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"Safe and enjoyable and reasonable use": Of public space, public fighting and Edmonton's defence of its Public Places Bylaw

By Geoff Ellwand

Cases Considered:
R v Keshane, 2011 ABQB 525

A recent Alberta Court of Queen's Bench decision, *R v Keshane*, 2011 ABQB 525 ("*Keshane*") has further refined the contentious, and important issue of how much control a municipal authority can have over shared public space. The judgment in *Keshane* decisively rejected a defence that the passage and application of a City of Edmonton bylaw prohibiting public fighting was beyond the power of the municipal government. In its judgment the court concluded that Edmonton's *Public Places Bylaw* was a valid exercise of municipal authority because (at para 118) "in pith and substance it relates to the purpose of providing safe and enjoyable public places for the benefit of all residents of and visitors to the City…". The court determined that as a consequence the bylaw fell within provincial authority "as either or both a matter of property and civil rights in the province under subsection 92(13) of the *Constitution Act, 1867* or a matter of merely local nature under section 92(16)." The Queen's Bench judgment overturned an earlier lower court decision *R v Keshane*, 2010 ABPC 275 (per Judge D.M. Groves) which reached almost exactly the opposite conclusion. The Queen's Bench judgment is the latest in a string of recent cases in both Alberta and British Columbia in which Constitutional challenges have been launched against municipal restrictions on activities in public space.

Background

According to the unchallenged facts in *Keshane*, this matter had its genesis on a spring evening, May 27, 2009, when Renada Lee Keshane became involved with a male, unknown to her, on a city sidewalk outside an Edmonton bar. In the course of several encounters which appear to have escalated in hostility, the man slapped Keshane across the face, then some time later, she kicked the male which led soon after to an exchange of blows. The police broke up the fight. There is no evidence anyone was hurt. The investigating officers concluded that this was a consensual fight and thus did not constitute assault under section 265 of the *Criminal Code*, RSC 1985, c C-46 (and it appears they also concluded the events did not warrant a section 175 *Criminal Code* charge of causing a disturbance.) Instead, they chose to address what was later described in the judgment (at para 90) as a "legislative gap" in the *Criminal Code* and issued Keshane a ticket for fighting in public, a violation of section 7 of the City of Edmonton's *Public Places Bylaw* 14614. The minimum penalty for a first offence is $500. When the matter reached the Provincial Court Keshane freely admitted she took part in the fight but pleaded not guilty. The essence of her defence was that section 7 of the *Public Places Bylaw* sought to regulate fighting, which is an offence under the criminal law and thus, she argued, beyond the power of a municipality to enact. The argument relied on subsection 91(27) of the *Constitution Act* which grants to the

federal government exclusive jurisdiction over criminal matters. Keshane's defence was conducted by law students from the University of Alberta (see Donald MacCannell's October 1, 2010 ABlawg post "Unconstitutional Regulatory Offences: Too Much and Too Little at Stake"). The students' argument proved persuasive. In September 2010, Provincial Court Judge Donna Groves in a detailed judgment agreed that the bylaw contained all the prerequisites to be considered criminal law and further it could not be saved by the double aspect doctrine. She therefore concluded that section 7 of the impugned municipal bylaw was in pith and substance criminal in nature and thus encroached on subsection 91 (27) of the *Constitution Act*, "by infringing within federal criminal jurisdiction…". Groves J. dismissed the charge against the accused, Keshane.

The judge's analysis was not shared by the City of Edmonton. Within days of the release of the Provincial Court judgment a City lawyer, Steve Phipps, announced that Edmonton intended to seek an appeal. "While we respect the decision" he told a local newspaper, "we feel the proper legal test was not applied" (Tony Blais, "City fighting to retain fighting bylaw" *Edmonton Sun* 22 September 2010).

The brief newspaper article does not specifically explore with the solicitor why Edmonton undertook an appeal in this case, but the City's subsequent actions and the argument it made before the Court of Queen's Bench certainly suggest the City's motivations. Perhaps most importantly it acted because this was a successful Constitutional challenge to an Edmonton bylaw, which while not binding on other courts, called out for clarification not just for Edmonton but for other municipalities with similar bylaws. For example, Calgary's Bylaw 54M2006 *To Regulate Public Behaviour* contains at section 3 essentially the same anti-fighting provision:

> 3. No person shall participate in a fight in any public place.

