

2022 Wilson Moot Problem

Annette Norris v. Calgary (City)

Annette Norris is a 26-year-old woman experiencing homelessness who lives in an encampment in Calgary's Rocky Hill Park. In September 2020, Annette brought an application to challenge a Bylaw passed by the City of Calgary that banned all permanent and temporary overnight shelter in city parks and authorized immediate evictions of encampment residents so that they may be transferred to temporary shelter space provided by the city. Annette claimed that the Bylaw infringed her rights to life, liberty, security of the person, and equality under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

In August 2020, facing a large increase in the number of encampments in city parks due to the COVID-19 pandemic, the City of Calgary passed Parks Bylaw 301-2020 (the "Bylaw"), which provided, in part:

1(1) No person may loiter or take up a temporary or permanent abode overnight on any portion of any park, or obstruct the free use and enjoyment of any park by any person, or violate any bylaw, rule, regulation or notice concerning any park.

(2) Any person who violates this bylaw may be removed from a park and is deemed to be guilty of an infraction of this bylaw.

2 Notwithstanding any other provision of this bylaw, the City of Calgary may only commence removal proceedings under this bylaw if it can provide alternate shelter to persons who have no fixed address and who are unable to provide adequate housing plans to City officials at the time of removal.

On September 2, 2020, Annette and others living in the Rocky Hill Park encampment received a trespass notice ordering them to vacate the park within one week or face eviction.

On September 5, 2020, Annette, supported by the Calgary Encampment Support Network ("CESN"), commenced an application in the Court of Queen's Bench of Alberta, seeking:

- (a) a declaration that the Bylaw infringes her rights to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");
- (b) a declaration that the Bylaw infringes her equality rights under section 15 of the *Charter*;
- (c) a declaration that the infringements of sections 7 and 15 of the *Charter* do not represent reasonable limitations on these rights; and

(d) a declaration that the Bylaw is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*.

The City of Calgary agreed not to evict the residents of the Rocky Hill Park encampment pending final disposition of Annette's application. The application was heard on an expedited basis before Madam Justice Gladys Perez in late September 2020. Madam Justice Perez accepted the following facts:

1. Annette Norris was born and grew up in Red Deer, Alberta. She is a cisgender white female and identifies as heterosexual. Annette's mother passed away when she was six and she and her father moved frequently in Red Deer and the surrounding area. As Annette got older, she had an increasingly strained relationship with her father and dropped out of high school when she was sixteen to move to Calgary.
2. Annette worked a series of low paying jobs in the service industry, including as a bartender and hotel housekeeping, but found it difficult to maintain a steady income. She was often late for work and found it difficult to focus while working. Annette moved frequently within Calgary to be closer to various jobs, but no particular job lasted more than a few months. She began to supplement her income with government support.
3. By April 2018, Annette was unable to find work. Her government support was insufficient to pay her rent. Despite some financial support from friends, she began to fall behind on her rent and her landlord threatened to evict her. Some of Annette's friends told her they were concerned that she was showing signs of depression and anxiety and urged her to seek counselling, but she did not do so.
4. In August 2018, Annette was evicted from her apartment. Although she slept on friends' couches from time to time, she began to live primarily at Outreach Calgary, a temporary shelter located in Calgary's Beltline neighbourhood.
5. Annette did not feel safe while living at Outreach. There were often violent incidents between shelter residents and between shelter residents and staff. Many of the other residents used drugs at the shelter even though this was against the rules. Outreach housed all genders and, while Annette spent her time primarily with other women, she was the target of inappropriate comments and advances made by male shelter residents.

6. In November 2019, Annette was assaulted by a male shelter resident while returning home late in the evening. Annette immediately left Outreach and moved into Glad House, a temporary shelter that only housed persons who identified as female.

7. While at Glad House, Annette able to seek treatment for her depression and anxiety issues, including cognitive behavioural therapy arranged by a Glad House caseworker. Her outlook improved greatly. She was able to get temporary work restocking bookshelves at Calgary's Central Library through an employment assistance program and began taking evening General Education courses to finish her high school diploma. She was placed on a waitlist for subsidized housing and hoped she would be able to leave Glad House in the summer of 2020.

