

## CASE COMMENT

### *Rights, the Homeless, and Social Change: Reflections on Victoria (City) v. Adams (BCSC)*

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CANADIAN COURTS ARE NOTORIOUS for excluding basic social and economic rights<sup>2</sup> from protection under the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> Our governments are complicit in this, consistently urging on the courts, in the words of the United Nations Committee monitoring the *International Covenant on Economic, Social and Cultural Rights*, “an interpretation of the *Charter* which would deny any protection of Covenant [social and economic] rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.”<sup>4</sup>

A recent judgment out of the British Columbia Supreme Court, *Victoria (City) v. Adams*,<sup>5</sup> challenges this pattern of failure. In this case, several homeless individuals successfully convinced the court that the City of Victoria infringed their section 7 rights under the *Charter* when

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<sup>2</sup> Social and economic rights include, for example, rights to health, social assistance, housing, and so on. For a more expansive list of what is protected in international human rights law, see the *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

<sup>3</sup> Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]. As Martha Jackman notes, a 2008 report from the International Commission of Jurists (ICJ) documents that Canadian courts and tribunals are distinctive in their continuing reluctance to recognize and enforce the socio-economic rights set out in the *International Covenant on Economic, Social and Cultural Rights*, an international treaty to which Canada has been signatory since 1976. See International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008), cited in Martha Jackman, “*Charter Remedies for Socio-Economic Rights Violations: Sleeping under a Box?*” in *Taking Remedies Seriously*, ed. Kent Roach (Montreal: Les Éditions Yvon Blais, forthcoming), 2.

<sup>4</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, CANADA, E/C.12/1/Add.31, 1 December 1998, para. 14.

<sup>5</sup> 2008 BCSC 1363, [2008] B.C.W.L.D. 7817 [*Adams*].

the city prohibited homeless individuals from putting up temporary shelter when sleeping outside in public space.<sup>6</sup>

More specifically, the case involves a constitutional challenge under section 7 of the *Charter* to two City of Victoria bylaws: the *Parks Regulation Bylaw No. 07-059*<sup>7</sup> and the *Streets and Traffic Bylaw No. 92-84*.<sup>8</sup> These bylaws, at the time of the trial, prohibited taking up temporary abode in a public space.<sup>9</sup> In practice, this meant a ban on erecting any form of overhead protection while sleeping outside on public property, even on a temporary basis, at all times.<sup>10</sup> Thus, putting up tents, tarps, or even sheltering under cardboard boxes for only a few hours on public property while sleeping was forbidden.

The case arose in October 2005, when the City of Victoria commenced an action to obtain a civil injunction to enforce these two bylaws in relation to a tent city consisting of seventy people and twenty tents in Victoria's Cridge Park. The defendants – nine of the homeless people living in the tent city – opposed the application, raising the *Charter* in defence. After significant procedural and interim wrangling (including the city's attempt to have the action discontinued), the case came to trial in June 2008. Two parties intervened at the British Columbia Supreme Court level: the British Columbia Civil Liberties Association and the attorney general of British Columbia.

Justice Carol Ross of the British Columbia Supreme Court held that the bylaws and their enforcement negatively affected the life, liberty, and security of the person interests protected under section 7 of the *Charter*. Further, such infringement, because it was both arbitrary and overbroad, was inconsistent with the principles of fundamental justice. The result, Justice Ross held, was a "significant" infringement of section 7 that was not justified under section 1 of the *Charter*. The court issued a declaration that the bylaws were of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter.

The City of Victoria and the BC attorney general had argued that the bylaws were essential to maintaining the public benefits of urban parks.

<sup>6</sup> Section 7 states: "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."

<sup>7</sup> City of Victoria, Bylaw No. 07-059, ss. 13(1), (2), 14(1), (2), 16(1) [*Parks Regulation Bylaw*].

<sup>8</sup> City of Victoria, Bylaw No. 92-84, ss. 73(1), 74(1) [*Streets and Traffic Bylaw*].

<sup>9</sup> In August 2007, the *Parks Regulation Bylaw* was amended by the city so that it "no longer prohibited 'loitering' in public parks" (*Adams*, para. 24). Prior to the hearing, at the defendants' request, the city clarified that the "operational policy of the Victoria Police" for enforcement of the bylaws allowed for sleeping in public in some circumstances but did not allow the use of any tents, tarps, boxes or other structures (*Adams*, para. 26).

