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Constitutional Challenge to Gang-Affiliation Law Scores (Interim) Win

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Case Commented On: *Barr v Alberta (Attorney General)*, 2016 ABQB 10

Last spring, I posted a comment flagging the constitutional concerns surrounding section 69.1 of the *Gaming and Liquor Act*, RSA 2000, c G-1, the province's gang affiliation law (here). The provision authorizes police officers to remove or exclude anyone from a licenced premises based on their belief that the target of removal is connected, in varying degrees, to a gang (see section 69.1 here). Failing to comply with this direction is an offence punishable by a fine and/or a maximum of 6 months in prison (*Gaming and Liquor Act*, sections 116, 117; *Barr v Alberta (Attorney General)*, 2016 ABQB 10 at para 3).

The gang affiliation law is meant to protect bar owners by diminishing gang presence in bars and de-incentivizing the lifestyle to potential recruits (*Barr* at para 6). Despite this laudable goal, the law raises several red flags under the *Charter*: it appears overbroad both in its sphere of application (it applies not only to bars, but all licenced premises) and targets for removal (including not only gang members, but persons who support or facilitate gangs, or persons *in the company* of any of those persons). It also appears to contravene the *Charter*'s guaranteed freedoms regarding peaceful assembly and association. I encourage readers interested in the provision to read my earlier post here.

At the time of my earlier post, no formal challenge to the law had been launched. Fast-forward one year and the anti-gang provision now faces a direct constitutional challenge stemming from an incident in September 2014. This month, the Applicants in that challenge scored a big procedural victory that, while not determinative, bodes well for future of their challenge (see *Barr v Alberta (Attorney General)*, 2016 ABQB 10). It also raises several questions about the Crown's approach to this issue.

Facts

Barr was an application to strike portions of several affidavits. The two Applicants, Mr. Barr and Mr. Kirkland, were criminally charged after refusing to leave a licensed premise as directed by the RCMP in September 2014, in direct contravention of the law (*Barr* at para 2).

In June 2015, Barr and Kirkland commenced an Originating Application in the Alberta Court of Queen's Bench. This Application seeks a declaration that that the gang affiliation law is of no force and effect because it is *ultra vires* the Province of Alberta, and/or that it unjustifiably infringes section 2 of the *Charter* (*Barr* at para 1).

The Respondent Crown filed (at least) six affidavits in its defence. From the information provided in *Barr*, we know the affiants included several Alberta peace officers and at least one expert on crime prevention and organized crime (*Barr* at paras 7, 11, 12, 14).

Counsel for the Applicants objected to the content of these affidavits, arguing that they contained several excerpts which offended the Alberta Rules of Court, Alta Reg 124/2010 (the Rules). In particular:

- The affidavits contained inadmissible hearsay evidence. According to Rule 13.18(3), affidavits filed in connection with a final application must be sworn on the basis of personal knowledge and belief. Four of the Crown's affidavits were based, at least in part, on hearsay evidence. Given that a final order was sought (a declaration that s. 69.1 was of no force and effect) that offensive content must be struck.

- The affidavits contained inadmissible opinion evidence. Opinion evidence is admissible if it comes from an appropriately qualified expert. Two of the Crown's affidavits provided opinion evidence giving the form and appearance of expert evidence. However, these persons were not offered to the Court nor qualified as experts in accordance with the Rules.

- The affidavits were not relevant. One of the opinion-laden reports was focused on American crime reduction statistics. According to counsel for the Applicants, this evidence was completely irrelevant to the legal question (the Canadian constitutionality) of the impugned provision.

In response, the Crown argued that the Applicants were viewing the Rules too strictly (*Barr* at para 13). In the Crown's view, the Rules ought to be read liberally when the Crown was asked to defend legislation enacted for the public good. An overly restrictive reading would unnecessarily restrain its ability to explain why the provision should survive constitutional attack (*Barr* at para 6).

The Crown argued that the impugned law offered a better approach than other provinces had developed to deal with the same problems. Explaining this benefit required broad affidavits outlining the historical experience of Alberta peace officers, along with other Crown evidence. "[S]trict adherence and slavish obedience" to the Rules would unduly prevent the Crown from advancing its argument (*Barr* at para 7). So long as the police were exercising their discretion objectively and rationally, the Crown argued that they ought to be given latitude and the provision ought to be upheld (*Barr* at para 7).

