From *Adams* to *Zhang*:
Defending Municipal Turf in British Columbia

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In British Columbia, municipalities own their streets and parks. Under s. 35 of the *Community Charter*,[2] subject to some limitations dealing with provincial arterial highways and so forth, "the soil and freehold of every highway in a municipality is vested in the municipality" and the municipality has the right of possession of highways not vested in it. According to s. 46 of the *Community Charter*, except as permitted by bylaw, a person must not obstruct, foul or damage any part of a highway or other public place, and s. 290 of the *Vancouver Charter* is of like effect. Section 36 of the *Community Charter* gives municipalities authority to, by bylaw, regulate and prohibit in relation to all uses of or involving a highway or part of a highway.

As regards parks, land in a municipality that is dedicated to the public for the purpose of a park or a public square by a subdivision plan, explanatory plan or reference plan deposited in the land title office is vested in the municipality for that purpose by s. 29 of the *Community Charter*. A municipality operating a parks service may, under s. 8(3)(a) of the *Community Charter*, regulate, prohibit and impose requirements in relation to the parks service. According to s. 12 of the *Charter*, a bylaw regulating the use of highways or parks may "establish different classes of persons, places, activities, property or things" and may make different provisions for different classes. The bylaw may also make different provisions for different areas, times, conditions or circumstances as described in the bylaw.

Most municipal enabling legislation in Canada gives municipalities and, in some cases, inter-municipal entities such as parks commissions, similar proprietary and regulatory powers in relation to parks and highways. This paper deals with recent British Columbia cases on unlawful occupation of park and highway areas that were decided on the basis of particular British Columbia statutes, and the cases may not be directly applicable in other jurisdictions. The issues of homelessness and acceptable forms of public expression in public places are in play in most of the provinces and territories, and there is likely at least some potential for these decisions to be applied outside of B.C.

[1] The author acknowledges the assistance of Christina Reed, Don Howieson and Taryn Eyton, all of Young, Anderson, Barristers and Solicitors, in preparing this paper.
[2] S.B.C. 2003 c. 26. Section 289 of the *Vancouver Charter* S.B.C. 1953 c. 55 is to the same effect.

Homelessness: Victoria (City) v. Adams

The effects on municipal bylaw-making and enforcement powers of the affordable housing shortage for which the temperate portions of British Columbia are notorious, have previously been the subject of a few judicial decisions. Notably, in *Tenants Rights Action Coalition v. Delta*,[3] the "secondary suite" regulations of the Corporation of Delta, a member municipality of the Greater Vancouver Regional District, were quashed because they discriminated against potential tenants who were not relatives of the homeowner. Like many B.C. municipalities, Delta had softened its prohibition on secondary suites in single-family residential zones provided that the suite was occupied only by a family member, and in particular a person "related by blood, marriage or adoption to the principal occupants of the dwelling of which the in-law suite is a part". Delta prosecuted a homeowner for renting a suite to a tenant who did not answer to this description, and the prosecution was stayed pending the resolution of TRAC's bylaw challenge. The allegedly unlawful tenancy was described in the Supreme Court action in the following terms (at para. 11):

> At present Mr. McDonald [the landlord] continues to work shiftwork and is often not home during the evenings or at night. Having a tenant provides secure and safe housing for Ms. McDonald and their children. The McDonalds have an excellent relationship with their tenant, of three years, Roberta Delbrouck. The suite provides safe and affordable housing for Ms. Delbrouck.

The Coalition attacked the bylaw on numerous grounds, including that the bylaw was unlawfully discriminatory in the municipal law sense, and unjustifiably contravened the *Canadian Charter of Rights and Freedoms*, particularly Section 7 (security of the person) and Section 15 (discrimination on the basis of family status and poverty). Before addressing these grounds, the Court made factual findings in relation to the affordable housing question, including a 1.3% vacancy rate in Metro Vancouver; a provincial waiting list for low-cost housing of nearly 10,000 households; and an average rental rate of $640 for a one-bedroom unit within the City of Vancouver (a sum that seems very reasonable twelve years later). The Court discerned, in various studies relied on by the Coalition, a broad public consensus that "secondary suites are the most cost effective and efficient method of producing affordable housing" in British Columbia. As the case was resolved on administrative law principles, the Court did not consider the *Charter*

[3] [1997] B.C.J. No. 2070 (B.C. Supreme Court).

arguments. In concluding that the distinction that the bylaw drew between persons eligible to occupy a suite and persons ineligible to do so was improperly discriminatory and therefore beyond Delta's powers, the Court had to contend with an earlier B.C. Court of Appeal decision that had upheld a nearly identical bylaw, concluding that the bylaw did not produce such unreasonable consequences that the Court was obliged to conclude that the Legislature did not intend that delegated powers over land use be exercised in such a manner.[4] The Supreme Court distinguished *Faminow*, in part, on the following basis (at para. 56):

> There is no indication in Faminow that the Court of Appeal was faced with arguments regarding the difficult situation of renters in and around Vancouver. The petitioners' evidence in this regard, accepted in evidence as legislative or background facts, shows that the renters' troubles in the Lower Mainland are fairly recent (since 1988) and relate to the high level of immigration over the last fifteen years. Renters who cannot live in secondary suites have fewer alternatives today than they did in 1988.