<sup>10</sup> *Adams*, para. 4.

Indeed, Justice Ross began her judgment by recognizing that this case raises “an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.”<sup>11</sup> But Justice Ross concluded that, by targeting behaviour not necessarily linked to damage to public parks, the bylaws overstep their purpose and consequently run afoul of the Constitution.

The City of Victoria has appealed this decision, and argument was heard before the British Columbia Court of Appeal on 10 and 11 June 2009. Five intervenors joined the fray at this level: the provincial attorney general and the Union of BC Municipalities argued for the constitutionality of the bylaws, while the British Columbia Civil Liberties Association, the Pivot Legal Society, and the Poverty and Human Rights Centre argued that the bylaws contravened the *Charter*. At the time of writing, the Court of Appeal has yet to issue its decision.

This case is significant for its approach to several key doctrinal and theoretical issues that, for some time, have haunted rights litigation regarding socio-economic issues under the *Charter*. This comment focuses on three aspects of the decision: first, the centrality of the debate over negative and positive rights to the case; second, the court’s configuration of the underlying sociological issue of homelessness; and, third, the implications of the case for the larger debate on the *Charter*’s potential for effecting transformative change.

#### THE CONTEST OVER NEGATIVE AND POSITIVE RIGHTS

Classically, a distinction has been drawn between civil and political rights and socio-economic rights.<sup>12</sup> Civil and political rights, or “first-generation rights,” protect such things as rights to association, expression, voting, and religion, and they are often understood as those rights most meaningful to those already in possession of property and privilege in our political, economic, and social systems. Social and economic rights, or “second-generation rights,” recognize more material needs and, at their strongest, demand redistribution of resources to the less fortunate and less privileged.

Social and economic rights are claimed to suffer from justiciability issues: typically, these are concerns about judicial competency and in-

<sup>11</sup> Senior District Judge Atkins in *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), 1554, quoted in *Adams*, para. 1.

<sup>12</sup> Jeremy Waldron, ed., *Theories of Rights* (New York: Oxford University Press, 1984).

stitutional legitimacy.<sup>13</sup> Notably, as a feature of this debate, social and economic rights are condemned as positive rights, while civil and political rights are more favourably understood as negative rights. Negative rights, on the one hand, are those entitlements that dictate government non-interference only; positive rights, on the other hand, require positive government provision – government proaction, not simply government forbearance.<sup>14</sup> Thus, positive rights are seen to involve allocation of state resources. It is argued that civil and political rights, as negative rights, better fit the arena of judicially protected constitutional rights, while social and economic rights involve social policy, a matter best left to the judgment of government and politicians.<sup>15</sup>

This divide between these generations of rights has long been discredited by international and domestic human rights experts, for whom the interdependence and indivisibility of all human rights is common creed.<sup>16</sup> Every human right imposes a mix of both negative and positive state obligations: civil and political rights no less than social and economic rights. Even traditional “negative” rights must be supervised and supported by the state using public resources.<sup>17</sup> Thus, any tidy scheme whereby judicially protected rights are limited to negative obligations is logically and historically flawed.

Some judges, in some contexts, understand this.<sup>18</sup> But the contrast between negative and positive rights, “long abandoned under interna-

<sup>13</sup> See, for example, the discussion in David Wiseman, “Taking Competence Seriously,” in *Poverty: Rights, Social Citizenship and Legal Activism*, ed. Margot Young, Susan B. Boyd, Gwen Brodsky and Shelagh Day, 263–80 (Vancouver: UBC Press, 2007); Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999); Jill Cottrell and Yash Ghai, “The Role of Courts in the Protection of Economic, Social and Cultural Rights,” in *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, ed. Yash Ghai and Jill Cottrell, 58–90 (London: Interights, 2004); Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 UBC L. Rev. 539–60.

<sup>14</sup> The provision of services or benefits that are preconditions to the fulfillment of certain interests protected as rights are examples of the kind of proactive government observance of rights that the debate imagines.

<sup>15</sup> In *Adams*, the city and the attorney general argued that the complex issue of homelessness was an area of policy most appropriate to the legislature, not the courts.

<sup>16</sup> Jackman, “Sleeping under a Box?”; *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (12 July 1993); *Montreal Principles on Women’s Economic, Social and Cultural Rights* (December 2002), online: International Federation for Human Rights <<http://www.fidh.org/IMG/pdf/cao10a.pdf>>.

