

It would not surprise most casual observers that property law generally does not afford protection to those without property. However, for those who are poverty stricken, it means that there is little protection for their own safety and well-being. This comment will discuss the extent to which impoverished Canadians are protected by property law (Ontario property law in particular), including the obstacles that exist and the potential solutions to these obstacles offered by Bill C-304. First, the concepts of the necessity test, adverse possession, and abandonment will be tested against the challenges posed by poverty. This comment will then briefly assess the potential of Bill C-304 to fill in the gaps left by these common law principles.

Poverty manifests itself in several different ways. In addition to those who find themselves on the street, many find themselves in homeless shelters and in substandard and/or overcrowded housing. While these may serve as temporary solutions for those fortunate enough not to end up on the street, they are highly short term solutions. This leads many suffering from poverty to seek refuge wherever they can, often in contravention with the law.

One example of this is the case of *Southwark London Borough Council v Williams*¹ (*SLBC*), where two families sought refuge in unoccupied homes and were sued by the local authority. Though the case is from 1971, it is not difficult to contemplate a scenario today of a family desperate because of an inability to afford rent (as was the case of the Williams family) or one forced to leave a house because of abhorrent living conditions (as was the case of the Anderson family). In fact, the Canada Mortgage and Housing Corporation has reported that as of 2006, 1.5 million Canadians could not afford their rent or were living in residences that were either overcrowded or in need of major repairs.² In *SLBC*, although the houses occupied by these families were deemed unworthy of repair or occupation, an order for possession was made against the defendants.

SLBC is particularly notable for the precedent it set for the scope of the common law defence of necessity. Lord Denning limited the applicability of this defence to certain situations of “imminent peril” and decided that the circumstances of the defendants did not necessitate taking refuge in these homes. This same defence was re-attempted in the Canadian case of *R v Clarke*³, 27 years later. In that case, the accused was charged with mischief for the attempted occupation of a vacant building in Toronto to raise social awareness about poverty and homelessness. Although the necessity defence was rejected by Justice Cole, his comments imply that he only rejected the argument because the accused was not homeless himself.⁴ This

suggests that the necessity defence may be useful for the homeless in this context in the future. In addition, Justice Cole appeared to accept the possibility of either an abandonment or adverse possession claim being successful defences for these claims.⁵

While the necessity defence may hold promise in the poverty context, the concepts of abandonment and adverse possession would be ineffective for those in similar circumstances to the defendants in *SLBC* or *R v Clarke*. For property to qualify as being abandoned, the true owner must give up actual control and the intention to control, to the exclusion of others.⁶ In *R v Clarke*, actual control was maintained by the placing of plywood on the doors and windows, while intention to control was maintained by the periodic inspections carried out by the owner.⁷ Though actual control may have been given up in *SLBC*, the fact that the houses were cued to be torn down would most likely be construed as intention to control, meaning that possession would default to the true owner. To make a successful claim of adverse possession in Ontario, the true owner must be dispossessed for the full statutory period of 10 years.⁸ Even if occupiers in situations such as *SLBC* and *R v Clarke* can prove that the true owner was effectively dispossessed, this statutory period would make adverse possession an unrealistic strategy in Ontario. Furthermore, Ontario's *Land Titles Act* imposes additional barriers, since any land registered under this system will be generally immune to claims of adverse possession.⁹

The best, albeit imperfect, legal protection available to homeless people seeking refuge is the *Canadian Charter of Rights and Freedoms*, as demonstrated in *Victoria (City) v Adams (Adams)*.¹⁰ In that case, a group of homeless people erected a tent city in a public park because of an insufficient quantity of shelter beds available. This violated a bylaw enacted by the city forbidding the construction of structural shelters in this area. The city applied for an injunction and the defendants argued that it would violate their section 7 right to life liberty, and security of the person. The city attacked this claim on the grounds that the government did not take action to cause the state of homelessness. The court rejected this argument, recalling J. Waldron's assertion that it is incumbent upon society to make public spaces available to the homeless if an economic system producing homelessness is to be tolerated.¹¹ However, the court was particularly cautious to avoid the perception that a property right was being granted,¹² since property rights are explicitly omitted from the *Charter*. This treatment of section 7 suggests that it would not be a useful defence in an *SLBC* scenario which deals with private property.

Therefore, while preventing the government from taking action against homeless people sleeping

in outdoor public spaces, the decision does nothing to alleviate the unnecessary exclusion of homeless people from unoccupied buildings, which could provide much more adequate shelter during extreme weather conditions (such as frigid temperatures).