Ironically, the remedy in the case was the quashing of Delta's "in-law suites" provisions in their entirety, and not merely the provisions limiting the occupancy of such premises. As a result, secondary suites were no longer permitted in Delta. The decision, and in particular the basis on which the Court distinguished *Faminow*, raised many troubling issues for those charged with drafting zoning regulations for residential uses, including whether the permissible scope of zoning bylaw land use distinctions now varies with the vacancy rate in particular types of housing, or with the immigration rate to the municipality, and whether Delta would be able to enact "family suites" bylaw provisions if the housing affordability crisis ever comes to an end.[5]

The following year, the *TRAC* decision was considered in *Bowes v. Victoria*,[6] in which the City enforced its single-family residential zoning restrictions against a group of unrelated individuals occupying a dwelling as tenants. Unlike many B.C. municipalities, Victoria does not permit

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[4] *Faminow v. North Vancouver (District)* (1988), 24 B.C.L.R. (2d) 49 (B.C. Court of Appeal). The "unreasonable consequences" analysis is derived from the decision of the Supreme Court of Canada in *R. v. Bell* (1979), 9 M.P.L.R. 103. In that case, the North York zoning regulations prohibited the occupancy of a dwelling unit by any group of persons not constituting a "family" defined as persons related by consanguinity, marriage or legal adoption, and thereby prohibited common student living arrangements in the municipality.

[5] For additional commentary on the *TRAC* decision, see John Mascarin's annotation at 42 M.P.L.R. (2d) 166.

[6] (1998), 44 M.P.L.R. (2d) 299 (B.C. Supreme Court).

unrelated individuals to share rental accommodation; in Victoria, a "family" is defined for zoning purposes as "one person or a group of persons who through marriage, blood relationship or other circumstances normally live together".[7] The Court refused the plaintiff's claim that the bylaw discriminated on the basis of family status, contrary to the B.C. *Human Rights Code*, holding that the City was merely identifying a permitted use class in its "family" definition (at para. 26):

> In recognizing a social structure based on commitment, the City, in defining family, has been careful not to offend the Code by discrimination based on the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation or age of a person. The By-Law merely defines uses to which a building can be put. For example, premises could be confined to the use of professionals, as opposed to merchants or retailers, or professionals could be divided between medical professionals and legal professionals. The very essence of zoning is creating discrimination between uses.

One wonders whether Victoria would still have succeeded in this case if the owners had enlisted a tenants' rights organization in its challenge to the bylaw, given that shared rental housing is also an important housing option for lower-income persons. (The difficulty of distinguishing the Victoria bylaw from the almost identical North York bylaw that was found in *R. v. Bell* to produce unreasonable consequences, and accordingly to be beyond the municipality's powers, should also be noted; the Court in *Bowes* did not expressly address the "unreasonable consequences" aspect of the Supreme Court of Canada's decision.) By making it unlawful for unrelated persons to jointly occupy such single-family dwellings as may be in the rental market, the City significantly narrows affordable housing choices for students and other single persons.

The housing affordability problem in B.C.'s lower mainland has worsened considerably over the past twelve years, and the Capital Region on Vancouver Island is not much better off. In both areas, one indicator of the severity of the problem is that, for some citizens, the affordability problem has become so acute that they are "homeless"; that is, they can afford no housing at all; they live in the streets, or in parks and other public areas. In 2005, the City of Victoria commenced legal proceedings against an encampment of otherwise homeless persons in Cridge

[7] For example, the zoning bylaw of the City of Langford just outside Victoria defines a "family" as "one or more persons related by blood, marriage, common law, adoption, or foster parenthood, or not more than four unrelated persons sharing one dwelling unit": Langford Zoning Bylaw, 1999, Schedule A, s. 1.01.

Park, seeking to enforce a Parks Regulation Bylaw that made it an offence to "take up a temporary abode overnight in any park".[8] The bylaw also provided that "a person may erect or construct, or cause to be erected or constructed, a tent, building or structure, including a temporary structure such as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council". These provisions were held to be unconstitutional.