<sup>17</sup> Holmes and Sunstein, “Cost of Rights,” 51–52.

<sup>18</sup> In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*] Justice Bastarache argues in his dissenting judgment that: “The appellant and several of the intervenors made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government

tional human rights law and increasingly rejected in other constitutional democracies,”<sup>19</sup> lives on in Canadian constitutional discourse and, in particular, plagued argument in this case. The City of Victoria and the BC attorney general argued strongly that the rights protected under section 7 of the *Charter* are negative rights only. Consequently, without the target of government action of some sort, the claimants have no section 7 issue. Government inaction or insufficient action will not trigger section 7. The strategy in this case, attempted unsuccessfully by the city and the attorney general at the Supreme Court level, was to turn the complaint about the bylaws into a claim for more substantive resolution of the underlying homelessness issue and then to disqualify that claim on the basis that it was for a positive right – something, they argued, section 7 did not protect.

The BC Supreme Court effectively sidestepped direct debate over positive versus negative rights by holding simply that the claim involved an issue of state interference only.<sup>20</sup> While this avoidance of the issue eased the way for the immediate favourable result for the claimant, it also raised two larger problems, as Martha Jackman thoughtfully points out. First, Justice Ross’s ruling fails to debunk the notion of a constitutionally meaningful distinction between negative and positive rights.<sup>21</sup> Indeed, her reasoning reinforces the claimed contrast.<sup>22</sup> Second, narrowing the claim to a mere negative right means that the solution or remedy to the infringement is simply government forbearance – elimination of the prohibitive bylaws. Yet, as any advocate for the homeless will attest, resolution of homelessness requires significant government action – resources and proactive policy and planning. What role can constitutional rights so calibrated play in this struggle? I return to this larger point at the conclusion of this comment.

It is open for the Court of Appeal to reject the traditional dichotomy of positive and negative rights. It is also possible for this court to establish that section 7 obligates government to take a variety of both negative

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in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions” (*Gosselin*, para. 218).

<sup>19</sup> Jackman, “Sleeping under a Box?” 1.

<sup>20</sup> *Adams*, para. 78.

<sup>21</sup> Jackman, “Sleeping under a Box?” 13. While trial court judges are seldom as “adventurous” in their judgments as legal commentators might wish, it was still open for her to cast more doubt on the utility of these notions.

<sup>22</sup> Justice Ross wrote: “In my view, the Defendants 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.” See *Adams*, para. 119.

and positive actions.<sup>23</sup> Certainly, the justices had considerable argument before them to that effect. The Poverty and Human Rights Centre, as intervenor at the Court of Appeal level, focused significantly on what its written argument regarded as a “neither necessary nor helpful” categorization,<sup>24</sup> arguing that “all rights are positive to varying degrees because all rights, one way or another, depend on positive action by governments for their enforcement.”<sup>25</sup> The Court of Appeal would do well to reject the government’s continued assertion of a distinction that is long past its stale date. As Louise Arbour, speaking as United Nations High Commissioner of Human Rights, stated: “There is nothing to fear from the idea of socio-economic rights as real, enforceable, human rights on equal footing with all other human rights, and no cause for simplistic or categorical distinctions between these rights, and rights described as ‘civil and political.’”<sup>26</sup>

#### UNDERSTANDING HOMELESSNESS

Understanding poverty and its manifestations is a considerable challenge for judges, given their own social and economic position.<sup>27</sup> As Dianne Pothier has written about other constitutional rights: “the ultimate question is whether the court ‘gets’ the context of the claimant in order to be able to make a sensible judgment.”<sup>28</sup> The stories and experiences of the marginalized do not easily make their way into law and legal judgment.<sup>29</sup> Indeed, the challenge is to persuade courts to understand “the day-to-

<sup>23</sup> Chief Justice McLachlin in the *Gosselin* decision stated: “One day s. 7 may be interpreted to include positive obligations.” See *Gosselin*, para. 82.

<sup>24</sup> *Adams* (Factum of the Intervenor, Poverty and Human Rights Centre, para. 43).

<sup>25</sup> *Ibid.*, para. 49. Acceptance of such an argument would mean that section 7 itself could be understood as embracing rights that required positive government action.

