

Involuntary Criminals

The Anti-Camping and Chattel Bylaw Charter Challenge in Victoria, British Columbia

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Most people caught sleeping on government property are “moved along” by private security and police. David Johnston is an example of what happens when you refuse to move along.

-Andrew Ainsley¹

Should municipalities have the right to criminalize a person for sleeping? With over seven hundred people living without homes in Victoria, BC, yet only 100-176 shelter beds available per night, is the City of Victoria violating the Charter of Rights and Freedoms by introducing bylaws that deem it illegal to sleep and maintain shelter anywhere outside? Should people have the right to sleep? September 4, 2007² marks day one of Da-

Julia is consistently fascinated by the political and social complexities embedded within issues of urban poverty. She is currently completing her undergraduate degree in political science and environmental studies at the University of Victoria, where she keeps busy exploring questions about urban poverty, food security, and the educational processes of addressing them. She is eternally grateful for access to healthy food and housing, which is increasingly in high demand, and would like to thank all of those in her community and around the world who have contributed to opportunities that have led her to write this piece.

vid Johnston's British Columbia Supreme Court trial, where he will attempt to prove that Victoria bylaws 91-19 and 92-84 violate section 7 of the charter. This is the first time in Canada such a challenge has gone to trial. If successful, it will set a legal precedent in Canada and disrupt political structures nationwide. This case highlights the political fragments that contribute to the national homelessness crisis, and offers a lens through which to view both the politics underlying homelessness, and severe bylaws of Canadian municipalities. This essay will outline the history of the "right to sleep" charter challenge, explore its constitutional basis, and critically analyze the implications of the political inferiority of municipalities relative to provincial and federal governments, as well as the impact this has on responses to homelessness and housing shortages in Canada.

After three and a half years of repeated arrests for offences such as "breach of peace," "assault by trespass," and "obstruction of justice,"³ Johnston now has the opportunity to legally challenge the constitutionality of Victoria city bylaws. Beginning in 2001, Johnston noticed that the number of times he was woken up by city police while sleeping outside was escalating. Fatigued by the increasing disturbances to his sleep, Johnston decided to occupy the provincially owned property of St. Ann's Academy, beginning on January 16, 2004, with the intention of being arrested. His wish was to challenge the Crown based on the constitutionality of city bylaws and hear a judge ruling on what he and many others coin the "right to sleep." The case is now set for trial in 2007.

Section 28 of Victoria's *Parks Regulation Bylaw 91-19* states:

(1) No person may conduct himself in a disorderly or offensive manner, or molest or injure any other person, or loiter or take up a temporary abode over night on any portion of any park, or obstruct the free use and enjoyment of any park by any other person or violate any by-law, rule, regulation or notice concerning any park.

(2) Any person conducting himself as aforesaid may be removed from a park and is deemed to be guilty of an infraction of this bylaw.⁴

Section 72-74 of Victoria's *Streets and Traffic Bylaw 92-84* states that no person can "disturb," "cause a nuisance in," or leave any "chattel, obstruction, or other thing ... in any such street, sidewalk or other public space."⁵ Although this charter challenge argues these bylaws violate

sections 7, 8, 11(d), and 12 of the charter, the main focus for the case is section 7, which will also be the focus in this essay. Section 7 of the charter reads: "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."

Since Johnston began occupying St. Ann's, local police have repeatedly arrested him and moved him out of the city. He erected a cardboard shelter on ten occasions, all of which were dismantled by local police officers the next morning. On November 4, 2004, after the tenth time police dismantled the structures, Johnston tore up the cardboard on the ground and police arrested him for mischief. This charge led the Provincial Capital Commission (PCC) to obtain an injunction that prohibited Johnston from occupying the grounds of St. Ann's.⁶

Around the same time, the City of Victoria obtained an injunction from the BC Supreme Court against a group who had been living at a "tent city" at the local Cridge Park since October 2005. When this injunction was issued Johnston's current lawyers, Catherine Boies-Parker and Irene Faulkner, got involved in the case.⁷ After the PCC injunction was introduced, Boies-Parker and Faulkner worked with Johnston and defendants from Cridge Park to challenge the injunction, but lost, unsurprisingly, due to a section in the "Community Charter" stating that property-owners have the right to impose injunctions on their property without the injunction being struck down.⁸ This injunction remains in place; however, this had no effect on Johnston's continual efforts to uphold the right to sleep.