As in the *TRAC* case, the Court in *Victoria v. Adams* prefaced the analysis of legal issues in its decision with a review of the housing situation in the City and its region. According to a 2007 study, there were 1200 homeless persons in or near downtown Victoria and another 300 living in "extremely unstable" housing conditions. On the night of January 15, 2005, a night on which the temperature dropped to minus 10 degrees Celsius, a City survey found 168 people sleeping outdoors in Greater Victoria. Madam Justice Ross found as a matter of fact that there were insufficient emergency shelter spaces in the City to accommodate persons needing such shelter, with the result that "hundreds of people are left to sleep in the public spaces in the City" (para. 58). Further, the Court accepted medical evidence that exposure to the elements without adequate shelter placed homeless persons at risk to their health including hypothermia, and that adequate shelter for those sleeping outside required some form of ground insulation as well as overhead shelter in the form of a tent or tent-like shelter.

The Court then held that the City's prohibition on temporary abodes in its parks contravened the Section 7 *Charter* rights of homeless persons to life, liberty and security of the person, in the following passages:

> In the present case, I conclude that the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision "life". The uncontradicted expert evidence establishes that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life threatening conditions, most notably hypothermia. The Bylaws and the operational policy prohibit the erection of the overhead protection that is necessary to protect the individual from this risk. I conclude that the Bylaws and the operational policy of the City engages [*sic*] the right to life. (para. 145)

[8] *Victoria (City) v. Adams*, [2008] B.C.J. No. 1935 (B.C. Supreme Court).

> The majority of homeless people in Victoria have no choice but to sleep on public property. There is no other place for them to go. I agree with the submission of the Defendants that creating shelter to protect oneself from the elements is a matter critical to an individual's dignity and independence. The state's intrusion in this process interferes with the individuals' choice to protect themselves and is a deprivation of liberty within the scope of s. 7. (para. 148)
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> In the present case, Victoria does not have sufficient shelter spaces for the homeless. Large numbers of homeless people are therefore left to shelter themselves on public property. The City has prohibited the erection of temporary shelter in the form of overhead protection, thereby exposing the homeless to a risk of significant health problems or even death. As in *Parker*, the state action by means of a sanction has deprived the homeless of access to the shelter required for adequate protection from the elements. As in *Morgentaler*, the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death.
>
> I find that this prohibition by the City constitutes a deprivation of the security of the person. (paras. 153 and 154)

Completing its Section 7 analysis, the Court found that the City's prohibition was not in accord with the principles of fundamental justice, to the extent that it was both overbroad and arbitrary. The City pointed out several problems that it considered were attributable to camping in its parks, including damage to endangered species and environmentally sensitive areas, disturbance to unstable bluffs, the leaving of litter including used syringes, and damage to turf. In relation to each of these issues, the Court referred to the fact that the "temporary abodes" that the challenged section of the bylaw prohibited were not the cause of these specific problems. That is to say, each of these problems could equally, or more directly, be addressed with regulations that did not infringe the Section 7 rights of homeless persons to erect an overnight shelter. Finally, the Court held that the prohibition on temporary abodes was not justified under Section 1 of the *Charter*, the prohibition lacking a rational connection to the harm to which it was addressed, the impact of the prohibition being disproportionate to its advantages, and the impairment of Section 7 rights not being minimal.

The Court noted the possibility that the City could have dealt with the campers with its proprietary powers, during the course of its consideration of whether the City's actions engaged the *Canadian Charter of Rights and Freedoms*. The Attorney-General of B.C., citing an earlier case from the Victoria region[9] dealing with the unlawful removal of trees from municipal land in which the Court of Appeal rejected an argument that the municipality should prosecute the logger for a parks bylaw contravention rather than claim damages in trespass, argued that it could not be said that the City's bylaws created a situation in which persons are precluded from erecting shelter in public places because the City as the owner of its parks would have the right under the common law to bring an action in trespass against persons erecting shelters within its parks. The Court rejected that proposition in the following terms, leaving open the question of whether the City might have avoided a *Charter* challenge by moving against the campers in a common law trespass action (at para. 111):[10]

> If an action alleging trespass were to be commenced by the City, arising from the same factual matrix as that under consideration in the present case, the court would have to address a number of issues including relevant defences and the effect of the *Charter*. The court would have to address how to apply the applicable common law principles in a manner consistent with the values embodied by the *Charter*. The court would also have to consider whether the matter involved government action such that the *Charter* applied directly.

