

January 25, 2010

VIA: EMAIL

Reply to: John Richardson
Direct Line: (604) 255 9700 ext. 110
E-mail: jrichardson@pivotlegal.com

Mayor and City Councillors
City of Vancouver
453 West 12th Avenue
Vancouver, BC V5Y 1V4

Dear Mayor and City Councillors

Re: Homeless on City streets and parks during the Olympics

I am writing with an urgent request that City Council give direction to City staff regarding temporary shelters for homeless people on city property.

I have already raised concerns with several members of Council that the BC Court of Appeal decision in *Victoria (City) v. Adams* requires changes to how the City regulates public space. The *Adams* decision means that the City now has an obligation to accommodate the right of homeless people to temporary shelters, rights that to this point have not been recognized by the City. In light of the coming Olympics, the high security presence, and the lack of sufficient shelter space, it is critical that Council to set guidelines regarding the enforcement of current bylaws in order to ensure their constitutionality.

Please find attached a copy of an Opinion letter by Joe Arvay, QC which speaks to the issue of tents and temporary shelters on public streets.

We understand that Council will consider a motion to have staff review and make recommendations for bylaw, regulatory and policy changes that will look at the implications of current case law. This is an important step. However, such a process will not address the immediate situation, which is that hundreds of homeless people are now and will continue to take shelter on public space, during a time with intense competing demands for that space and an intense security, police and military presence. There is a danger that without guidelines in the interim, dated policies will lead to homeless people being forcefully displaced from public property, resulting in violations of human and Charter rights while the world watches.

We urge City council to adopt interim guidelines regarding the enforcement of Street and Traffic and Park Control bylaws to address the time period of the Olympics until new bylaws, regulations and policies can be drafted by city staff and adopted by Council.

Thankyou,

PIVOT LEGAL SOCIETY
per:



John Richardson
Executive Director

Reply to: Joseph J. Arvay, Q.C.
jarvay@arvayfinlay.com

Our File No: 2681-001

January 13, 2010

PRIVILEGED AND CONFIDENTIAL

Pivot Legal Society
678 East Hastings Street
Vancouver BC V6A 1R1

Attention: John Richardson

Dear Mr. Richardson:

Re: Project Red Tent

You have asked us to provide an opinion on whether the City of Vancouver (the “City”) can prohibit the homeless from erecting the use of tents on City sidewalks and indeed whether it has a legal duty pursuant to s. 71 of Vancouver’s *Street and Traffic By-Law* No. 2849 (the “By-law”) to grant permission to homeless people for the use of tents on City sidewalks.

Short Answer

In our opinion, a broad prohibition of the use of tents on City sidewalks and a failure to grant permission for the same, at least under certain conditions, would not only be contrary to the proper exercise of the City’s powers under the *By-law* but would also violate the s. 7 *Charter* rights of the homeless as have been most recently and eloquently outlined by the British Columbia Court of Appeal in *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams*].

In this opinion, we focus only on the implications of the *Charter* on the exercise of the City’s powers and leave for another day a consideration of administrative law issues.

Facts Relied On

We include a brief summary of the important facts and assumptions on which we have relied on for the purposes of this initial opinion. We ask that you provide us with any corrections or clarifications to these facts and assumptions, since a change may affect the substance of our opinion.

Absent the permission sought by Pivot, homeless people will be prevented from erecting tents on City sidewalks pursuant to the *By-law*.

Sections 10 and 11 of the *Parks Control By-laws* provide:

10. No person shall conduct himself or herself in a disorderly or offensive manner, or molest or injure any other person, or loiter or take up a temporary

abode overnight in any place on any portion of any park, or obstruct the free use and enjoyment of any park or place by any other person, or violate any by-law, rule, regulation, notice or command of the Board, the General Manager, Peace Officer, or any other person in control of or maintaining, superintending, or supervising any park of or under the custody, control and management of the Board; and any person conducting himself or herself as aforesaid may be removed or otherwise dealt with as in this by-law provided.

11. No person shall erect, construct or build or cause to be erected, constructed or built in or on any park any tent, building, shelter, pavilion or other construction whatsoever without the permission of the General Manager.

The effect of these provisions in the *Parks Control By-laws* is to authorize the General Manager of the Board of Parks to permit temporary structures in City parks and to set conditions to which those temporary structures must conform.

Absent permission, homeless people would be prevented from erecting tents in City parks. No permission has yet been obtained for homeless people to erect tents in City parks.