After obtaining a court condition to not return to St. Ann's Academy, Johnston's arrests and charges then began to include a long list of court order breaches. Johnston's last probation breach and arrest occurred on July 4, 2006, and resulted in thirty-six days of fasting in jail before his release. It was during this period that Johnston submitted a Statement of Defense for a Provincial Supreme Court trial based on the charter challenge. He insisted that he would no longer breach probation nor return to St. Ann's if he was granted a trial. A nine-day trial has been scheduled for September 4, 2007, when Johnston's legal team will finally have the chance to strike down municipal by-laws in a charter challenge. According to Victoria bylaws, there is nowhere for people to legally sleep or erect shelter outside between the hours of 11 p.m. and 7 a.m.⁹ It is these bylaws that Johnston, Faulkner and Boies-Parker argue violate section 7 of the charter.¹⁰

In 2005, the Victoria Cool-Aid Society conducted a homeless count, concluding that there is a minimum of seven hundred homeless people in Victoria;¹¹ Boies-Parker found through her research that there were only 100-176 shelter beds available on any given night.¹² This means that over five hundred people are unable to access emergency shelter housing, and are forced to sleep outside. By doing so, these individuals unwillingly become criminals.

It is obvious, but relevant to this case, that an individual cannot survive without sleeping. If an individual is unable to survive without sleeping, then it follows, based on section 7 of the charter, that the right to sleep is ensured by one's legal right to "life, liberty, and security of the person." As Boies-Parker argues, "section 7 imposes a positive obligation on the state to ensure that all residents have adequate shelter."¹³ In addition to the charter, article 25.1 of the Universal Declaration of Human Rights and article 11.1 of the International Covenant on Economic, Social, and Cultural Rights strengthen state obligations to respond to housing needs. Both documents recognize that everyone has the right to an adequate standard of living. What makes these documents so relevant to this case is the 1999 *Baker v. Canada* case that ruled international human rights law has "a critical influence on the interpretation of the scope of the rights included in the charter."¹⁴ Furthermore, article 2.1 of the International Covenant states each "State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights."¹⁵ Both at a national and international level, it is recognized that states have an obligation to provide basic necessities of life to the absolute best of their resourceful abilities.

Boies-Parker goes on to argue that it is not necessary to prove section 7 imposes a positive obligation on the state in order to illustrate that the city bylaws are unconstitutional. She insists, "section 28 of the parks bylaw constitutes a positive interference with the life, liberty, and security of the person ... and has done so contrary to the principles of fundamental justice."¹⁶ Considering that the bylaws make it illegal for people to sleep, and recognizing that one cannot live with sleeping, it is argued that the bylaws strip a person of their right to life. Also, because it has been made illegal for anyone to erect shelter or sleep overnight in public spaces, it is argued that the city bylaws deprive the homeless of the liberty to establish their own safe and secure housing.¹⁷ If they do not have the option to utilize city shelters, they must organize themselves in

a way that allows them to engage in a necessity of life: sleep. Bylaws 91-19 and 92-84 restrict this liberty and force people to sleep as criminals.

In addition, this argument also emphasizes that a restriction to one's right to "security of the person" is being imposed because people without shelter are not able to adequately protect and secure themselves from harm. Security of the person also becomes jeopardized when one considers the restrictions on sleeping within a group. Numerous defendants in the PCC injunction case against Cridge Park campers described the enhanced sense of security and safety that emerged when a supportive group lived together in tent city.¹⁸ For example, defendant Natalie Adams struggled with drug addiction while sleeping on the streets alone, yet "while living at tent city, [she] did not use drugs. It was the first time in her life when she lived with people who cared for her and loved her."¹⁹ Tent city was the first place Mr. Fletcher has felt safe "in years," and all other defendants claimed to feel an increased level of safety at tent city and an overall improved quality of life.²⁰

Finally, the principles of fundamental justice must be highlighted to secure the argument that Victoria bylaws 91-19 and 92-84 violate section 7 of the charter. Based on the proceedings of *R. v. Ruzic*, the courts concluded: "moral involuntariness ... similarly to physical involuntariness, deserves protection under s. 7 of the charter."²¹ *R. v. Ruzic* posits that no person should be penalized for violating a law that they have no choice other than to violate. The current charter challenge of Victoria city bylaws highlights repeatedly that hundreds of homeless people in Victoria involuntarily violate bylaws 91-19 and 92-84. In responding to case *R. v. Ruzic*, Boies-Parker argues that "to deprive the applicants of their life, liberty, and security of the person without affording them a 'realistic choice' is offensive to our societal concept of fundamental justice."²² This concludes the argument for the violation of s. 7 in the charter by bylaws 91-19 and 92-84.