The decision in *Adams* raises numerous significant issues, particularly whether regulations prohibiting overnight accommodation in national, provincial or regional parks, including regulations limiting length of stay in designated campgrounds, would survive a *Charter* challenge. The decision does not explicitly address the trust-like status of municipal parks, which has occasionally been the basis for judicial decisions preventing the use of parks for purposes incompatible with their natural character, as, for example, in *Victoria (City) v. Capital Region Festival Society*,[11] in which the court refused the City's application for a declaration that it would

[9] *Dykhuizen v. Saanich (District)*, [1989] B.C.J. No. 1964 (B.C. Court of Appeal).
[10] Note that, in *Vancouver (City) v. Zhang*, the City's application for injunctive relief was allowed under the principle that such relief will be refused only in exceptional circumstances when the contravention of a law is being enjoined, the public interest generally outweighing equitable considerations such as the balance of convenience and irreparable harm (*City of Toronto v. Polai* (1972), 28 D.L.R. (3d) 638 (Supreme Court of Canada). This principle might not apply where the local government seeks injunctive relief in a common law trespass action.
[11] [1998] B.C.J. No. 2658 (B.C. Supreme Court).

be within the terms of the trust on which it held Beacon Hill Park to allow its use for a music festival including sound stages, concessions, and a beer garden. If trust terms must give way to the *Charter* rights of private individuals, it would be helpful to have judicial guidance as to the precise balancing of those two types of obligations that local governments are obliged to undertake.

The decision is also notable, in the context of the homelessness issue, in referring to international covenants as an aid to interpretation of the meaning and scope of rights under the *Canadian Charter of Rights and Freedoms*. In particular, the Court referred to Article 25 of the United Nations' *Universal Declaration of Human Rights* (right to a standard of living adequate for the health and well-being of oneself and one's family, including housing), and to the International Covenant on Economic, Social and Cultural Rights (including the covenant of signatories including Canada to "take steps to the maximum of its available resources" to ensure the realization of the right to adequate housing). Such international obligations will likely continue to play a major role in advocacy on behalf of homeless persons in Canada.[12]

Victoria's appeal of the decision is scheduled be heard in the B.C. Court of Appeal on June 10 and 11, 2009 with interventions by the Union of B.C. Municipalities, B.C. Civil Liberties Association and the Poverty and Human Rights Centre. In the meantime, the City has made two attempts to limit the impact of temporary overnight accommodation on its parks. Initially, it sought to enforce the Parks Regulation Bylaw without removing its unconstitutional provisions, by prosecuting a camper for maintaining a temporary shelter during the daytime, on the theory that such enforcement had no effect on the constitutional rights that the Supreme Court had found the bylaw to violate (the right to erect an overnight shelter in the park). The Provincial Court Judge simply refused to enforce bylaw provisions that had been held unconstitutional, regardless of how they were being enforced.[13] The City then amended the bylaw to specifically prohibit the use of a temporary shelter in a park between the hours of 7 a.m. and 7 p.m., and at all hours of the day in areas of a park developed as playgrounds, sports fields, pathways and roads, and initiated a prosecution for an offence under that new, narrower prohibition, this time with success.[14]

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[12] David Hulchanski of the University of Toronto's Cities Centre, in a keynote address to a conference on housing and homelessness at the University of Calgary on February 18, 2009, commented on upcoming *Charter* litigation on homelessness based on Canada's international obligations. His paper can be accessed via the conference website Growing Home: Housing and Homelessness in Canada.
[13] *R. v. Johnston et al* (B.C. Provincial Court, Mackenzie P.C.J., January 28, 2009).
[14] *R. v. Johnston and Shebib* (B.C. Provincial Court, Blake P.C.J., February 12, 2009).

Political Expression: Vancouver (City) v. Zhang

The next B.C. municipality to encounter *Charter* arguments in enforcing a bylaw limiting private use of public spaces was the City of Vancouver. Since 2002, members of the Falun Gong group have conducted a continuous vigil outside the Chinese consular facilities near the corner of 16th Avenue and Granville Street (along on the principal highway route between downtown Vancouver and Vancouver International Airport), protesting alleged atrocities of the Chinese government against its members in China. In addition to enormous and often gruesome signage posted on the garden wall of the consulate (a billboard measuring about 8 feet by 100 feet, and projecting a few inches into the highway right of way), the protestors erected a very small wood hut on the narrow grass boulevard between the wall and the City sidewalk, in which the member maintaining the vigil took shelter during rainy weather. This diminutive structure was located almost entirely on the highway right of way, but did not prevent pedestrians from using substantially the entire width of the concrete sidewalk. Vancouver's Street and Traffic Bylaw, enacted under the *Vancouver Charter*, prohibits construction, maintenance or occupation on any City street of any structure, object or thing which is an obstruction to the free use of the street, or which may encroach on the street. It was common ground that the hut did encroach on the street, but the protesters denied that it obstructed the free use of the street, and asserted that the bylaw infringed their right to freedom of expression under Section 2(b) of the *Canadian Charter of Rights and Freedoms*.[15]