It is predicted that there will be more than 3,000 homeless people in the City during the 2010 Winter Olympic Games.

According to the most recent figures available from the City and the Province, even assuming all Homeless Emergency Action Team (“HEAT”) and extreme weather response shelters are open and all homeless people have transportation to available beds, there will still be a significant shortfall of shelter spaces for homeless people. Thus many of the City’s homeless will have no option but to sleep outside in the public spaces of the City – including City sidewalks.

City sidewalks are in many ways preferable to other public spaces for overnight sleep for the following reasons:

- park space is limited, particularly during the Olympics, and putting everyone in parks will strain the capacity of the parks and limit uses for other people;
- many homeless people prefer to avoid concentrations of people for the same reasons they avoid shelters: theft, violence, noise, drugs, etc.;
- sidewalks are more accessible than parks;
- sidewalks are safer than parks because they have more passers by, security cameras and are generally more visible;
- adjacent buildings provide windbreak on sidewalks;
- sidewalks provide some shelter from rain and snow, particularly if there is an awning;
- sidewalks have superior drainage to parks because water flows away to the street and gutter rather than pooling below the tent;
- sidewalks are warmer than parks because there is heat from vents in the ground and ambient heat from buildings;
- passers-by can make donations of clothing, etc.;
- homeless people are more visible to service providers on streets who can approach them with offers of assistance.

Whatever the reasons, and they presumably vary from person to person, according to the Greater Vancouver 2008 Homeless Count most homeless people sleep in pedestrian areas as opposed to parks or back alleys. The Count cites one interviewer, who stated; "Our big surprise was perhaps the visibility of the homeless once you look. We found that although we traipsed through the back alleys and near parks that all of our homeless people were located in busy pedestrian areas."

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. As results from the 2005 and 2008 Greater Vancouver Homeless Counts show, a large majority of homeless people have one or more existing health conditions, making their susceptibility to such risks a heightened concern.

Some form of overhead protection is part of what is necessary for adequate protection from the elements.

Charter Analysis and Opinion

Section 71 of the *By-law* provides in relevant part:

71. (1) No person shall build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied (**except in accordance with any by-law of the City, or except with the approval of and subject to such conditions as shall be determined by the Council**) in any street, any structure, object, substance, or thing which is an obstruction to the free use of such street, or which may encroach thereon, or lay or construct, or reconstruct any sidewalk on any street, **without first obtaining therefor the written permission of the City Engineer.**

The effect of the *By-law* is to authorize City Council to permit temporary structures on City sidewalks, and to set conditions to which those temporary structures shall conform. In practical terms, the combined effect of the *By-law* and ss. 10 and 11 of the *Parks Control By-laws* is to prohibit the taking up of a temporary abode in a public place absent permission by the designated decision-maker.

Not only is City Council authorized to permit temporary structures on City sidewalks in light of the *By-law*, in fact, in the wake of the BC Court of Appeal's decision in *Adams*, there is a strong case to be made that City Council has a legal obligation to permit homeless people to erect tents on sidewalks – at least on some sidewalks and at certain times of the day. Acting quickly to permit the tents according to some fair criteria is necessary to accommodate this new legal reality.

Preliminary Issue

In contradistinction to the facts facing the Court in *Adams*, the City of Vancouver, rather than the province, owns the streets. This is not a material distinction because just as the Province is bound by the *Charter*, so too is the City of Vancouver. Professor Hogg provides as follows:

Because s. 32 makes the *Charter of Rights* applicable to the federal Parliament and the provincial Legislatures, the Parliament and Legislatures have lost the power to enact laws that are inconsistent with the *Charter of Rights*. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, administrative tribunals and police officers, is also bound by the *Charter*.

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 1998)
at 37-13

Given that the City is bound by the *Charter* it must ensure that when it acts it does so in conformity with the *Constitution*. In particular, in this case, it must refrain from interfering with the s. 7 rights of homeless people. If those rights are interfered with, such interference must conform with the principles of fundamental justice and must be reasonably justified under s. 1 of the *Charter*.

R. v. Morgentaler, [1988] S.C.R. 30, pp. 46, 54 (CanLII)
Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, para. 1
Vriend v. Alberta, [1998] 1 S.C.R. 493, paras. 134-135

Section 7 of the *Charter*

Section 7 of the *Charter* provides:

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.