Justice Sanderman agreed with the Applicants. The Rules were designed to regulate litigation fairly and to ensure that all parties are aware of the framework in which the litigation will proceed. The Crown's reliance on inadmissible evidence would subvert this process (*Barr* at paras 9, 13).

The Crown was right that it ought to be afforded some latitude to define the case as it saw fit, but not for the reason it suggested. Given that the matter proceeded by way of Originating Application, there was no Statement of Defence to use as a reference in defining the Crown's view of the matter, or the relevant parameters of the action. However, this latitude does not entitle the Crown to offend an evidentiary or procedural rule (*Barr* at para 9).

As a result, portions of several affidavits were struck because they offended the rules on hearsay. Two affidavits had additional portions struck because they contained opinion evidence from persons who were not offered as experts capable of providing these opinions. One affidavit was

disallowed entirely because it contained expert evidence that was not properly submitted, and additionally, the evidence within it was not relevant to the proceedings (*Barr* at paras 11, 12, 16).

Discussion

This case doesn't provide any final resolution of the constitutional issues raised by Mr. Barr and Mr. Kirkland. It does, however, offer some insight into how the case will be argued. It also raises some questions about Crown counsel's approach to the Rules of Court.

The Upcoming Challenge

I haven't had the opportunity to read the Crown's affidavits, either in their final or amended form. With that caveat in place, based on the discussion in *Barr* we know that they focus on the fact that the law is necessary, works well in practice, protects the public good, and is properly enacted. Or, in *Charter*-speak, the affidavits are focused on a section 1 argument that the law is rationally connected to a valid objective. While these arguments may or may not be persuasive, by themselves they are not enough for the law to survive a constitutional attack. A law may be rationally connected to a valid object, and yet fail a constitutional challenge.

Indeed, this is often the case. Most *Charter* challenges fail at the minimal impairment stage of inquiry (Peter Hogg and Allison Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)", (1997) 35:1 Osgoode Hall LJ 75 at 85). Unless a persuasive argument can be made that the gang-affiliation law is minimally impairing and, after that, is a generally a proportional response, it will fail constitutional scrutiny.

It may be that the affidavits do cover these points in areas that were not the subject of the application to strike. However, based on the sweepingly broad blanket this law creates, in my opinion the minimal impairment stage of the section 1 test is a steep hill for the Crown to climb.

The Crown's Arguments in Defence of their Affidavits

As a civil liberties lawyer, I find the Crown's defence of this application troubling on two points.

First, it is concerning to hear the Crown argue that a different standard of compliance with the Rules ought to apply to them because they are defending a law enacted in the public good. This idea runs contrary to the rule of law. In a country governed by the rule of law, everyone – including the Crown – follows the same rules. The Crown's chosen defence strategy should not impact its compliance with the basic rules governing litigation. They should not be granted latitude because the Rules make it more difficult for them to advance their arguments.

It also bears emphasizing that the Crown's argument (that the law was enacted in the public good) is not unusual or unique. Indeed, in every *Charter* challenge, the Crown must establish that the impugned law is enacted for the public good (the pressing and substantial objective test). Arguing that this should dictate a more lenient standard for affidavits is tantamount to arguing that the Crown shouldn't have to follow the Rules as closely as other parties in *Charter* challenges.

Second, the Crown argued that the gang-affiliation law should be upheld so long as the police used it objectively and in a rational and principled fashion. This is not how *Charter* challenges should work, and raising the argument in Court displays a problematic attitude of the Crown towards its obligations. Law enforcement may exercise their discretion with every law in a rational and principled fashion. Indeed, we all hope that is the case in every situation. However, if the law is drafted in such a way that it authorizes a sweeping disregard for an individual's *Charter* rights without reasonable justification, it must be struck down.

The Crown's approach to this case (as revealed through the application) raises questions about the Crown's method for defending the gang-affiliation provision. Only time will tell whether the Crown's loss in *Barr* was the result of simple oversight, or whether it was part of a larger strategy or a gamble that didn't pay off. In the meantime, we are left wondering what the fate of the gang-affiliation law is, and how the Crown will approach the case on a go-forward basis. While litigation can be unpredictable, at this juncture the loss in *Barr* can only be seen as tilting the odds of success in favour of Mr. Barr and Mr. Kirkland.

Stay tuned on this one.