The B.C. Supreme Court found that the hut was an obstruction to the free use of the street, holding that it was not necessary for the City to establish that an object actually obstruct a street user if its presence on a portion of the street made that portion unavailable to other street users. On that point, the Court applied its 2002 decision in *R. v. Maurice*,[16] in which the City had obtained an injunction against persons occupying the sidewalk in front of the abandoned Woodward's Department Store in downtown Vancouver in contravention of the Streets and Traffic Bylaw. Squatters had settled on the sidewalk under the protection of canopies after being evicted from the building, furnishing their shelters with mattresses, tents, and other belongings, but not so as to completely obstruct passage on the sidewalk by members of the public (though many pedestrians likely chose to avoid these particular blocks of the downtown area during the "squat"). The squatters conceded that their belongings obstructed the sidewalk, and advanced various arguments, unsuccessfully, as to why the City should not be given an injunction,

[15] *Vancouver (City) v. Zhang*, 2009 BCSC 84 (B.C. Supreme Court).
[16] [2002] B.C.J. No. 2645 (B.C. Supreme Court).

including arguments based on the *Canadian Charter of Rights and Freedoms*. Unlike in *Adams*, the squatters did not seek to have the City's Streets and Traffic Bylaw quashed or read down for constitutional reasons, but urged the Court, without citing binding authority, to exercise its discretion on the injunction application having regard to *Charter* values, which the Court refused to do. The decision, in fact, dealt in only the briefest of terms with the degree of obstruction of a street that was required to constitute a bylaw offence, as the issue was not really contested.

On the *Charter* issue in *Zhang*, after finding that the protest vigil, including the wood hut which symbolized the continuous nature of the vigil and the depth of the protesters' commitment, had expressive content for the purposes of Section 2(b), the Court turned to the Supreme Court of Canada's decision in *Committee for the Commonwealth of Canada v. Canada*[17] for the proposition that an individual is free to communicate in a place owned by the state only if the form of expression used is compatible with the principal function or intended purpose of that place. Relevant to that issue is the historical or actual function of the place, and whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. Madam Justice Stromberg-Stein ultimately held that the erection of permanent structures, in this case the small wood hut, was incompatible with the fundamental purpose of the street, which is the movement of pedestrian and vehicles, and therefore outside the scope of Section 2(b). (If that were not the case, the Court found that the bylaw provisions in question would indeed infringe the protesters' rights to express themselves in the manner of their choice by erecting the wood hut to shelter those engaged in their continuous vigil.)

On the question of justification under Section 1 of the *Charter*, which the Court considered notwithstanding that no infringement of *Charter* rights had been found, the Court found that the Streets and Traffic Bylaw did not ban political expression on City streets generally, but prohibited only the installation of physical obstructions on streets, and thereby minimally impaired the protesters' freedom of expression. The objective of the City in keeping its streets clear of obstructions and encroachments was pressing and substantial, and minimally impaired the protesters' right of expression in that they remained free to use the street to conduct their protest without constructing structures there. Thus the City succeeded in obtaining an injunction requiring the removal of the offending structure, with which the protesters immediately complied

[17] [1991] S.C.J. No. 3. The Court held that distribution of political pamphlets at Dorval (now Pierre Elliott Trudeau International) Airport was a form of expression protected by Section 2(b) of the *Charter*, and unjustifiably infringed by the federal Government Airport Concession Operation Regulations.

while applying for an interim stay of the order pending their appeal. The stay was denied[18] and the protest continues, with the appeal likely to be heard in the fall of 2009.

The decision in *Zhang* was made, it is suggested, in the context of a relatively deep pool of *Charter* jurisprudence dealing with the use of public spaces for political protest, leading to a result that most municipal lawyers do not find at all surprising. In contrast, the courts have not had much opportunity to consider the application of the *Charter* to the homelessness issue, and local governments have had little guidance as to how their proprietary and regulatory powers ought to be exercised in relation to this issue. Thus, the B.C. Court of Appeal's decision in *Adams* will be an important one to watch.

[18] *Vancouver (City) v. Zhang*, Unreported, Court of Appeal Registry No. CA036802, February 9, 2009 (B.C. Court of Appeal).