Abbotsford (City) v *Shantz*: Update on Bylaw Regulation of Public Parks and dealing with homelessness

A: Introduction

On October 21, 2015, The British Columbia Supreme Court released the decision *Abbotsford (City)* v *Shantz*, 2015 BCSC 1909 ("Shantz"). The litigation dealt with the question of whether the City's attempts to regulate the use of public parks was constitutional in relation to how it led to treatment of the homeless population.

The Supreme Court found that Abbotsford's Public Park bylaws were unconstitutional, but only to the extent that they did not allow homeless individuals to erect temporary shelters in public parks from the hours of 7:00 p.m. to 9:00 a.m. The reason for the finding of unconstitutionality was based on the fact that a lack of overnight shelter had a significant negative impact, established by expert evidence, on the health of homeless individuals. Another important factor was that the City of Abbotsford had shortage of affordable housing options and shelter beds.

This recent decision does not impact the current state of the law in a significant way, as the conclusion reached was similar to a case decided by the British Columbia Court of Appeal in 2008 called *Victoria (City)* v *Adams ("Adams")*. However, many of the comments made by the judge in Shantz shed light on how the courts view bylaw regulation of public places. The judge touched on not only the content of the bylaws, but also on their enforcement. Keeping these comments in mind will help local governments draft bylaws related to public spaces which will not be vulnerable to constitutional challenges, which are expensive and protracted legal disputes.

B: The Law before *Shantz*

The first case dealing squarely with the intersection of public space bylaw regulation and homelessness was Adams. The legal dispute arose after 70 homeless individuals set up a "tent city" in a Victoria public park. The City of Victoria applied for an injunction to remove the tent city arguing breach of their bylaws, and in response the constitutionality of those bylaws was challenged.

It was legal for the homeless to sleep in the parks at night, but putting up temporary overhead shelters in the form of tents, tarps or cardboard boxes was prohibited by the City's parks and streets bylaws. It was argued that this action by the local government deprived the homeless of "life, liberty and security of the person", which is a protected constitutional right.

Various factual circumstances were critical to the Court finding that the bylaw was unconstitutional. Evidence was led at trial establishing that there was over 1,000 homeless people in Victoria but only 104 shelter beds in normal conditions and 326 in extreme conditions. Expert evidence was led which showed that exposure to elements without adequate overhead protection from the elements created significant health risks.

The Court of Appeal was careful to limit the scope of their decision. They made sure to point out that there was no positive obligation on local governments to ensure an adequate number of shelter beds. Additionally, they were not making a declaration that there is a "free standing right" to build a shelter in a public park.

Between Adams and Shantz, there have been other cases in British Columbia dealing with similar issues. In *Johnston* v *Victoria (City)*, 2011 BCCA 400, the Court of Appeal rejected the argument that it was unconstitutional to prohibit shelters during daytime hours. *Vancouver Board of Parks and Recreation* v *Williams*, 2014 BCSC 1926, was an

application by the City for an injunction involving a group of individuals who took up shelter in Oppenheimer Park . The case is important for local governments, as the court commented that the government has the responsibility to show that enforcement of parks bylaws will not translate to ousting homeless people onto the streets with the effect of placing them in further danger. The court did grant the injunction, but included obligations on the City to ensure that there was an orderly transition from the Park to shelter beds. In that case, there were already enough shelter beds available for the number of homeless involved.

C: Summary of *Shantz*

In 2013, the City of Abbotsford applied for a temporary injunction trying to stop a group of homeless individuals from occupying a public park with tents and other structures, along with occupying a large wooden structure in an adjacent parking lot. This temporary injunction was granted, and in 2015 the City sought a permanent injunction to replace it. In response, the British Columbia and Yukon Association of Drug Survivors ("DWS"), on behalf of the homeless group, challenged the constitutionality of the City's parks and streets bylaws. One of the main bylaw provisions at issue prohibited sleeping or being present in any park overnight and erecting any form of shelter without a permit. Permits for overnight camping were available on a discretionary basis, but cost $10/night per vehicle or tent, and required a valid credit card and that the applicant obtain insurance.

The factual background surrounding the dispute is important. In June 2013, City employees were found to have made efforts to evict individuals from a separate camp located on Gladys Avenue. The Court found they did this by spreading chicken manure on the campsite. In protest, a group of homeless set up another camp in Jubilee Park without the permission of the City. They were ordered to vacate this camp after the City was granted an injunction in 2013. After that, some of the homeless erected tents along the west side of Gladys Avenue. Their presence along

the road was tolerated by the City and their staff while the constitutional challenge was pending.