8. When the COVID-19 pandemic began in March 2020, Glad House had uneven success enforcing social distancing protocols. Multiple residents were still housed in the same sleeping quarters, and many did not wear masks in common areas. Glad House experienced an outbreak of COVID-19 in April 2020 and all residents were required to quarantine under local public health guidance. Annette was let go from her temporary employment as Central Library closed and her evening courses were suspended.

9. Feeling trapped and no longer safe at Glad House, Annette looked for alternate shelters but was unable to find any that were able to accept her immediately. Annette and a few of the friends she had made at Glad House left when the quarantine was lifted and began to live in a small encampment in Rocky Hill Park.

10. Initially, the encampment in Rocky Hill Park was small and primarily comprised of tents in a secluded wooded area of the park. The encampment grew rapidly between May and July 2020 from 11 tents housing approximately 20 people to 42 tents housing approximately 80, as shelter residents felt increasingly unsafe due to frequent outbreaks of COVID-19.

11. Supported by CESN, Annette and others began to construct more permanent and safer shelters in the park. These shelters were rudimentary enclosed rooms made of plywood on a small, raised platform, which helped residents to stay dry. Annette was able to live with a small community of friends where she felt secure and supported. Her caseworker from Glad House would sometimes meet with Annette in the park to work on a new plan for her to seek employment. In August 2020, Annette resumed attending her General Education courses at a nearby public school.

12. Residents of the Rocky Hill Park encampment came to live there for many reasons. Many were concerned about the shelter system in Calgary and were uneasy with reported incidents of COVID-19 outbreaks. Others struggled with drug addiction and were evicted from shelters with a zero-tolerance approach to drug and alcohol use. Some wanted to live with pets or have partners or friends visit them but were unable to because of the strict limits placed on visitors permitted in the shelter.

13. Residents of the area around the park increasingly began to complain about drug use, petty crime, and unsanitary conditions in the encampment. Several felt that the park was no longer safe to visit, particularly after dark. Numerous residents petitioned their city councillor to evict encampment residents and restore the damage done to the park by the encampment.

14. The City of Calgary provided data which showed a large increase in the number of complaints made by park users. From June 1 to July 31, 2020, there were 121 complaints made about public drug use (compared to 40 in the same period in 2019), 70 complaints made about violence or threatening behaviour (compared to 10 in the same period in 2019), 150 complaints about human waste in the park (compared to 32 in the same period in 2019), and the Calgary Fire Department was called to respond to three fires that were started by the use of propane tanks in temporary shelters.

15. By August 2020, the number of COVID-19 cases in Calgary had subsided somewhat from the spring peak and shelters put in place safeguards to prevent further outbreaks, including mandating mask use in all indoor common areas, ensuring a minimum of two-metre spacing between beds, and requiring that staff members get tested regularly. The City of Calgary also rented several vacant office spaces and hotels and converted these into temporary shelters, greatly increasing the number of shelter beds available.

16. Given the increase in the number of shelter beds and the reduced incidence of COVID-19 outbreaks, the city decided to take a stronger stance on encampments in city parks. It passed the Bylaw and began to distribute eviction notices to several encampments, including the notice received by Annette and others in Rocky Hill Park on September 2, 2020.

17. As required by the Bylaw, Annette was visited the following day by a city inspector who informed her that, as Annette did not have other housing available, she had a choice of living either in a shelter called Sanctuary Northeast or in a converted motel functioning as temporary

shelter, called Safe Inn. Both shelters were located some distance away from Rocky Hill Park and both housed all genders.

18. Annette refused the alternate shelter arrangements provided on the grounds that both were far away from the support network she had built and that she did not feel safe living in an all-gender shelter, a similar living arrangement to Outreach, where she had been assaulted. Annette contacted legal support at CESN, who agreed to assist her in challenging the constitutionality of the Bylaw.

19. In her affidavit in support of her application, Annette stated:

Rocky Hill Park is the only place I've felt safe recently. In Rocky Hill, I live with my friends and have built a stable community where we support each other through hardship. We care about our home and have always done our best to keep it clean and tidy. I do not do drugs and neither do my friends. While some others living in the encampment may be struggling with substance abuse issues, the city should be supporting those people, instead of using them as an excuse to get rid of the rest of us.

