principles of fundamental justice. If it was, there is no violation of section 7. If it was not, the court will then turn to section 1.

6 Section 1 allows governments to limit rights in certain circumstances. It reads: "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". Governments are seldom able to justify violations of section 7 under section 1. The legal analysis under section 1 is the *Oakes* test, which is named after the Supreme Court of Canada decision in *R. v. Oakes*, [1986] 1 S.C.R. 103. The court will first consider whether the challenged law has a pressing and substantial objective. If it does, the court will then consider whether the law is rationally connected to that objective, whether it minimally impairs the rights of the persons challenging the law, and finally whether the benefits of the law outweigh any harm caused by it. The government must provide evidence to show it should succeed on each step of the *Oakes* test.

Further, Ross J. decided the prohibition in the bylaws was both overbroad and arbitrary, and therefore not in accordance with the principles of fundamental justice.

The Attorney General of British Columbia and the City argued that the objective of the bylaws and the operational policy was to maintain the various benefits of urban parks. However, Ross J. found that their arguments were premised on the false notion that the only options were a choice between the bylaws' absolute ban on the erection of overhead shelter on the one hand and chaos on the other. She also found that the bylaws went much further than simply prohibiting the harms the Attorney General and the City said would arise from tent cities, by totally preventing the use of any shelter.

Ross J. found the evidence did not show that any harm to parks was related to what was prohibited by the bylaws. The evidence showed that damage to parks resulted from people sleeping or camping overnight, making their way to a sleeping or camping site, and digging holes into the bluffs, but the damage was not caused by the erection of overhead protection.

The infringement of Ms. Adams' and the other homeless defendants' rights, which Ross J. called "very significant", was not justified under section 1 of the *Charter* because the impact of the bylaws was disproportionate to the advantages and because the impairment of *Charter* rights was not minimal. Ross J. noted that the City and the Attorney General professed concern for preservation of parks, yet the bylaws applied to all public land. Further, the provincial and municipal governments expressed concern about structures that provide for a degree of permanence, yet all overhead protection, including that taken down every morning, was prohibited.

What Adams Says about Canada's International Human Rights Obligations

International human rights instruments, including the *Universal Declaration of Human Rights*⁷ and the *International Covenant on Economic, Social, and Cultural Rights*,⁸ recognize adequate housing as a fundamental right. Canada ratified the *International Covenant on Economic, Social and Cultural Rights* in 1976.

Although the federal government has formally committed itself to these and related international instruments, it has not incorporated the rights set out in them directly into Canadian legislation. In various cases, governments have argued that the lack of legislative

7 GA Rs. 217(III), U.N. GAOR, (3d) Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71, Article 25(1):
Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

8 16 December 1966, 999 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360, Article 11.1:
The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

incorporation makes the rights unenforceable in Canadian courts.⁹ Following this pattern, in *Adams*, the Attorney General of British Columbia argued, among other things, that international instruments like the *Universal Declaration of Human Rights* were irrelevant, and that international human rights law could only be referred to as an “interpretive aid” where the legislation being interpreted is ambiguous.

Madam Justice Ross rejected these arguments, noting that the issue in *Adams* was not interpretation of legislation, but interpretation of the *Charter*. Ross J. found that the Court could refer to international instruments as an aid to interpreting the meaning and scope of *Charter* rights. She observed that in numerous decisions, the Supreme Court of Canada has confirmed the informative value of international human rights norms as aids to the interpretation of section 7 of the *Charter*.¹⁰

In the *Adams* decision, Ross J. referred to a wide variety of international covenants and declarations that “establish the different dimensions of the right to adequate housing and enshrine it as a fundamental principle of international law.”¹¹ She also referred to the federal government’s statements to international bodies responsible for enforcing the treaties regarding the protections provided by section 7 of the *Charter*. For example, she noted that in 1993 the Government of Canada stated to the Committee on Economic, Social, and Cultural Rights¹² that section 7 of the *Charter* must be interpreted in a manner consistent with Canada’s obligations under the *Covenant* to not deprive persons of the basic necessities of life.

Ross J. also observed that the Government of Canada confirmed this position in 1998 in the “Federal Responses” to the *Review of Canada’s Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights*.¹³ In 1998, the Committee asked whether the answer given in 1993 was still the position of Canada. The Government of Canada replied that Supreme Court of Canada decisions, which are binding on all levels of government, have found that section 7 guarantees that no one is to be deprived of basic necessities.

Ross J.’s decision makes clear that, what Canadian governments have said to the international bodies that enforce human rights treaties can matter in Canadian courts. Even though the various international instruments do not automatically form part of the domestic law of Canada, they inform the interpretation of the rights contained in the *Charter*.

9 For more information on the relationship between international and domestic law, and the concept of “incorporation”, see the Law Sheet “The Role of International Social and Economic Rights in the Interpretation of Domestic Law in Canada”. The Law Sheet is available online: www.povertyandhumanrights.org/html/cat1599.html

10 See paras. 95-99 of the *Adams* decision. For example, in *United States v. Burns*, [2001] 1 S.C.R. 283, the unanimous Supreme Court of Canada endorsed an earlier statement of the Court, in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, that:

The various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*’s provisions.