In *Adams*, the BC Court of Appeal described the tension that arises between the needs of homeless people and the goals of the City to preserve public spaces in the following terms:

[4] The conflict between “essential, life-sustaining acts” and the “responsibility of the government” aptly focuses the issues in this case. The claims of the homeless people recognized by the trial judge have a narrow compass in absolute terms – they are the right to cover themselves with the most rudimentary form of shelter while sleeping overnight in a public place, when there are not enough shelter spaces available to accommodate all of the City’s homeless. The City, on the other hand, bears the responsibility to the public to preserve public places for the use of all, and of necessity focuses on the wide public impact of any use of public places for living accommodation. The constitutional context applies the most lofty of guaranteed human rights – the rights to life, liberty and security of the person – to the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter. Thus, though the trial judge’s decision in this case is narrow in scope, it takes on wide meaning and implications for all.

The Court summarized the Trial Judge's findings as follows:

[39] The trial judge found, based on the expert evidence, that there was a risk of serious harm to the health of the homeless, and that the harm flowed from the state action in prohibiting the erection of shelter (at para. 142). The Bylaws violated the rights of the homeless to life by prohibiting the erection of overhead shelter, leading to a risk of a number of serious and life threatening conditions (at para. 145); to liberty, by interfering with the ability of the homeless to choose to protect themselves from the elements, a matter of dignity and independence (at para. 148); and to security of the person, by depriving homeless persons of access to shelter, and thereby exposing them to a risk of significant health problems or even death (at paras. 153-154).

[40] The deprivation was not in accordance with the principles of fundamental justice, as the Bylaws were overbroad and arbitrary (at paras. 169-193). The Bylaws were overbroad in both time and geographical ambit because "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). Further, "to the extent to which the purpose of the Bylaws is to prohibit tent cities, they are clearly overbroad" (at para. 189). The Bylaws were arbitrary because the damage to the parks that the Bylaws are meant to prevent was not related to the prohibited conduct, namely the erection of temporary shelter (at para. 193).

[41] The s. 7 breach was not saved by s. 1. The preservation of parks was an important objective (at para. 200) and the Bylaws were rationally connected to the objective in one respect (at para. 204), however the Bylaws were not minimally impairing (at para. 207) and the deleterious effects of the prohibition on the homeless outweighed the salutary effects on the problems of homelessness (at para. 208-217).

The Court of Appeal unanimously upheld the Trial Judge's decision in almost all respects:

[10] For the reasons that follow, we find no legal basis to interfere with the trial judge's conclusion, on the uncontradicted evidence before her, that the prohibition in the bylaws on the erection of temporary shelter violates the rights of homeless people to life, liberty and security of the person under s. 7, and the violation is not justified under s. 1 of the *Charter*. Nor did the trial judge improperly intrude into the policy decisions of elected officials in finding the bylaw provisions to be of no force or effect insofar as they prohibit homeless persons from erecting temporary shelter. She left it to the City to consider the alternative solutions to the identified problem, and to determine the best manner in which to deal with it in the context of the City's legislative policies.

[11] On all but one of the substantive legal issues, we do not accede to the appellant's arguments, including the appeal from the trial judge's award of special

costs to the respondents. We disagree with the trial judge that the prohibition in the bylaws was arbitrary, but that does not affect the outcome of the appeal. We order that the appeal is allowed only to the extent of varying the wording of the order, as set out in para. 165 of these reasons, to more accurately reflect the issue considered at trial and the trial judge's reasons for judgment.

Thus, the Court held that when the number of homeless people exceeds the number of available shelter beds, a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structure – violates their constitutional rights to life, liberty and security of the person under s. 7 of the *Charter* in a manner that does not accord with the principles of fundamental justice and is not demonstrably justified in a free and democratic society.

Turning to the situation in Vancouver, while a constitutional challenge may be directed at the *By-law* itself on the same basis that occurred in *Adams*, the challenge here could also be directed to the exercise by the City of a discretion that is inconsistent with the *Charter*. Since the *By-law* confers an imprecise discretion on the City, it must therefore be interpreted as not allowing *Charter* rights to be infringed: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, para. 87.

Refusing Permission Would Cause the Deprivation at Issue

In *Adams*, the Court of Appeal held:

[86] Both the City and the AGBC argue that the requirement that the state action cause the deprivation of life, liberty or security of the person is not met in this case because the prohibition on the erection of shelter is not the cause of the respondents' state of homelessness or insecurity. They say s. 7 is not engaged where, as a result of the state action, the claimants merely remain in a state of insecurity. In claiming that the state action must be the sole cause of the deprivation, they rely on the comment of Justice Bastarache in his dissenting reasons in *Gosselin* (at para. 213) that "state action... in and of itself" must deprive the claimant of her life, liberty or security of the person.