<sup>26</sup> Louise Arbour, “Freedom from Want: From Charity to Entitlement” (LaFontaine-Baldwin Lecture, delivered at the Capitole de Québec, 4 March 2005). Available online at [http://www.icc-icc.ca/en/assets/pdf/lectures/LouiseArbour\\_Lecture.pdf](http://www.icc-icc.ca/en/assets/pdf/lectures/LouiseArbour_Lecture.pdf) (viewed 18 October 2009).

<sup>27</sup> See, for example, Martha Jackman, “Open Justice or ‘Just Us’: The Poor, the Courts and the Charter,” in *Open Justice/La transparence dans le système judiciaire*, ed. Yves-Marie Morissette, Wade MacLauchlan, and Monique Ouellette, 281-94 (Montreal: Les Éditions Themis/Canadian Institute for the Advancement of Justice, 1994); Martha Jackman, “Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases,” in *Poverty: Rights, Social Citizenship, and Legal Activism*, ed. Margot Young et al., (Vancouver: UBC Press, 2007) 23-39; Diane Pothier, “But It’s for Your Own Good,” in *Poverty: Rights, Social Citizenship, and Legal Activism*, ed. Margot Young et al., (Vancouver: UBC Press, 2007) 40-56. Also, more generally, see Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” 42 (1997) McGill L. J. 91-117.

<sup>28</sup> Pothier, “For Your Own Good,” 42.

<sup>29</sup> Nor do they resonate strongly in elite politics, which is why, of course, these claims end up as constitutional challenges.

day realities of living in poverty and to [appreciate] the enormous social constraints that structure the ‘options’ that are meaningfully available.”<sup>30</sup> One example of failure to rise to this challenge is Chief Justice Beverly McLachlin’s Supreme Court of Canada majority judgment in *Gosselin v. Quebec (Attorney General)*.<sup>31</sup> In this case, ignoring the vulnerability and precariousness of those on social assistance, the chief justice found that an age-based scheme that resulted in a monthly welfare benefit of \$170 – roughly one-third of regular benefit levels – was no affront to human dignity and freedom.

Justice Ross’s decision in *Adams* rests on firmer and more credible sociological foundations. Specifically, three general factual findings were critical to the court’s decision and, together, show sound judicial appreciation of the experiences and contexts of the claimants. First, the court accepted that hundreds of those homeless in Victoria “have no option but to sleep outside in the public spaces of the City,” given the large disparity between the number of homeless people and the availability of shelter beds.<sup>32</sup> Moreover, for certain groups, shelter spaces are not available or not appropriate. Shelters in Victoria do not accept children, few spaces are available for youth, and couples cannot gain access to shelter services together.

Second, the court found that both individual and social factors account for homelessness.<sup>33</sup> It cited a long and full list of the social factors to blame for this: deinstitutionalization, federal government withdrawal from social-sector housing, rising housing costs and shrinking earning power, policy changes to federal transfer payments, and changes to British Columbia’s income assistance policy. The list makes clear that the court understood the systemic nature of the causes of homelessness.

These two sets of findings are critical. I have argued elsewhere that overly simplistic classical (or neoliberal) ideals of individual choice con-

<sup>30</sup> Janet E. Mosher, “Welfare Reform and the Re-Making of the Model Citizen,” in *Poverty: Rights, Social Citizenship, and Legal Activism*, ed. Margot Young et al. (Vancouver: UBC Press, 2007), 134.

<sup>31</sup> *Gosselin*, para. 1.

<sup>32</sup> *Adams*, paras. 5, 58, 69. The court accepted a 2007 Task Force report that concluded that planning to address the problem should assume that fifteen hundred individuals in Victoria were homeless. Another report concludes that, at best, available shelter beds can serve only 326 individuals. Consequently, the court wrote: “It is abundantly clear from the evidence ... that there are currently many more homeless people in Victoria than can be accommodated in the available shelters. While some homeless people choose to seek accommodation in the shelters, the fact is that there are not sufficient spaces in the shelters to accommodate those who seek shelter. Thus hundreds of people are left to sleep in the public places in the City” (*Adams*, para. 58).

