

## *Bamberger v Vancouver (Board of Parks and Recreation), 2022 BCSC 49*

Kirchner J :—

### I. INTRODUCTION

[1] In 1984, an encampment of some 60 tents was established at the site of what would become CRAB Park at Portside in Vancouver. The encampment was a protest designed to pressure government authorities into creating a public park at the site. The name of the park is taken from the acronym for the activist group—Create a Real Available Beach Committee—that envisioned the establishment of a waterfront public park in an area of the city short of green space. The community activism and the camp protest had its desired effect and, in 1987, CRAB Park at Portside (“CRAB Park” or the “Park”) was established as a Vancouver public park on federal port land leased by the City.

[2] Today, tents have returned to CRAB Park but not out of protest. Rather, the Park is the most recent of Vancouver parks in or near the Downtown Eastside to see an encampment of Vancouver residents who are experiencing homelessness. The camp emerged in May and June of 2021. Since then, the General Manager of Parks and Recreation (the “General Manager”), an appointee of the Vancouver Board of Parks and Recreation (the “Park Board” or the “Board”), has made two orders (the “Orders”), purportedly under the Park Board’s *Parks Control By-law* (the “Bylaw”), ordering the campers to leave the park. The validity and enforceability of those orders is at issue in these proceedings.

[3] The first Order, made July 8, 2021, prohibits any overnight sheltering in CRAB Park. The second, made September 7, 2021, closes a portion of CRAB Park to all members of the public for the purposes of rehabilitating the Park from the damage said to be caused by the encampment. The closed area includes the only area within the Park where overnight sheltering was permitted prior to the July 8 Order.

[4] As recognized by the seminal decision in *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams BCCA*], aff’g 2008 BCSC 1363 [*Adams BCSC*], where there are inadequate indoor shelter spaces to accommodate persons genuinely experiencing homelessness, those persons are entitled to erect overnight shelters in public parks as a matter of their constitutional right to life, liberty, and security of the person. This right is guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Charter*].

[5] On March 31, 2021, the Park Board, together with Province of British Columbia and the City of Vancouver, signed a Memorandum of Understanding (the “MOU”) acknowledging that homelessness “continues to grow” in Vancouver and elsewhere. Despite efforts by various levels of government to create affordable

housing and sheltering options, the Park Board concedes there are insufficient indoor shelter spaces in Vancouver to accommodate the city's homeless population. However, it maintains there is adequate indoor space for those camping at CRAB Park.

[6] In Vancouver and elsewhere, a line of cases has developed since *Adams* as tensions between governments and persons experiencing homelessness arise, and a balance is sought between the *Charter* right to shelter and municipal efforts to protect public access to parks. As Justice Skolrood said in *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 at para. 42:

As these cases illustrate, and as is demonstrated on the evidence filed in this specific case, homelessness is a multi-faceted social problem with no one cause and for which there is no single or obvious solution. It is also an issue that engenders strong feelings, both on the part of homeless people and advocates who decry the lack of available services and housing options, and in local citizens and merchants who deal with the manifestations of homelessness on a daily basis.

[7] On this occasion, the issue comes before the court by way of two competing petitions. The first is brought by Kerry Bamberger and Jason Hebert (the "Petitioners"), both of whom are currently experiencing homelessness and living in tents in CRAB Park. They seek judicial review of the two Orders. They argue both were made without according rights of procedural fairness to those sheltering in the Park and both are unreasonable because they are grounded in an unsupported conclusion that there are sufficient and appropriate indoor sheltering spaces to accommodate those sheltering in the Park.

[8] The second petition, brought by the Park Board, seeks a statutory injunction to compel Ms. Bamberger, Mr. Hebert, and all other persons with notice to comply with the General Manager's September 7, 2021 Order.

[9] The Park Board further argues that even if the Orders are set aside on the Petitioners' judicial review, the Court should still grant the statutory injunction to enjoin those sheltering in CRAB Park from doing so in daytime hours in contravention of the *Bylaw*.

[10] For the reasons that follow, I have concluded the application for judicial review should be granted and the Orders should be set aside with the matter remitted back to the General Manager or the Park Board for reconsideration. In light of that conclusion, I will not grant the Park Board's application for an injunction to compel compliance with the September 7, 2021 Order. Further, the Park Board's application for an injunction to compel compliance with the *Bylaw* should be adjourned pending reconsideration of the Orders or sooner if there is a significant change in the circumstances of the encampment, including with respect to matters of health, safety or public nuisance.