This case is the first of its kind in Canada to be brought to trial. No Canadian courts have ever heard a trial challenging bylaws that prohibit sleeping and erecting shelter in public space.²³ *Vancouver Board of Parks and Recreation v. Sterritt* and *Vancouver Board of Parks and Recreation v. Mickelson* offered similar challenges in 2003, but both were abandoned after losing an injunction hearing. According to Faulkner, cases dealing with the homeless can be challenging to follow through due to the transient nature of those involved and affected by the bylaws, and due to financial limitations.²⁴ Similar cases have emerged in the United States, a number of them resulting in a court ruling against legis-

lation based on constitutional grounds. In *Pottinger v. City of Miami*, the courts concluded that city bylaws prohibiting sleeping and erecting shelter in public spaces are unconstitutional. As a result, “safe zones” were implemented where homeless people unable to access shelters could legally stay.²⁵ The federal appeals court in California ruled it unconstitutional to arrest the homeless for sitting, lying, or sleeping on sidewalks.²⁶ A legal, healthy, and environmentally sensitive tent city called “Dignity Village” emerged from the streets after camping bylaws in Portland were struck down on a constitutional basis.²⁷ It has not occurred within Canada, but challenging camping and sleeping bylaws has proven successful south of the border, which only helps to strengthen this case. A more dignified Victoria is possible.

While Johnston’s case offers sound arguments for the section 7 charter violations of Victoria bylaws, there are other grounds that the courts could use to strike down the challenge, which have been used previously. In Dallas, Texas, the Federal Court of Appeal ruled in favour of anti-camping bylaws under the grounds that those challenging the bylaws did not have sufficient standing to challenge the case. They were not considered to have “violated the law,” but rather had been given tickets for camping.²⁸ This case raised awareness, but overall it resulted in an unsuccessful challenge. In a similar case in San Francisco, the U.S. Federal Courts denied a challenge, arguing there were not “sufficient constitutional barriers” for the case.²⁹ *Roulette v. City of Seattle* is one other similar case that was denied by federal courts.³⁰

Faulkner suggests that the courts could rule that homeless people in Victoria do have the choice to move out of Victoria to a location like Goldstream, where the bylaws are not so severe.³¹ If they do not want to violate bylaws in Victoria, arguably homeless people could settle elsewhere. However, food banks, addiction and mental health services, shelters, counseling, and employment services abound in the city centre in comparison to Goldstream or places away from the Victoria core. To force the homeless away from these services would restrict them from accessing services necessary for maintaining their life. Faulkner also entertained the possibility of the courts forcing the city to increase shelter space, funding, or resources for the homeless, rather than find city bylaws unconstitutional. In maintaining independence of the courts from politics, Faulkner doubts that it is even a possibility that the courts would suggest alternatives to the city about their resource allocation.³² Only the ruling itself will confirm or disprove any hypotheses that people have about the upcoming trial, but, as the court rulings previous-

ly discussed display, a sound argument for unconstitutional bylaws does not necessarily suffice in Court. Faulkner offers the reminder that who the current judges are and how judgments are being made are always important considerations. Nonetheless, she feels "the time is ripe."³³

Regardless of the success of this case, there are underlying political implications of housing and homelessness issues that must be addressed. What is politically interesting about this case is that it highlights the lack of funding and power that municipalities often have to address homelessness and housing shortages. Municipalities largely rely on provincial funding, and when this funding is not adequate to provide shelters and services for the homeless, the municipalities must face the consequences. City of Victoria Community Planner Wendy Zink suggests that "municipalities do not have the financial resources to deal with rising homelessness."³⁴ The only financial autonomy that municipalities have is through their ability to collect property taxes. For this reason, those who pay property taxes (i.e. businesses and owners of home and property) have a stronger voice in local politics than those who do not. Bylaws are then introduced as a mechanism to address local homeless issues, which in turn lead citizens to challenge city bylaws in order to address the rights of the homeless.

A successful charter challenge against Victoria's city bylaws will have no impact on the political inferiority of municipalities. Municipal governments receive an eight per cent share of tax revenues, provinces forty-two per cent and the federal government fifty per cent,³⁵ which reinforces the previous point that municipal governments are highly reliant on property tax revenue and are dependent on the province. The outcome of this case does not change the fundamental power differentials embedded within the political structure.