Furthermore, even if the *Adams* case is to be perceived as a victory for the homeless, it does nothing to address the problem of inadequate housing in general. It is telling that the British Columbia Court of Appeal gave an explicit assurance that they were not imposing a “positive benefit” on the municipal government.¹³ *Adams* demonstrates that when *Charter* rights are triggered the court becomes able to grant a remedy, but reminds us that there is no *Charter* right encompassing a right to adequate housing. Even though *SLBC* demonstrates that inadequate housing can often lead families and individuals to desperation, they do not involve the government deprivation of liberty and accordingly do not invoke the *Charter*. Since the common law doctrines of adverse possession and abandonment have impractical requirements, it may be that the only recourse is to draft new legislation, such as Bill C-304.

Bill C-304 seeks to address both problems of homelessness and inadequate housing by proposing a national strategy to combat poverty. The bill requires that this national strategy “includes provision for temporary emergency housing and shelter in the event of disasters and crises”¹⁴. This may address the kind of situations that arose in *SLBC* where the families occupied abandoned buildings due to desperate circumstances. However, it also bears a resemblance to section 21 of the *National Assistance Act* cited by the defendants in *SLBC*, which requires the local authority to provide “(b) temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine.”¹⁵ This clause prevented the defendants in *SLBC* from succeeding because it was decided that their circumstances could have been reasonably foreseen. Bill C-304, on the other hand, omits foreseeability and extends the principle from *Adams* stating that homelessness is not a choice.¹⁶ Likewise, it is often not a choice to live in a residence that is unaffordable, inadequate, or unsuitable. By requiring that existing housing meets health security and safety standards¹⁷, Bill C-304 may prevent those like the families in *SLBC* from needing to seek refuge in unoccupied homes.

One potential shortcoming of the bill is the absence of a concrete mechanism to mitigate the legal impediment faced by those affected by poverty, even when the law is on their side.

Although the defendants in *Adams* were fortunate enough to be represented on a *pro bono* basis, this option is not available to many impoverished people who have no financial capability to hire legal counsel. While one clause of the bill requires “a process for the independent review, addressing and reporting of complaint about violations of the right to adequate housing”¹⁸, it is unclear whether the homeless would still be forced to seek legal assistance. However, by using the word “independent”, it does ensure that complainants will not have to report violations to a minister who is connected to the institution being complained about (as was the case in *SLBC*). As well, guided by a set of standards based on the objectives laid out in the bill, this review process could have greater latitude than the courts have traditionally had.

It is clear that while legislation would be the most effective way to address these issues, there may be other short term solutions. If Bill C-304 fails to correct the insufficient protection afforded to individuals by current statute and common law, *Clarke* demonstrates that the necessity defence may be interpreted more broadly in the future. In addition, *Adams* confirms that those suffering from homelessness may be protected by the *Charter* if their needs are not framed as property rights. If the court recognizes that the health and safety risks posed by a lack of shelter involve the security of the person, it is conceivable that one day they may accept that the health risks posed by inadequate housing are justiciable using the same approach.

¹ *Southwark London Borough Council v Williams* [1971] 2 WLR 467 (UK CA) *Williams*].

² Prof. David Wiseman, “Property & Poverty” (Lecture delivered at the Faculty of Law, University of Ottawa, 15 October 2005) [unpublished].

³ *R. v. Clarke* [1998] OJ No 5259 (QL) [*Clarke*].

⁴ *Ibid* at para 34.

⁵ *Ibid*.

⁶ *Popov v Hayashi*, [2002] WL 31833731 (Ca Sup Ct), reprinted in Bruce Ziff et al., *A Property Law Reader: Cases Questions and Commentary* (Toronto: Carswell, 2008).

⁷ *Clarke supra* note 3 at para 5.

⁸ *Real Property Limitations Act*, RSO 1990. c L-15. s 4.

⁹ *Land Titles Act*, RSO 1990, C L-5 s 51.

¹⁰ *Victoria (City) v. Adams* [2009] B.C.J. No. 2451 (QL) [*Adams*].

¹¹ J. Waldron, “Homelessness and the Issue of Freedom” (1991) 39 UCL Rev 296, reprinted in Bruce Ziff et al., *A Property Law Reader: Cases Questions and Commentary* (Toronto: Carswell, 2008).

¹² *Adams supra* note 10 at para 98.

¹³ *Ibid* at paras 95-96.

¹⁴ Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 2nd Sess, 40th Parl, 2009, cl 3(3)(h) [*Housing*].

¹⁵ *Williams supra* note 1 at para 474.

¹⁶ *Adams supra* note 10 at para 105.

¹⁷ *Housing supra* note 13 at cl 3(3)(i).

¹⁸ *Ibid* at cl 5(1)(d).