<sup>33</sup> *Ibid.*, para. 59.



figure too much of *Charter* equality jurisprudence.<sup>34</sup> Similarly, the idea that the state bears no constitutional obligation for situations that result from individual choice – no matter how distressing the outcome – under section 7 of the *Charter* is also popular among governments and courts. Here, in order to argue that the city had no constitutional obligations with respect to the homeless claimants, both the attorney general of British Columbia and the city filed evidence that individuals were sleeping in public parks by choice.

However, Justice Ross, because of these two findings, held that it is only a minority of individuals who choose to be homeless: “While there may be some people for whom urban camping is a lifestyle choice, it is clear that this is not the situation of the majority of the population of Victoria’s homeless. Rather, there are people who do not have practicable alternatives.”<sup>35</sup> Concluding that the homeless are on the streets over time because of larger social factors and, on any one particular night, because of inadequate shelter beds refutes the argument that “sleeping rough” is best understood merely in terms of individual idiosyncrasy and choice.

Third, the court accepted expert evidence that, absent some form of overhead protection, homeless people incur significant risks to health, including death by hypothermia.<sup>36</sup> For example, the court found, based on one expert’s testimony, that, “if homeless people who sleep outside are prohibited from erecting even the most rudimentary forms of shelter from the elements (e.g., tent, tarpaulin, or cardboard barriers), this would have clear and direct adverse impacts on their health.”<sup>37</sup> In combination with other similar testimony, the court concluded that the prohibition against making a temporary abode while sleeping outdoors on public property is an interference with the life, liberty, and security of the person of the homeless claimants.

These conclusions allowed the court a more nuanced contextual appreciation of the perspectives and experiences of the claimants. It is their “common sense” that emerges and underpins the decision.

<sup>34</sup> Margot Young, “Blissed Out: Section 15 at Twenty,” in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, ed. Sheila McIntyre and Sanda Rodgers, (Markham, ON: LexisNexis Canada Inc., 2006), 45.

<sup>35</sup> *Adams.*, para. 66.

<sup>36</sup> *Ibid.*, para. 142.

<sup>37</sup> *Ibid.*, para. 67, quoting from the expert opinion of Dr. Stephen Hwang of the Department of Medicine, University of Toronto.



## WHITHER CHARTER RIGHTS?

Legal judgments typically allow endless hours of close doctrinal and ideological analysis (at least for those so inclined). But their results, independent of these details, also matter tremendously, although not always predictably or straightforwardly.<sup>38</sup> In this case, the court reached the right conclusion, at least on the issue as it was framed by the claimants and the court. Prohibiting shelter for those forced to sleep outdoors, absent sound and convincing state reasons pertaining to the larger public good, must be unconstitutional if our system of constitutional rights is to have any claim to ensuring a just society. The judgment is clear that there are constitutional limits on governments' powers to restrict an individual's ability to provide shelter for herself or himself.<sup>39</sup> This is good.

However, my concluding argument is, I hope, more subtle than this. What does it mean for one of the few victories under the *Charter* for social and economic rights – assuming this Supreme Court judgment holds up on appeal – to grant so minimal a protection to so needy and marginalized a sector of Canadian society? More concretely, the result of this victory is, as the city understands it, to require the city merely to suspend the prohibition on shelter from 7:00 PM to 7:00 AM the next morning.<sup>40</sup> The case established no other obligations to the homeless. Is this, then, a case that offers much to celebrate in terms of the progressive force our *Charter* holds for Canadian society? Certainly, this case does not involve a minor or insignificant issue. While the manifestations of poverty in Canada are many, homelessness is among the most extreme and distressing.<sup>41</sup> The issue of homelessness and appropriate state responses to it is clearly critical, engaging a number of *Charter* rights.

The claimants' lawyers, however, appear to have strategically chosen a narrow conceptualization of their clients' rights: the city is obligated

<sup>38</sup> See, for example, Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, 2nd ed. (Ann Arbor: University of Michigan Press, 2004).

<sup>39</sup> *Victoria (City) v. Adams: Advancing the Rights to Shelter*, Law Sheet, the Poverty and Human Rights Centre, 2009, 2. Available online at <http://povertyandhumanrights.org> (viewed 6 October 2009).

