Comment on *Victoria (City) v Adams* (2009 BCCA 563)
The Remedy Provided by the B.C. Court of Appeal: Something to Work With?

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Some advocates have expressed understandable concern about the remedy from the British Columbia Court of Appeal in *Victoria (City) v Adams* (2009 BCCA 563). The concern arises from the fact that the Court explicitly links the violation of the rights of those erecting shelter in the parks to the absence of sufficient shelter facilities. In this sense, the Court of Appeal did not agree with the decision of the trial judge to declare unconditionally unconstitutional and of no force and effect any of the provisions of the by-laws which prevented homeless people from erecting temporary shelters.

> The final issue with respect to the declaration arises out of the fact that the impugned provisions of the Bylaw are only unconstitutional because there are insufficient resources in the City of Victoria to shelter the homeless. If there were adequate shelter beds or appropriate designated areas outside of parks to accommodate the homeless, the Bylaw provisions that we are concerned with might well be valid. [para 162]

Drawing on the analogy of circumstances in which a provincial law is declared to be "inoperative" so long as a federal law is in place which has parmountcy, the Court of Appeal opted for a finding that the bylaw is operative so long as there is inadequate shelter space. However, the Court of Appeal also recognizes that the determination of the adequacy of shelter space is not a simple matter.

> A declaration that a provincial law is "inoperative" while a paramount federal law subsists is not problematic. It is a simple matter to determine the status of the federal law. The situation in the case at bar is not so simple. There is no "bright line" test to determine whether resources to shelter the homeless in Victoria are sufficient to render the provisions of the Parks Regulation Bylaw once again constitutional. [para 165]

Instead of attempting to define the sufficiency of resources in advance, the Court opts to make its order of inoperability valid until such time as the Supreme Court considers an application from the City to suspend it, on the basis that sufficient shelter resources have been provided.

> We consider that the appropriate manner of dealing with this problem is to allow the City to apply to the Supreme Court for a termination of the declaration if it can demonstrate that the conditions that make the Parks Regulation Bylaw unconstitutional have ceased to exist. [para 165]

The concern about this explicit linking of the finding of unconstitutionality with the resources provided to "shelter the homeless" is, of course, that the right to adequate housing to which Canada is committed under international human rights law, and which ought to define the scope of the Charter's protections, appears to have been reduced to an obligation to "shelter the homeless". The reference to "appropriate designated areas" is even more worrisome. This type of minimalist application of the right to housing as it is protected by the right to security of the person in the Charter is inconsistent not only with Canada's obligations under international human rights law, ut also with a contextual approach to remedy that recognizes the diversity of needs of homeless individuals, particularly women.

In this case, however, the problem of the minimalist and 'negative rights' framework (ie – governments must not interfere unreasonably with the destitute trying to shelter themselves from the

elements as opposed to taking positive measures to solve the problem) largely emanate from a restricted approach to what was originally identified as the violation. Rather than framing the violation in this case as a failure to ensure the right to adequate housing of those who are living in the park, the applicants identified the violation as denying them the ability to shelter themselves in a situation where there was no other option for shelter.

Within the limited framework of the claim in this case, the restructuring of the remedy by the B.C. Court of Appeal may be seen as a small opening of the positive dimensions of the issue that had not been addressed at all in the remedy ordered by the trial judge. And it may provide a model strategies to consider in future cases. A lesson we can learn from this case, as in *Eldridge v British Columbia (Attorney General)* ([1997] 3 SCR 624), is that even when a Court insists on framing a finding of a violation in more traditional “negative rights” terms, we may nevertheless leverage a more positive rights approach with respect to the remedy. In *Eldridge*, the Court resisted a simple finding that the impugned legislation was unconstitutional, and instead found that a decision not to provide funds for a program for interpreter services constituted discrimination given its reasonable and modest cost. The Court then provided the Respondent government with time to implement the necessary programs to ensure equality for the deaf and hard of hearing. Similarly, in this case, instead of restricting its role to a consideration of whether the bylaw is or is not unconstitutional, the Court of Appeal chose to engage more creatively with the possibility that positive measures to ensure access to shelter might constitute an alternative remedy to the violation of rights.