The City of Calgary says that I have been offered safer shelter alternatives elsewhere, but I do not agree. Both Sanctuary Northeast and Safe Inn accommodate residents of all genders. The last time I stayed at a shelter like that, I constantly felt unsafe and ended up being assaulted. Furthermore, both shelters are located far away from my friends, employment outreach workers, and the evening courses I have been taking. If I lived that far away, I would completely lose the support network that has been so essential to getting me back on my feet. The city says it is giving us options, but it really is forcing us to move from a safe place to an unsafe place, and no one should be forced to live like that.

20. Linda Chang, a social worker at CESN, also swore an affidavit in support of Annette's application. She stated in part:

Calgary is experiencing a housing crisis. I work with individuals experiencing homelessness on a regular basis, including Annette. For many people experiencing homelessness in Calgary, parks are the safest place to be. While the city has made good progress in increasing the number of shelter beds recently, a shelter bed is not an adequate substitute for safe housing. Too many shelter residents, especially individuals who identify as female, queer, or Indigenous persons, are exposed to violence, theft, and drug abuse in shelters.

Encampments are often safe and peaceful places. Individuals living in encampments simply want to live within a community they can trust with their personal safety. CESN has taken a leadership role in providing encampment residents with clothing, food, water, and more permanent living structures for the winter months. The City of Calgary cannot provide an adequate substitute for the security that encampment residents feel. Until affordable social housing and proper

government support is available, encampments continue to be a viable – and sometimes the only – safe housing option for many people.

21. Annette also tendered expert opinion evidence from Dr. Jonathan Hazelman of the Department of Urban Studies at the University of Calgary. Dr. Hazelman's evidence was accepted by the Court as follows:

- (a) At least 3,000 people living in Calgary experience homelessness. Of the total number of individuals experiencing homelessness, nearly 70% experience chronic homelessness (defined as individuals currently experiencing homelessness and who either have a total of at least six months of homelessness over the past year, or have recurrent experiences of homelessness over the past three years with a cumulative duration of at least 18 months).
- (b) There are many factors that contribute to homelessness, including housing eviction, addiction issues, or social and emotional challenges. Women are more than twice as likely as men to be homeless as a result of fleeing domestic violence or unsafe housing situations.
- (c) The homeless population is disproportionately comprised of groups marked by social disadvantage, mental and physical illness, and drug dependencies. Individuals experiencing homelessness are 75% more likely to identify as LGBTQ2S+, and 57% more likely to identify as Indigenous, compared to the general population.
- (d) Individuals experiencing homelessness often have physical and mental health problems that become aggravated while they are homeless. Experiencing homelessness has direct adverse health consequences including an increased exposure to infectious diseases and an increased risk of violence and victimization.
- (e) Exposure to the elements, during summer and winter, can be life-threatening. Individuals living outside are at a very high risk of death by hypothermia in the winter months, particularly in Calgary, which has a cold winter climate. Even rudimentary forms of shelter from the elements, such as tents or cardboard barriers, lower the risk of death or serious injury while living outside.
- (f) Evicting individuals from encampments can have severe mental health consequences, as individuals living in encampments are often taken away from support networks and an

environment where they feel secure. Approximately two thirds of individuals who move from living outdoors to a shelter return to living outdoors within six months.

- (g) The COVID-19 pandemic has disproportionately affected shelter residents. The *per capita* number of COVID-19 cases was 15 times higher in shelters than in the general population in Alberta.
- (h) Individuals living in shelters in Calgary experience a higher rate of violence and theft than those living in encampments. This risk is particularly acute for individuals who identify as female and/or LGBTQ2S+.

22. On cross-examination, Dr. Hazelman conceded that individuals living in encampments face unique challenges, including a lack of reliable access to food, water, clothing, and washrooms. Dr. Hazelman also conceded that there have been outbreaks of COVID-19 among encampment residents, and certain encampment residents face incidents of violence. Dr. Hazelman admitted that he could not state with certainty that individuals experiencing homelessness were safer living in encampments than in shelters, but maintained that temporary shelters have many issues that make them unsuitable as an option for long-term housing.

23. Calgary City Councillor Darien Hosseini, who also serves at the Chair of the City of Calgary's Pathways To Shelter ("PTS") program aimed at ending homelessness, provided evidence that:

- (a) Based on his experience, PTS is one of the most aggressive programs adopted by a Canadian city aimed at ending homelessness. Under the PTS program, the city has planned to increase the supply of affordable and subsidized housing by adding over 50,000 new affordable housing units in the next decade, enough to house every low-income Calgarian who applies for housing support.
- (b) PTS also provides increased funding for shelter spaces, and the city has adopted a policy of guaranteeing a shelter space for every individual experiencing homelessness in Calgary and those on the waitlist for affordable housing. Shelters are considered a temporary housing solution until permanent housing can be found.
- (c) Given the opening of new temporary shelters during the COVID-19 pandemic, Calgary now has sufficient shelter space to house all individuals experiencing homelessness,

although the city cannot guarantee that an individual will be able to stay at a particular shelter of their choosing.