Abbotsford has a relatively high level of "chronically homeless" individuals, defined as those who have been without a home for more than one year. The available shelter space in the City is not sufficient for the number of homeless in the city, and there is a general shortage of affordable housing.

There was also evidence that conditions in the various camps set up by the homeless contained unsafe conditions. It was common to find drug paraphernalia littered on the ground along with other waste. Assaults and fires were reported, and some weapons were found.

The City's bylaw enforcement policy was to remove those occupying parks after receiving calls or complaints from the public. They would generally do this by issuing verbal and written notices to vacate and began with seeking voluntary compliance. They would also take measures to ensure homeless were not "squatting" on private property. There were anecdotes about the actions of City officials, including cutting the straps holding up a tent, spraying pepper spray into empty tents, cutting open a tent to see if anyone was inside, and of course the spreading of chicken manure to induce the homeless to leave the original camp. DWS sought damages in relation to these anecdotes, based on government officials breaching the Charter by abusing their powers.

The Court made a number of findings. The expert evidence established that continual displacement of Abbotsford's homeless caused them impaired sleep and psychological pain and stress which created a risk to their health. While the judge recognized that the sustainable use of publicly owned property required the local government to create some constraints, the effect on the homeless of prohibiting temporary shelters overnight without a permit was "grossly disproportionate" to any

benefit to the City or the rest of the public and so was unconstitutional. The Court found that it was also "overbroad" in relation to what the City was trying to achieve. This conclusion was almost exactly the same as what was decided by the Court in *Adams.*

Ultimately, the judge concluded that the best balance between the needs of the homeless and those of the City was to allow temporary shelters to be set up from the times of 7:00pm to 9:00am, to be taken down during the day. One of the factors for not allowing the camp to remain during the day was the dangerous conditions created by having a permanently established camp.

One thing the judge strongly considered ordering was that specific park land be designated for use by the homeless as it would provide some certainty for them and residents of the City, taking into account proximity of public parks to services for the homeless. However, this was not ordered as the judge felt that such a decision should be left to politicians to make and not the courts.

The judge declined to order damages for the alleged misconduct of City officials in enforcing the bylaws. However, the main reason for this was because there was a lack of evidence at trial showing that their actions harmed any particular individual, which is required for Charter damages. The judge was, however, highly critical of their actions and suggested that the individuals affected were still open to undertake separate legal action. In response to the spreading of chicken manure, the judge commented that it was "disgraceful and worthy of the Court's disapproval."

E: Implications for Local Governments

The only clear obligation that Adams and Shantz imposes on local governments is that when there is not enough shelter beds for the homeless population, it is unconstitutional to pass a bylaw prohibiting temporary shelters to be put up at night.

In a more general sense, the Courts in British Columbia do recognize the need for local governments to regulate the use of their public spaces for the benefit of all groups. In drafting bylaws, the most important thing to consider is whether the effect of regulation will be the displacement of homeless or will have a negative impact on their health. Often, streets and parks bylaws will have this effect but are also necessary to the safe use and enjoyment of the public space by the general public. Regulations falling under this category are allowed only to the extent that they impair the right to "life, liberty and security of the person" of the affected homeless group as little as practically possible. This extends not only to the drafting of the bylaw, but also to its enforcement.

On the topic of minimal impairment, an interesting aspect of the Shantz decision was that the enforcement practices of other cities were compared to Abbotsford's enforcement measures. Some cities ticketed and fined homeless groups without first seeking voluntary compliance, which was viewed as being more impairing. However, just because Abbotsford's enforcement measures were less impairing on the rights of the homeless than other cities did not mean these measures were minimally impairing. It is important that measures adopted which will affect the health and safety of the homeless have the least impact necessary to achieve an important public purpose.

While the Courts are hesitant to impose positive obligations on local governments to deal with the complex issue of homelessness, they do expect that local governments will consider the impact that their actions will have on this group. In both Adams and Shantz, the argument that homelessness is a "choice" was rejected. Actions to displace homeless groups are likely to be met with criticism when those individuals have no safer place to go.

Please contact us should you wish to discuss the implications of this decision in more detail:

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