## II. THE RIGHT TO SHELTER IN PUBLIC PARKS

[11] In *Adams* BCSC, Madam Justice Ross found a Victoria bylaw prohibiting

homeless persons from erecting temporary shelters in Victoria parks infringed their right to life, liberty, and security of the person, as guaranteed by s. 7 of the *Charter*. She found the number of homeless persons in Victoria far outnumbered the available shelter beds such that many of Victoria's homeless were forced to sleep outside. Despite this, the city's bylaw prohibited anyone from erecting temporary shelters, including tents, tarps, or even cardboard boxes, in public parks, leaving them exposed to serious and life-threatening conditions and depriving them of their dignity, independence, and ability to protect themselves.

[12] After a refinement of Ross J.'s order by the Court of Appeal, it was declared that the offending sections of Victoria's *Park Regulation Bylaw* were "inoperative 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": *Adams* BCCA at para. 166.

[13] The constitutional right as articulated in *Adams* was thus circumscribed in two respects: (1) the right is exercisable when the number of homeless outnumbered the available indoor sheltering spaces, and (2) the right to erect a temporary shelter is confined to overnight hours.

[14] Since *Adams*, many municipal bylaws and government actions that seek to limit or restrict the ability of persons experiencing homelessness to erect and maintain shelters have come under challenge in this court, including in: *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 [*Williams*]; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 [*Shantz*]; *British Columbia v. Adamson*, 2016 BCSC 584 [*Adamson No. 1*]; *British Columbia v. Adamson*, 2016 BCSC 1245 [*Adamson No. 2*]; *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 [*Courtoreille*]; *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876 [*Brett*]; and, most recently, *Prince George (City) v. Stewart*, 2021 BCSC 2089 [*Stewart*].

[15] The basic constitutional right as framed in *Adams* has remained largely unchanged. However, it is now recognized that it is not just the number of available indoor sheltering spaces that frames the right but also whether those spaces are truly accessible to those sheltering in parks. In *Shantz*, for example, Hinkson C.J.S.C. stated:

Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impractical 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.

[16] More recently, in *Stewart*, Hinkson C.J.S.C. stated:

It is apparent that very few of the emergency shelter beds are low barrier, and it appears that many of the homeless persons in the City are ineligible to stay in at least some of the shelters. While the City contends that the availability of 81 shelter beds in the City

is sufficient to house the encampment occupants, I am not satisfied that these shelter spaces are in fact accessible to all of the occupants of the encampments.

[17] The question of sheltering in public parks during daytime hours has also arisen in the cases since *Adams*, but the jurisprudence, thus far, has not extended the s. 7 *Charter* right to include it, at least not expressly. In *Shantz* at para. 276, Hinkson C.J.S.C. found “there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so” but held that a “minimally impairing response to balancing that need with the interests of other users” of the parks would be to allow overnight sheltering between 7:00 p.m. and 9:00 a.m.

[18] However, in *Adamson No. 1* and *Stewart*, Hinkson C.J.S.C. declined to grant injunctions to close specific homeless encampments and made no specific qualification that those sheltering in the parks could only do so during overnight hours. In *Adamson No. 1*, Hinkson C.J.S.C. did not squarely address the issue of daytime sheltering but nor did he tailor a remedy to require the encampment to be removed at sunrise.

[19] In *Stewart*, he addressed the issue more directly, noting at para. 73 that the closure of shelter spaces due to COVID-19 resulted in scores of people having nowhere to shelter “in either the daytime or the nighttime.” He observed that these persons did not remove their tents or vacate the encampment each morning. In declining to grant the injunction, at least in respect of one, he did not consider or grant a more limited injunction that would restrict sheltering to overnight hours. He took judicial notice of the fact that “Prince George can be very cold in the fall and winter, and that people with nowhere warm to stay must find ways of keeping warm to stay alive”: *Stewart* at para. 64.

[20] Thus, while neither *Adamson No. 1* nor *Stewart* purport to expand the scope of the constitutional right to daytime sheltering, it was not specifically enjoined in either case.

[...]

[*After assessing the evidence before the General Manager of Parks and Recreation, the Court found that their decision to issue the orders prohibiting overnight sheltering and closing a portion of the park was “unreasonable” (in the administrative law context) because they had an “insufficient evidentiary basis on which to reasonably conclude that there are ‘sufficient and appropriate indoor spaces’ to shelter those in CRAB Park.” The Court found that “[t]here is no evidence to suggest the General Manager turned her mind to the specific needs of those sheltering in the Park or whether the available shelter spaces were suitable to their needs. As recognized by the jurisprudence since Adams, the suitability of available shelter spaces, in addition to the number of available spaces, is relevant to the constitutional right of sheltering in a public park.”*]