- (d) Calgary has taken steps to prevent the outbreak of COVID-19 in the shelter system, including physical distancing and mask wearing measures, improving air circulation and filtration systems, and maintaining a distance of at least 2 metres between beds. The city has additionally invested \$3.4 million towards adopting infection control measures designed to improve hygiene and prevent the spread of the virus in shelters. Incidents of COVID-19 in shelters have been greatly reduced as a consequence.
- (e) Calgary has significant concerns regarding encampment safety. There is limited to no access to adequate sanitation facilities, resulting in frequent reports of human waste in parks. Clean running water is hard to access which exacerbates sanitary issues. Other concerns include sex trafficking, garbage accumulation, pest infestations, and open drug use, which has resulted in fatalities due to inadequate supervision and intervention. There have been numerous fires in encampments, which puts encampment and community residents in danger. Fire risk increases in the winter months as residents use generators, propane tanks, or open flames to keep warm.
- (f) The Calgary Police Service has received numerous reports of criminal activity in parks where encampments are located. The crimes reported range from petty theft and vandalism to violent crimes including sexual assault and drug and human trafficking.
- (g) Complaints from residents in the area have increased regarding noise, threats, harassment, drug use, and waste near encampments, including Rocky Hill Park. Councillor Hosseini corroborated data provided by the City of Calgary that showed a four to five times increase in the number of complaints made to City staff about these issues. Several residents have complained that they are now afraid to enter parks where encampments are located, particularly with their children, and city staff have faced harassment and threats from shelter residents.
- (h) The Bylaw was passed to address the concerns raised by community residents living in proximity to encampments, such as the one in Rocky Hill Park, as well as to protect the safety of individuals living in encampments.

- (i) Under the Bylaw, no eviction can occur unless an encampment resident is guaranteed temporary shelter. The city assists with moving the resident and their belongings to the shelter. While the city cannot guarantee accommodations in any particular shelter, reasonable efforts are made to accommodate requests. If a shelter is located some distance from support programs and community resources, the city provides public transit fare to travel.

24. On cross-examination, Councillor Hosseini conceded that there is no fixed timeline for moving shelter residents to permanent housing, and that the waitlist for permanent housing may exceed a year.

25. Councillor Hosseini also acknowledged that many instances of criminal behavior in city parks did not involve encampment residents. He admitted that there were complaints of noise, drug use, and alcohol consumption in Rocky Hill Park long before the encampment was established. The park is known as a place for social gatherings, particularly among young people in the area.

26. When asked if requests for accommodation in same-gender shelters were respected, Councillor Hosseini said that “our priority is getting a roof over people’s heads, and while we always do our best to ensure safety, we can’t accommodate every single request.”

Madam Justice Perez granted Annette’s application in October 2020, holding, in part:

If the guarantee of “security of the person” in the *Charter* is to have any meaning, it must protect the right to secure and stable shelter. The other rights guaranteed in the *Charter* would have very little meaning if this most basic of human necessities is not protected. The Bylaw deprives individuals of the right to shelter by allowing for forcible eviction from safe – albeit imperfect – shelter for individuals who do not have other viable options. The fact that the City of Calgary provides alternative shelter options to encampment residents does not save the Bylaw from violating the right to security of the person. As the evidence before me demonstrates, temporary shelters are rife with hazards. The City of Calgary does not have the right to force Ms. Norris and others to move far away from their support networks into an environment where they feel unsafe.

While the stated goals of the city are to address safety concerns on behalf of area residents and encampment residents, the Bylaw does not address either of these issues effectively. First, it applies to all parks in the city, regardless of whether safety issues have been raised or not. Second, the evidence before me suggests it is not possible to quantify an increase in crime or solely attribute this to encampment residents. Finally, forcibly removing encampment residents may in fact place them at even greater risk of harm.