Aside from municipalities strategically organizing themselves to maximize property tax revenue, imposing bylaws is one other tool of political power that municipalities may utilize. In the same article previously quoting Zink, she also argues, "municipalities are required to use bylaws to respond to large social issues. Homelessness is a national disaster."³⁶ Considering the dependence of municipalities on the province to provide necessary funding for social and affordable housing and services for the homeless, it appears that the introduction of certain bylaws is, at least in part, a response to this lack of power. Municipal bylaws can be introduced and remain unconstitutional until someone challenges them, as is occurring with Johnston's charter challenge. In comparison to other levels of government, municipal governments are more

directly linked with the people and their concerns; therefore, their doors are often the first to be knocked on. When homeless people are sleeping in doorways or parks, because they do not have access to shelters, people tend to confront municipal governments first, because they are directly engaged in the issues; what may be overlooked, however, is the limited municipal capacity to deal with these local issues, and thus the political motivations for introducing bylaws such as 91-19 and 92-84 becomes more clear. Nevertheless, the fragility of municipal resources and political power does not justify introducing unconstitutional bylaws. Furthermore, such a political analysis should not threaten Johnston's case, as unconstitutional bylaws are not an adequate substitute for political resources and power. However, an understanding of political jurisdiction in Canada provides valuable insight into potential motivations behind such bylaws.

Possible solutions to local housing problems include more collaboration among all levels of government, and local governments using their property tax revenue differently. John Irwin suggests municipalities could introduce a "special housing levy on the property tax bill" as occurred in Seattle from 1986-1994.³⁷ He also encourages municipalities to offer housing developers an incentive to include affordable housing in their plans in order to be "fast-tracked through the development approval process."³⁸ The Federation of Canadian Municipalities highlight fiscal imbalance and the \$60 billion infrastructure deficit as the causes of most municipal challenges, and state that "predictable distribution of responsibilities and funding among all orders of government is the only solution."³⁹ There are multiple suggestions for how to strengthen municipalities and their role in dealing with local issues; even still, they remain highly dependent on higher levels of government to initiate political change.

If Johnston's charter challenge is successful, it may not change the political inferiority of municipalities, but it would offer political incentives on all levels to address the needs of the homeless more seriously. If it were legal for the homeless to sleep on public property, it would no longer be acceptable for police or security to move people along when they are unsatisfied with the location of the people. Likely, the visibility of homeless people would increase, opening the political arena up to public and private pressures to deal with the issue. On October 27, 2006, BC Premier Gordon Campbell stated in a speech to the Union of BC Municipalities that in the next budget, the provincial government will increase funding for affordable housing and financial support for municipi-

palities dealing with homelessness issues.⁴⁰ This announcement illuminates a previous point: municipalities are highly dependent on provincial funding in order to address local issues, like homelessness. Faulkner offers a reminder that “while we come at it from different angles, we are all on the same side.”⁴¹ Perhaps this case can offer more incentive to those in higher levels of power and influence to uphold promises and more seriously engage in issues of homelessness and housing so that the right to sleep campaign does not mark the end of Johnston’s efforts.

This case is threatening to all levels of government across Canada. Because this is the first time in Canada that the constitutionality of anti-camping and chattel bylaws has been challenged, if successful, this case would then set a precedent within Canadian law.⁴² This threatens the municipal authority to introduce such bylaws in an attempt to deal with homeless issues under limited resources. It also threatens provincial and federal governments with an issue that would likely become more visible to the public, and therefore impose more pressure to channel resources towards homelessness and housing. As Faulkner suggested earlier, everyone wants homelessness to end; however, actually having to spend more money and resources on the issue is something that limits government flexibility to deal with it as and when they choose. The courts may decide that anti-camping and chattel bylaws violate the charter, thus Johnston’s undeterred patience may result in him being able legally to sleep at St. Ann’s — it may not. Not until the reason for judgment is offered and subsequent appeals are concluded will the legality of this patient struggle be determined.

A political stronghold on municipalities is no justification for unconstitutional bylaws; however, this case opens up the opportunity to explore underlying political fragments and motivations for introducing anti-camping and chattel bylaws. Municipalities are but one voice in this conversation, and by examining the political foundations of municipal power, it becomes clear that what Johnston’s case is challenging moves far beyond unconstitutional bylaws. The impacts could extend deep within the structural foundations of the political arena and drive these conversations more to the surface. It is possible that September 7, 2007 marks the beginning of a trial that places Victoria as the first Canadian municipality to not criminalize people for being homelessness. Involuntary criminals sleeping across the country anxiously await the decision.