11 See para. 90.

12 *Summary Record of the 5th Meeting*, ESC, 8th Sess., 5th Mtg., U.N. Doc. E/C.12/1993/SR.5 (25 May 1993).

13 (November 1998), online: Canadian Heritage, Human Rights Program http://www.bayefsky.com/issuesresp/canada_ceschr_1998.php

Beyond Adams: Next Steps

Adams, while a very important step in the right direction, is a modest step towards the advancement of social and economic rights for homeless women and men. In Canada, there is no practical reason why a homeless person should be confronted with a choice between breaching a bylaw in order to take shelter in a park and having no access to any shelter, not even a tarp or a cardboard box. Governments in Canada clearly have the capacity to ensure that no one is homeless. Yet, even through a time when Canada has had successive budget surpluses, homelessness has not been addressed effectively, and in many regions it has worsened.¹⁴ Now that Canada faces a recession, the situation of homeless people will be even more precarious, unless bold and immediate steps are taken.

Under international human rights law, the right to an adequate standard of living, including adequate housing, requires much more than permitting people to sleep outdoors. The provision of emergency shelter is considered minimal. There is also an obligation on governments to ensure that everyone has adequate housing, and this positive content is embedded in the *Charter*.¹⁵

In *Adams*,¹⁶ Madam Justice Ross noted that she was not required to decide, and did not decide, whether section 7 includes a positive right to shelter because the homeless defendants' claim was limited to an assertion of entitlement not to have their self-help efforts interfered with. Interestingly, Ross J. quoted the Chief Justice of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*,¹⁷ who wrote: "One day section 7 may be interpreted to include positive obligations". This suggests Ross J. may not have been convinced of the correctness of the Attorney General's position that section 7 can never impose positive obligations on governments. It is well established in international human rights law that certain rights, including the right to an adequate standard of living, impose positive obligations on governments. Necessarily, this must also be a live question for Canadian courts interpreting the *Charter*, because the *Charter* is a primary vehicle through which Canada's international human rights obligations are given effect.

The next step for advocates is to find ways to move Canadian courts and tribunals further toward recognition of the positive obligations of governments. The question of how to do this deserves serious strategic thinking, and advocacy.¹⁸

Conclusion

The decision in *Adams* shows that international human rights can matter – in constitutional litigation and in the lives of Canada's most vulnerable groups. There are opportunities to take governments to task for failing to recognize and protect those international human rights.

14 See e.g. Federation of Canadian Municipalities, *Quality of Life in Canadian Communities: Trends and Issues in Affordable Housing and Homelessness* (2008), online: <http://intraspec.ca/qol2008.pdf>.

15 See the Poverty and Human Rights Project Law Sheet on the right to adequate housing, online: <http://www.povertyandhumanrights.org/html/cat1599.html>.

16 See para. 118.

17 [2002] 4 S.C.R. 429, online: <http://www.canlii.org/en/ca/scc/doc/2002/2002scc84/2002scc84.html>.

18 The City of Victoria is appealing the *Adams* decision to the British Columbia Court of Appeal. It will likely be late 2009 before the Court of Appeal hears the case and makes a decision.

Canadian courts have a role to play. International treaty bodies, that periodically review Canada's progress in implementing its human rights treaty obligations, continue to highlight the failures of Canada's federal and provincial governments to fulfill the rights of women to equality and of everyone to an adequate standard of living. Most recently, the United Nations Committee on the Elimination of Discrimination Against Women called upon Canada to raise social assistance rates and establish minimum standards for social assistance programs.¹⁹ In the area of housing, the CEDAW Committee expressed its regret that Canada lacks a national housing strategy and urged Canada to step up its efforts to provide affordable and adequate housing options for women and children, including in Aboriginal communities.

About the Poverty and Human Rights Centre

This Law Sheet was produced by the Poverty and Human Rights Centre in Vancouver British Columbia. The Poverty and Human Rights Centre is a non-profit research and public education centre committed to promoting recognition and realization of rights to social and economic security. The Centre's Directors are Gwen Brodsky and Shelagh Day. For more information about the Poverty and Human Rights Centre, go to the Centre's website <http://www.povertyandhumanrights.org>.

The financial support of the Social Sciences and Humanities Research Council Community University Research Alliance, the Canadian Bar Association Law for the Future Fund, and the Law Foundation of British Columbia, is gratefully acknowledged.

The Poverty and Human Rights Centre also acknowledges the assistance of Pamela Murray and Elaine Littmann in the preparation of this Law Sheet.

19 Concluding Observations of the Committee on the Elimination of Discrimination against Women, Forty-second session, 20 October – 7 November 2008, U.N. Doc. CEDAW/C/CAN/7 (7 November 2008)