It is entirely unacceptable to reduce the right to adequate housing of those sleeping in parks to a mere right of access to shelter beds. On the other hand, a right to shelter, if interpreted properly, may at least be better than a right not to be prevented from putting plastic or cardboard over oneself while sleeping in a park. Additionally, there is some language in the decision that may be helpful in pushing the remedy a bit further than mere access to shelter. The Court says that if there were adequate shelter beds the impugned provisions "**might** well" be valid (para 162), and recognizes that "there is no ‘bright line’ test to determine whether resources to shelter the homeless in Victoria are sufficient to render the provisions of the *Parks Regulation Bylaw* once again constitutional." (para 165) It is on this basis that the Court decides the appropriate remedy is to allow the City to apply at some point in the future to the Supreme Court for a termination of the declaration "if it can demonstrate that the conditions that make the *Parks Regulation Bylaw* unconstitutional have ceased to exist." (para 165)

It may be possible to push the concept of "resources to shelter the homeless" (para 165) in the direction of a remedy that addresses a diversity of needs - not just shelter beds. Advocates could argue again for consistency with international human rights law, which mandates a serious allocation of the maximum available resources not only to emergency shelter but also to long term adequate and secure housing. Advocates could also insist that any shelter being provided meet the criteria of dignity and that the provision of appropriate "shelter" incorporate the components of community and autonomy that led to some choosing to live in the park rather than live in a shelter in the first place.

This remedy addressing the immediate need for shelter might be characterized, as in the famous *Grootboom* case in South Africa, as a kind of first order immediate remedy for those who are homeless. It need not obscure or replace the constitutional obligation to protect and ensure the right to adequate housing in a broader and more substantive dimension. In *Grootboom*, the gap between the first order remedy and full implementation of the right to adequate housing could only be addressed over time because of lack of resources and the immensity of homelessness. Canada has no justification for delaying the full implementation of the right to adequate housing in all of its dimensions, in terms of both meeting the need for emergency shelter and for longer term adequate housing . Advocates could insist at any hearing into whether the conditions that forced people to live in the park had been remedied, that not only the first order remedy of access to shelter be provided in a dignified and appropriate manner, but that further measures be in place to ensure that the

shelter solution is only temporary - as a first step in the direction of securing adequate housing. The advantages of a further hearing into the sufficiency of measures taken seems to at least be an opportunity to push the courts further.

There remain inherent problems with leveraging a positive rights remedy from a negative rights finding in this way. It is not an appropriate strategy in all cases. One problem in this case is whether the continuation of the "negative" remedy (the non-operability of the by-law) really provides a meaningful incentive for the city and province to remedy the problem through appropriate positive measures. They may never request a subsequent hearing and in this sense the positive obligation to remedy the problem with the shelter system may remain unenforced. The fact that there is no time-frame put on such a remedy, or ultimately any requirement that it be implemented, or any provision for the applicants to request a hearing into the measures taken, are all symptomatic of the inadequacy of a purely negative rights framework.

Structurally, however, the shift from the remedy granted at trial to the one granted on appeal, while it may seem like it a permanent striking down to a temporary order, is actually a helpful shift. It suggests a route through which even conservative courts may be willing to be involved in positive remedies to social rights violations. It is at least a step forward from *Chaoulli v Quebec (Attorney General)* (2005 SCC 35) model, which informs so much of this case. In *Chaoulli*, when Quebec asked for an alteration of the remedy to allow for a lengthier suspension of the declaration, the Charter Committee on Poverty Issues (CCPI), as an intervener, responded by arguing that the Court should refine the declaratory remedy further and asked for a second hearing into remedy. CCPI argued that it was unclear how the reasoning contained in the finding of a violation of s. 7 translated into the suspended declaration. The Court had not clarified that since the finding of violation was contingent on a preliminary finding that wait times in the public system violated the right to life, then Quebec surely had the option of remedying the problems in the public system, in which case the prohibition of private health insurance would no longer violate s. 7. In some ways, the CCPI was just calling the court on the dishonesty of the majority decision. Even if they were shy about ordering a positive remedy within the public healthcare system ("no freestanding constitutional right to publicly funded healthcare" – para 104), their reasoning as to the nature of the violation should have allowed them to consider the option that was available to Quebec to choose a positive remedy over a negative one - fixing the problems in the public health care system which the Court had found to violate the right to life, rather than providing a carte blanche for private insurance companies. The problem was that the majority of the Court seems to have wanted, in that case, private healthcare insurance to become a permanent fixture. But that is not what their reasoning justified in terms of a remedy to the unconstitutional state of affairs.

Despite the fact that the Court says it does not need to consider that issue of positive obligations to ensure the right to housing in this case, it does provide for a subsequent hearing in which to assess whether the inadequate resources provided by the governments to address homelessness (the conditions of which led to the finding that the by-law provisions constituted a violation of s. 7) have "ceased to exist." (para 165) The Court recognizes this is a complex question, not a bright line, but proceeds to give responsibility to the Supreme Court to take up that challenge. This presumes judicial competency to assess the sufficiency of measures taken. Despite the problematic elements of the remedy in *Adams*, I think that given the original "negative rights" framing of the claim, it is a step in the right direction.