#### **(b) General Manager’s Discretion for Daytime Sheltering**

[21] Based on the evidence and the arguments presented by the Injunction Respondents, the daytime needs of at least some of those sheltering in the Park is a serious issue. The evidence shows that for some, daytime sheltering is a necessity or, at least decamping every morning and carrying their possessions throughout the day is a substantial hardship. For example:

- Ms. Bamberger acknowledges she is supposed to pack up her tent and her belongings every day but estimates that, between her tent and personal possessions, she would have to carry at least 500 pounds of gear throughout the day. She deposes she cannot afford to rent a storage locker and her tent is too large and heavy to carry around. If she leaves her tent set-up at CRAB Park, it does not get touched, and she feels her belongings in the tent are safe under the watch of others in the camp.
- Mr. Manitopyes deposes that although he does not have many possessions, he cannot risk losing what he has. These include a warm double-layer shelter that is necessary for his safety as the weather gets cold. He states this shelter is too bulky to move to a storage locker during the day. Mr. Manitopyes is an artist who sells his art to earn some money. He is unable to carry his sculptures and carving supplies with him and is concerned they will get stolen if left somewhere unattended.
- Mr. Randen has lived in many places on the streets and alleys of downtown Vancouver. He has moved around often and had to pack up his things every morning. He states it is exhausting and time-consuming to take down his tent every day and set it up again in a new place that evening.
- Mr. Dechaghadjian is 70-years-old. Prior to living in CRAB Park, and after unsuccessfully staying in an SRO and shelters, he was setting up and taking down his tent every day. With the arrival of fall, this became too much for him at his age. To protect his belongings from the rain, he needs to keep tarps up, and it is too physically demanding for him to set this up and take it down daily.

[22] The experience of these deponents is not true of all those sheltering in CRAB Park. Others are evidently not so challenged in decamping in the morning. Andrew Don, the Lead Park Ranger for the Parks Board, deposes he attended at the Park on seven occasions in July and August. One of his Park Ranger SR Slips (essentially a written report of his attendance) records at least one person, whom he describes as a “model camper”, had packed up her tent and was “mobile”. Mr. Don states in his Slip “if everyone in the park was as punctual as her with packing up, and as neat and tidy as she was, there would be no issues.” Mr. Don recorded others who were also packing up tents. Other Rangers report fairly successful efforts, prior to the end of June, in having campers pack up their tents in the morning.

[23] The evidence also suggests some persons sheltering in the Park have access to suitable indoor living or sheltering spaces but are either showing support for those in the camp or prefer to be in the Park. Thus, while there is evidence

of true hardship for some in complying with the daytime prohibition, it is not universal.

[24] Despite these exceptions, I am satisfied the requirement to decamp each morning poses a substantial hardship on some of those sheltering in CRAB Park. An injunction compelling everyone to decamp each morning would truly be a “blunt instrument” that will capture those for whom a more nuanced approach might be called for.

[25] As I have discussed, under subsections 11B(b) and (c) of the *Bylaw*, the General Manager has the discretion to designate areas within a park for daytime sheltering. In reconsidering the July 8 and September 7 Orders, the General Manager should be open to considering all aspects of her discretion to deal with the CRAB Park encampment “in a positive and compassionate way” as contemplated by the MOU. The General Manager may well find it appropriate or necessary to invoke this provision to accommodate those CRAB Park campers who face true hardship in decamping each morning. I am not saying she is required to exercise this discretion or to exercise it in a particular way, but to date she appears not to have considered it as a potential tool to break the chain of non-compliance with the *Bylaw*.

[26] The Park Board does not have a constitutional duty to provide storage facilities for daytime use by those experiencing homelessness. Nor does the constitutional law, at least to date, compel the Board to permit daytime sheltering. However, the Park Board, through its *Bylaw*, has seen fit to give the General Manager a tool to allow daytime sheltering, presumably to accommodate genuine needs where they might exist. Granting the Park Board an injunction at this stage, before the General Manager reconsiders the Orders, may imply that a daytime sheltering option need not be seriously contemplated as part of that reconsideration.

[27] Clearly there is a persistent issue with ongoing use of public parks for daytime sheltering. The affidavits in this case suggest some reasons for why this might be the case. Perhaps at the end of the day an injunction will be the only way or the best way to address the issue. However, at this stage, I am not persuaded it is in the public interest to risk the relocation of the encampment to another park where it will present a greater disturbance to the larger community, at least before the General Manager or the Park Board has considered the full range of options under the *Bylaw* to address the issue.

*[The Court adjourned the Park Board’s application for an injunction pending the Board’s a reconsideration of the orders based on the Court’s conclusion that these orders were unreasonable.]*