[87] There are a number of problems with this argument. First, the passage relied on from *Gosselin* does not form part of the analysis of the majority. Further, Bastarache J.'s comments are made in the context of a positive rights claim, and in my view, are more an expression of his concern about the absence of state action in that case, rather than an attempt to formulate a general test for causation. Moreover, an "in and of itself" causation requirement is incompatible with other Supreme Court of Canada jurisprudence. In *Morgentaler and Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, the impugned state action was not the sole cause of the deprivations at issue, yet the Court held that the causation requirement was met.

[88] The trial judge found the Bylaws were the direct cause of the deprivations of life, liberty and security of the person that flow from the prohibition on shelter. The respondents do not argue, and the trial judge did not find, that the Bylaws are

the cause, or even a contributor to, the respondents' state of being homeless. The deprivations of life, liberty or security of the person which may arise as a result of being homeless, without any interaction with the state, are not at issue. This is clear throughout the reasons for judgment (in particular at para. 108):

Homeless people are exposed to a number of risks to their lives, health and security of the person because of their homeless condition. Those risks that are associated with the state of being homeless are not at issue in this litigation. In the present case, the allegation is that the Bylaws at issue impair the ability of the homeless to address their need for adequate shelter. This is a particular state action that is alleged to create a particular deprivation. In my view, this satisfies the need for the deprivation to have been caused by state action.

[89] We do not accede to this ground of appeal.

In this case, state action sufficient to implicate s. 7 of the *Charter* would be established where the discretion authorized by the *By-law* was exercised to deprive an individual from addressing or fulfilling their need for shelter. As in *Adams*, the deprivations of life, liberty or security of the person which may arise as a result of being homeless, without any interaction with the state, are not at issue here. Rather, what needs to be considered is particular state action – here discretion exercised pursuant to the *By-law* with respect to the granting of a permit – that has the potential to create a particular deprivation, namely, the risk of serious harm from sleeping on the street without shelter. This harm does not flow from homelessness, but rather from the state action of refusing to grant permission for the homeless to use the tents provided on the street. But for the refusal, many homeless people would be able to erect the tents provided by Pivot and thereby protect themselves from the elements and avoid the serious health effects which result from sleeping without sufficient shelter.

No Positive State Action Required

The Court of Appeal in *Adams* held:

[92] The argument in *Gosselin* was that security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs. Like the respondents' application before Stewart J., the claim was for a positive benefit from the state.

[93] The Chief Justice, for the majority, noted (at para. 81) that under the existing jurisprudence, s. 7 has been interpreted as restricting the state's ability to deprive people of life, liberty or security of the person, but has not placed a positive obligation on the state to ensure that each person enjoys these rights. While she left open the possibility that "[o]ne day, s. 7 may be interpreted to include positive obligations", she found that the evidence in that case did not support that interpretation (at paras. 82-83).

[94] The trial judge considered these arguments, concluding (at para. 119) that the respondents were not seeking positive benefits and it was therefore not

necessary to decide for the purposes of this case whether s. 7 protects positive rights. She said:

In my view, the [respondents] do not seek positive benefits in this action and it is therefore not necessary for the Court to consider whether s. 7 includes a positive right to the provision of shelter. **The [respondents] are not seeking to have the City compelled to provide the homeless with adequate shelter. Rather, the claim is that in the present circumstances, in which the number of homeless people exceeds available shelter space, it is a breach of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter.**

[95] Nor does the trial judge's decision that the Bylaws violated the rights of homeless people under s. 7 impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness. **The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless.** While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents' claim or the trial judge's order into a claim or right to shelter.

[96] That is not to say the decision will not, from a practical point of view, require the City to take some action in response. That will likely take the form (as we were advised it already has) of some regulation of the overnight use of public parks, and perhaps the creation of additional shelters or alternative housing, which is consistent with the City's evidence about the initiatives it has undertaken to deal with the homeless. Such responsive action could be said to be a feature of all *Charter* cases; governments generally have to take some action to comply with the requirements of the *Charter*, which can involve some expenditures of public funds or legislative action, or both. That kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights.

[97] We do not accede to this ground of appeal....

