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Unconstitutional Regulatory Offences: Too Much and Too Little at Stake

By Donald MacCannell

Cases Considered:

R. v. Keshane, 2010 ABPC 275

In a thorough 22 pages, Provincial Court Judge Donna Groves acquitted Renada Lee Keshane of a $500 ticket for fighting in public. Ms. Keshane was ticketed under a decade-old provision of Edmonton's *Public Places Bylaw*, Bylaw 14614, which, the Court ruled, violates the constitutional division of powers. While the cost of litigating this ticket almost certainly dwarfed the fine at stake, constitutional review of bylaw offences is predictably and disturbingly sparse. "Fighting in Public" and similar provisions impose considerable limits on behaviour, but are rarely worthwhile to litigate. The potential result is the injustice of a longstanding unconstitutional provision.

Section 7 of Edmonton's *Public Places Bylaw* requires that:

> 7. A person shall not participate in a fight or similar physical confrontation in a public place.

The penalty is $500 for a first offence, and $1,000 for subsequent offences (*Public Places Bylaw*, section 23(2)(c)).

Ms. Keshane argued that section 7 is a criminal provision, subject only to federal regulation (para 4-6, 15). The City of Edmonton relied on the double aspect doctrine, and argued that public fights are subject to both federal and provincial regulation (paras. 17, 18).

Judge Groves considered the purpose and effects of section 7 as well as extrinsic evidence relating to the adoption of the provision and its enforcement practices. She concluded that section 7 would rarely be applied to sanction people who fought "in an open field", where no disturbance is caused (para 59). Most accused people, she reasoned, would also have caused a disturbance, which is a criminal offence. As a result, the "most significant effect of section 7 is that people who are committing criminal offences are being issued violation tickets" (para 62).

The Court ruled that the double aspect doctrine did not apply, reasoning that the City was not attempting to regulate the use of property so as to suppress fighting. It was regulating the behavior of fighting (para 91, 103-106). In short, there wasn't a provincial head of power which could support the provision. It was criminal in nature, within the exclusive jurisdiction of the federal government under section 91(27) of the *Constitution Act, 1867*, and the double aspect doctrine did not apply (para. 106).

While Judge Groves' decision does not bind any other court, if followed, it has the potential to resolve three serious policy problems that surround the offence.

First, section 7 imposed mandatory minimum penalties where a criminal conviction for the same conduct would allow for lower fines or non-monetary penalties. The Court considered this at para. 99.

Second, section 7 did not import defences under the *Criminal Code*, R.S.C. 1985, c.C-46. On a plain reading, a person who fights in self-defence could still be ticketable, unless criminal defences can be accessed through the doctrine of federal paramountcy. It was the express intention of the City of Edmonton to dispose of consent as a defence (para. 33).

Third, and generally applicable, is the potential for escalation. A person who commits a municipal or provincial offence is under a duty to identify him or herself to police. Failure to comply with this obligation constitutes the criminal offence of obstructing a peace officer in the execution of his or her duties (see *R. v. Moore*, [1979] 1 S.C.R. 195 and section 129 of the *Criminal Code*). The obstruction offence permits an officer to arrest that person (section 495 of the *Criminal Code*). If the person resists the arrest or assaults the officer, an even more serious criminal charge materializes out of what, at the start, was only regulatory misconduct.

This potential remains a concern with several unchallenged bylaws. The foremost example may be found in Calgary's *Transit Bylaw*, Bylaw 4M81, section 14:

> 14(1) No person shall, in or upon any transit vehicle, passenger shelter, transit station, 7th Avenue Transit corridor, or any other property owned or occupied by The City for the purposes of Calgary Transit: ...
>
> (c) use profane, insulting or obscene language... .

A person is liable to a fine of $100 on conviction under section 14. The provision is drafted so broadly that even benign comments are captured by the offence. "Dinner was awful" is inescapably insulting language.

More to the point, s. 2 of the *Canadian Charter of Rights and Freedoms* guarantees freedom of opinion and expression. In any other context, one is entitled to be as insulting as she likes, so long as she falls short of a criminal offence. By contrast, the Bylaw makes rudeness an offence. If an accused person doesn't cooperate in the issuance of the violation ticket, rudeness is criminalized.

There is a social benefit in exposing these offences to judicial scrutiny and yet it is a pleasant surprise that Ms. Keshane came before the Court. For an accused person, the cost of the ticket is almost certainly lower than the cost of advancing a constitutional challenge. For the Crown, it remains an option to apply to withdraw charges, an application only a confident and politically-motivated accused person would oppose. Yet, there remains a great deal at stake in terms of what conduct does and does not entangle one with the police. A test case would demand competent advocacy, but offer little compensation. There is, as a result, a lack of judicial consideration and no access to precedent. At trial, Ms. Keshane was represented by Student Legal Services (SLS), a charitable legal service run by Edmonton law students. If SLS had not taken on the case, s.7 of the *Public Places Bylaw* might still stand.