<sup>40</sup> *Parks Regulation Bylaw, Amendment Bylaw (No. 5), No. 09-074, A Bylaw of the City of Victoria*. Available online at [http://www.victoria.ca/cityhall/bylaws\\_list.shtml](http://www.victoria.ca/cityhall/bylaws_list.shtml) (viewed 21 December 2009). Indeed, the City of Victoria has started confiscating any shelter materials that are left up outside of these hours, arresting individuals with tents still standing after 7:00 AM. See Andrew MacLeod, "Tent Camping Homeless to Politicians: Face Facts!" *Tyee*, 16 June 2009. Available online at <http://theyee.ca/News/2009/06/16/VictoriaTentCamping/index.html> (viewed 11 October 2009).

<sup>41</sup> Federation of Canadian Municipalities, *Quality of Life in Canadian Communities: Trends and Issues in Affordable Housing and Homelessness*, Theme Report no. 4 (2008). Available online at <http://www.fcm.ca/CMFiles/qol2008rVVM-3272008-3162.pdf> (viewed October 2009).

simply to allow the homeless to erect temporary shelter without government interference.<sup>42</sup> They did not seek recognition of a positive right to a minimal level of shelter or to any particular policy to address the problem of homelessness. More critical rights to shelter – rights well-established under international law as binding on Canada as a nation – were raised before the Court of Appeal by the intervenor Poverty and Human Rights Centre.<sup>43</sup> Of course, one cannot fault either the claimants or their lawyers for arguing what is most likely to succeed in court, but it can be an unfortunate tactic from the perspective of long-term *Charter* development. And that this seems to be how a winning argument in this case must be crafted speaks broadly of the distressing state of constitutional rights jurisprudence. It also illustrates the problem of individual case representation of key socio-economic issues and makes all the more cogent the need for strategic, systemically informed social and economic *Charter* rights claims by public interest third parties.<sup>44</sup>

This case thus leads us to revisit the politics of rights protection under our *Charter*. The time to argue against a constitutional bill of rights is long past: that question was decided in 1982. But assessment of what the *Charter* has and can mean for social justice in Canada is surely as important as ever. To what extent can the rights under our *Charter* “partake in political and social transformation in a way that does not merely affirm the status quo and reduce transformation to mere repetition and reproduction of the past and the present”?<sup>45</sup> If the right that results from this case is the best that the *Charter* can offer in the face of such real and material social injustice as homelessness, then constitutionalized rights are cold and thin comfort indeed for the many individuals sleeping on our streets and in our parks.

The challenge is political and not simply doctrinal or legal, and the stakes in the struggle for social and economic rights are high: “the reason that ‘rights talk’ is resisted by the powerful is precisely because it threatens (or promises) to rectify distributions of political, economic or social power that, under internationally agreed standards and values, are unjust.”<sup>46</sup> Social and economic rights, more than the rights more

<sup>42</sup> *Adams* (Factum of the Respondents, Opening Statement).

<sup>43</sup> *Adams* (Factum of the Intervenor, Poverty and Human Rights Centre, para. 13).

<sup>44</sup> Unfortunately, these cases too often raise standing and procedural issues that bar their carriage by public interest third parties. See, for example, *Canadian Bar Association v. НМТQ et al.*, 2006 BSCS 1342, [2007] 1 W.W.R. 331. See also *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, 290 D.L.R. (4th) 617.

<sup>45</sup> Karin Van Marie, “Haunting (In)Equalities,” in *Rethinking Equality Projects in Law: Feminist Challenges*, ed. Rosemary Hunter, (Oxford: Hart Publishing, 2008), 125.

<sup>46</sup> Arbour, “Freedom from Want.”

traditional to liberal societies, call for disruption of current balances of power and resources. For this reason they are resisted by governments and difficult for courts.

Ultimately, the tougher and real question is why anyone in Canada should end up sleeping in a park – even with the shelter of a tarp or cardboard box. Governments have failed to respond adequately to this challenge. No wonder that the dispossessed and politically powerless have looked to the *Charter* and the rights it enshrines for just resolution. Whether or not our *Charter* and our Canadian courts are up to this task is still an open question.

#### POSTSCRIPT

The Court of Appeal decision was released in December 2009. The bench of three justices unanimously upheld the Supreme Court decision, allowing the appeal only to the extent of making the declaration of unconstitutionality of the bylaws more specific. The Court of Appeal resisted arguments that the respondents were seeking positive benefits under section 7 and agreed with the trial judge that it was not necessary in this case to decide whether section 7 protects positive rights. The City of Victoria has said it will not appeal the decision to the Supreme Court of Canada.