Adams, paras. 92-97 (underlined emphasis in original, bold emphasis added)

And so it is in this case. *Adams* renders unconstitutional actions by the City in so far as they prevent homeless people from erecting temporary overhead shelter while sleeping outside in City parks and streets. Like the homeless people in *Adams*, Pivot is not seeking to have the state allocate any scarce resource or provide a minimal level of shelter. It is only seeking the City's permission for the homeless to set up tents that Pivot will provide them with. The claim is that in the present circumstances, in which the number of homeless people exceeds available shelter space, it is a breach of s. 7 for the City to use its indeterminate discretion authorized by the *By-law* to prohibit homeless people from taking steps to provide themselves with adequate shelter. The request only requires the City to refrain from exercising its discretion in a manner that interferes with the s. 7 rights of homeless people. From a practical point of view, such a

requirement will likely take the form of some regulation of the overnight use of streets but this does not transform the request into a positive rights claim.

Principles of Fundamental Justice

Like in *Adams*, a blanket refusal to grant permission to homeless people to erect temporary shelter on streets would be overbroad. In *R. v. Heywood*, the Supreme Court of Canada held:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

R. v. Heywood, [1994] 3 S.C.R. 761, at 792-793

Here a blanket refusal would be overbroad in both time and geographical ambit because “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” [*Adams*, para. 40, see also para. 116].

The City allows countless structures to encroach or even obstruct City sidewalks such as patios, sandwich boards, produce stands and works of art. Allowing temporary tents for the homeless should be seen as far more pressing and indeed urgent than allowing for the ubiquitous “whales” or “eagles” that we see occupying the City’s sidewalks. Many City sidewalks can, and already do, easily accommodate both foot traffic and overnight and perhaps even daytime shelter for homeless people. There is simply no reason to prohibit temporary shelter to be erected by those homeless people given they are already taking up space and sleeping on those streets. Indeed, there are many reasons to permit such shelter – not the least of which is the City’s obligation not to infringe the “most lofty of guaranteed human rights – the rights to life, liberty and security of the person” of some of the most vulnerable members of our society by frustrating their search for one of the most basic of human needs, shelter.

At the very least, in this case, the City should consider adopting a basic policy regarding the use of tents on sidewalks as a “pilot project” before it was to conclude that it is unworkable or not required as a matter of administrative or constitutional law. A skeleton of such a policy might include the following restrictions that apply to other encroachments of the street:

- no tents in the middle of the sidewalk, or on a curb (such as sandwich board placement: <http://vancouver.ca/engsvcs/streets/retailUse/pdf/SignBoards.pdf>);
- tents must allow a minimum passage space for pedestrians (such as merchandise displays <http://vancouver.ca/engsvcs/streets/retailUse/produceflower.htm>);

- tents must allow a minimum distance from any "obstruction" such as trees, lamp standards, bike racks, bus stop or meters (such as merchandise displays <http://vancouver.ca/engsvcs/streets/retailUse/produceflower.htm>);
- areas around tents must be kept in a neat, clean and orderly manner (such as merchandise displays <http://vancouver.ca/engsvcs/streets/retailUse/produceflower.htm>);
- tents must not block access to any Fire Department equipment, connections or exits from any buildings (such as merchandise displays <http://vancouver.ca/engsvcs/streets/retailUse/produceflower.htm>); and
- tents must be taken down during the business hours of adjacent businesses.

These are of course only suggestions based on what the City has done with respect to other structures or things that obstruct or encroach on City sidewalks. No doubt there are other conditions that may need to be imposed to deal with the unique challenges posed by providing shelter for the homeless. Our main point remains is that as a matter of constitutional and administrative law the City cannot have a blanket prohibition on any tenting in public places. A solution needs to be found that properly balances the constitutional rights of the homeless and the legitimate concerns of the City and we hope that we have assisted in some small way in suggesting a way of arriving at the solution.

Conclusions

Homelessness is a complex, social problem, but government action that effects homeless people is not therefore shielded from constitutional review. The constitutional context ensures that the most basic human needs of some of the most vulnerable members of our society are protected under the shield of a fundamental right. When a court is asked to rule on the constitutional validity of state action, it is not improperly intruding into the policy sphere, rather it is fulfilling the constitutional imperative that it ensure that state action complies with *constitutional* commitments.

We trust that this opinion adequately answers your questions and we remain willing to assist you further should the City refuse the permission you seek.

Yours truly,

ARVAY FINLAY

Per:

Joseph J. Arvay, Q.C.

JJA/sy