Notes

¹ Andrew Ainsley, "Love and Fearlessness: Crimes of Necessity," interactive documentary website, <http://www.loveandfearlessness.com> (accessed November, 2006).

² This paper was written in November of 2006. As of November, 2007, the trial has been delayed while the province seeks dismissal of the case. Unless dismissed, the charter challenge is set to begin January 22, 2008.

³ David Johnston, "Journal of the Occupation of St. Ann's Academy," <http://www.angelfire.com/apes/hatrackman/welcome.htm> (accessed November, 2006).

⁴ City of Victoria, *Parks Regulation Bylaw* 91-19.

⁵ City of Victoria, *Streets and Traffic Bylaw* 92-84.

⁶ The PCC is a provincial Crown Agency that oversees the grounds of provincial property in the capital city. (British Columbia Provincial Capital Commission, "About the PCC," <http://www.bcpcc.com/pages/about.htm> (accessed November, 2006).)

⁷ Irene Faulkner, interview by author, Victoria, B.C., November 8, 2006..

⁸ Faulkner.

⁹ City of Victoria, *Parks Regulation Bylaw* 91-19, s. 28;

City of Victoria, *Streets and Traffic Bylaw* 92-84, part iv, ss. 72-74.

¹⁰ Catherine Boies-Parker, "Statement of Argument," Corporation of the City of Victoria v. Jane Doe, John Doe and persons unknown, Supreme Court of British Columbia, no. 054999 (October 25, 2005), s. 3.

¹¹ Cool-Aid Society, "2005 Homeless Count," <http://www.coolaid.org> (accessed November, 2006).

¹² Boies-Parker, s. 18.

¹³ Ibid., s. 32.

¹⁴ Baker v. Canada (Minister of Citizenship and Immigration), no. 25823, para. 70.

¹⁵ United Nations High Commissioner for Refugees, "International Covenant on Economic, Cultural, and Social Rights," Office of the High Commission for Human Rights.

¹⁶ Boies-Parker, s. 53.

¹⁷ Ibid., ss. 47-46.

¹⁸ Supreme Court of British Columbia, "Statement of Defence," Corporation of the City of Victoria v. Jane Doe, John Doe and persons unknown, Supreme Court of British Columbia, no. 054999 (July, 2006).

¹⁹ Ibid.

²⁰ Ibid., 1-5.

²¹ R. v. Ruzic, no. 26930, para 47, Canadian Legal Information Institute, <http://www.canlii.org/ca/cas/scc/2001/2001scc24.html> (accessed November, 2006).

²² Boies-Parker, s. 61.

²³ Faulkner.

²⁴ Faulkner.

²⁵ Pottinger v. City of Miami, no. 882406,
<http://osaka.law.miami.edu/~schnably/pottinger/pottinger.html> (accessed November, 2006).

²⁶ UPI Wire, "Homeless Not Illegal, Court Rules," *The Post Chronicle*, April 15, 2006,

http://www.postchronicle.com/news/breakingnews/article_21214572.shtml
(accessed March, 2007).

²⁷ Dignity Virtual Village, "Welcome to Dignity Village,"
<http://www.outofthedooways.org/about/index.html> (accessed November, 2006).

²⁸ Johnson et al. v. City of Dallas, no. 94-10875.

²⁹ Joyce v. City and County of San Francisco, no. C-93-4149.

³⁰ Roulette v. City of Seattle, no. C93-1554R.

³¹ Faulkner.

³² Ibid.

³³ Ibid.

³⁴ Shannon Kari, "B.C. Bylaws Targeting Homeless Face Court Challenge," *The Globe and Mail*, Aug 29, 2006.

³⁵ Federation of Canadian Municipalities, *Building Prosperity from the Ground Up: Restoring Municipal Fiscal Imbalance* (Ottawa: Federation of Canadian Municipalities, 2006), 6.

³⁶ Kari.

³⁷ John Irwin, *Home Insecurity: The State of Social Housing Funding in BC* (Vancouver: Canadian Centre for Policy Alternatives, BC Office, 2004), 15.

³⁸ Ibid.

³⁹ Federation of Canadian Municipalities, 3.

⁴⁰ Province of British Columbia, press release,
http://www.gov.bc.ca/bvprd/bc/home.do?action=premier&navId=NAV_ID_province
(accessed November, 2006).

⁴¹ Faulkner.

⁴² Ibid.