I find that the Bylaw is not saved by section 1 of the *Charter* and must be declared to be of no force or effect. While I can accept that the need to maintain public health and public safety is indeed a pressing and substantial objective, the Bylaw is not rationally connected to these aims, is not minimally impairing, and has a disproportionate impact on Ms. Norris' rights.

Considering these findings, I need not address Ms. Norris' submissions on section 15. While I have a great deal of sympathy for Ms. Norris' submission that "homelessness" should be considered an analogous ground of discrimination under section 15, I do not propose to recognize it as such for the purposes of this application.

The City of Calgary appealed the decision of the Court of Queen's Bench, and in February 2021, a majority of the Court of Appeal of Alberta allowed Calgary's appeal. Writing for herself and Mr. Justice Park, Madam Chief Justice Hockley wrote, in part:

With respect, I cannot agree with the application judge that the Bylaw violates Ms. Norris' right to security of the person under section 7 of the *Charter*.

What Ms. Norris is really seeking in her application is the claim to a positive benefit: the obligation of government to provide housing that she deems acceptable. In my view, section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. No deprivation has occurred here.

While other courts have found that section 7 may be engaged by similar bylaws, those decisions largely turned on the absence of alternative shelter for those evicted from sleeping on public property. The evidence here is quite different. The City of Calgary significantly increased the number of shelter spaces, and the Bylaw expressly does not permit forced eviction unless alternative shelter space is available. The application judge failed to give this factor meaningful weight in her analysis.

Section 7 does not give Ms. Norris the right to choose a specific type and location of shelter – it simply provides that the state cannot deprive her of shelter in a way that violates her right to security of the person. By offering reasonable alternatives, the City of Calgary has not deprived Ms. Norris of this right. Her application must fail on this basis.

Mr. Justice Sayed dissented, largely adopting the reasons of Madam Justice Perez, and adding:

I agree with the court below that the Bylaw is an unconstitutional violation of Ms. Norris' right to security of the person. However, I would go further. The Bylaw also violates Ms. Norris' right to liberty. The right to liberty grants the individual a degree of autonomy in making decisions of fundamental personal importance. The right to determine where to live, sleep, and build a home is very clearly a decision of fundamental personal importance. The Bylaw deprives Ms. Norris and others of the right to liberty as it forces them to live in a shelter designated by the city, regardless of its suitability or to the potential dangers posed in living there. Ms.

Norris had no choice but to be placed in an unsuitable place to live. In my view, this is a clear deprivation of the right to liberty which did not occur in accordance with the principles of fundamental justice.

I respectfully disagree with my colleague the Chief Justice in her determination that Ms. Norris is seeking a positive benefit. Ms. Norris is simply asking that the City of Calgary refrain from taking action, not that it provide her with a benefit. In any event, I am less certain than my colleague that section 7 of the *Charter* cannot encompass positive rights in this context, but I will leave that issue for another day.

In my view, the Bylaw also infringes Ms. Norris' rights under section 15 of the *Charter*. I would recognize "homelessness" as an analogous ground. Analogous grounds of discrimination serve as the basis for perpetuating improper distinction not based on merit but rather on a personal characteristic that is immutable or changeable only at unacceptable cost. The status of experiencing homelessness cannot be changed except over an extended period of time, often with significant state assistance.

Even if homelessness were not an analogous ground of discrimination, I find that the adverse impact of the Bylaw on other protected groups is substantial. As is clear from the evidence, individuals experiencing homelessness are often disproportionately Indigenous persons, LGBTQ2S+ persons, and persons with disabilities, including addiction. A section 15 analysis must consider the intersectionality of multiple enumerated or analogous grounds.

For the reasons given by Justice Perez, I agree that these infringements of sections 7 and 15 of the *Charter* are not saved by section 1.

Annette has been granted leave to appeal the Court of Appeal's judgment to the High Court of the Dominion of Canada on the following issues:

- (a) Does the Bylaw infringe Annette Norris' rights to life, liberty and security of the person under section 7 of the *Charter*?
- (b) Does the Bylaw infringe Annette Norris' equality rights under section 15 of the *Charter*?
- (c) If the answer to either of questions 1 or 2 is "yes", is the infringement a reasonable limitation on those rights that is demonstrably justified in a free and democratic society?¹

¹ Note that the High Court of the Dominion of Canada will not consider any legislative or adjudicative facts other than those found by Justice Perez.