Furthermore, in the City of Edmonton's submission it was argued that the trial judge erred on several key points including (at para 19):

> 1) in determining the pith and substance of section 7 of the Bylaw when she:
> (a) failed to consider intrinsic evidence of purpose contained in the Bylaw;
> (b) misconstrued the extrinsic evidence of purpose;
> (c) failed to determine the purpose of the Bylaw;
> (d) placed undue emphasis on the *Criminal Code* in determining the legal effect of the Bylaw…

The Queen's Bench Decision

In her judgment, Madam Justice June Ross of the Court of Queen's Bench concurs with the lower court analysis that the issue before the Court is whether Edmonton's *Public Places Bylaw* is *ultra vires* the City. Ross J. also accepts the facts as outlined in the Court below. But beyond that there is little agreement with the judgment handed down in the Provincial Court. Ross J. does however acknowledge the difficulties this case raises and (at para 68) quotes Professor Peter Hogg that in cases such as these, courts are required "to draw a distinction between a valid provincial law with an ancillary penalty and a provincial law which is invalid as being in pith and substance a criminal law. The elusiveness of that distinction creates uncertainty about the scope of provincial power under section 92(15) as well as the scope of federal power under section 91(27)." But Ross J. points out (in para 69) that the Supreme Court of Canada has

addressed that elusive distinction a number of times and once again quotes Professor Hogg that the "dominant tendency of the case law has been to uphold provincial penal legislation".
It is a case that did not uphold a municipal bylaw, *Westendorp v The Queen* [1983] 1 SCR 43 ("*Westendorp*") that Ross J. (at para 98) calls "central to this case". In *Westendorp* the Supreme Court struck down a Calgary bylaw which contained provisions to prevent a person from remaining on the street or approaching another person for the purposes of prostitution. It was *ultra vires* Ross J. observes because it dealt with (at para 77) "a matter of public morality that was beyond the competence of the provincial legislature ".

Ross J. draws several distinctions between the fighting bylaw and *Westendorp* concluding at para 109:

> Section 7 also differs from the prostitution bylaw in that the nature of the prohibited conduct does not stand apart from other conduct prohibited in the Bylaw. In *Westendorp*, the focus of the offence on what was said, rather than congregations or obstructions as such, stood out from other sections of the bylaw. In this case, the prohibited conduct of fighting, in common with other forms of prohibited conduct (littering, urinating, bullying, firing projectiles and smoking) are all activities that by their very nature interfere with the safe and enjoyable use of public places.

Ross J. notes (at para 99) that Professor Hogg has observed that *Westendorp* simply is "a reminder that the provincial power to create offences…(must be)… safely anchored in property and civil rights or some other head of provincial power."

The judgment explores these issues in further detail but in the end Ross J. concludes the impugned City of Edmonton bylaw constitutes a valid exercise of municipal authority, allows the City's appeal and reinstates the conviction against Keshane.

Conclusion

This is a case with the potential to further influence the way municipal government can effectively regulate behaviour in public spaces. It is one of a series of relatively recent court judgments in Alberta and British Columbia, which while they have not always found in the municipality's favour have contributed to a clearer picture of what municipalities can do to control public parks and other public places.

Admittedly, the concept of tighter state control of a public space has about it a discomforting, authoritarian aura, but I argue that unregulated or inadequately regulated public space is at its heart unfair and anti-democratic. If citizens are unreasonably denied or discouraged from using public space, by fighting for example, then a shared civic resource is diminished with all the consequent damage that may do to the vibrancy of the civic fabric. Of course successful municipal regulation must respond to the diverse demands placed on civic public spaces in a free and democratic society. It is an issue with some considerable currency as municipalities in Canada, the United States, Britain, and Australia deal with various occupations of high profile public places (though in the case of the Wall Street Occupation, the protesters are using a privately owned park).

In *Keshane* the Alberta courts demonstrate commendable caution on the issue. Courts in this province and in British Columbia appear prepared to accept a significant degree of municipal

regulation providing that regulation is both reasonable and accommodating within the meaning of section 1 of the *Charter*. See for example *Victoria (City) v Adams*, 2009 BCCA 563. The British Columbia Court of Appeal upheld a challenge to a Victoria bylaw which contained an absolute ban on erecting tents in municipal parks. A group of homeless campers successfully argued they had no other shelter available and denying them the use tents as protection against the weather was a contravention of their section 7 *Charter* right "to life, liberty and security of the person". The Court agreed and found the bylaw provision invalid, but importantly, it told the City while it could not prohibit camping, it could control it. Victoria amended its bylaw to permit the erection of tents but only overnight. This was strictly enforced and the campers, faced with the inconvenience of daily dismantling and re-erecting their tents sought other locations.

Another example is the battle by a Calgary street preacher in part against prohibitions on the use of amplified sound without a permit in City of Calgary parks (*R v Pawlowski*, 2011 ABCA 267). Artur Pawlowski is an indefatigable litigant who has engaged in a long court battle against a series of tickets issued mainly for contravention of the City of Calgary's *Parks and Pathways Bylaw*, 20M2003. He has relied largely on section 2(b) *Charter* guarantees of freedom of expression. See Jennifer Koshan's several ABlawg postings on the case most recently, 4 October 2011, "Leave to Appeal Granted in Street Preacher Case". The City conceded that the bylaw infringes section 2(b) *Charter* guarantees, but successfully argued the bylaw is saved by section 1 "reasonable limits" provisions. While the matter is not yet fully resolved the court has now narrowed the issue to the City acting arbitrarily in issuing the permits and it appears the bylaw may well survive.

Then there is *Vancouver (City) v Zhang* 2010 BCCA 450. Practitioners of the Falun Gong movement erected a small tent-like structure on the sidewalk outside Vancouver's Chinese consulate as part of their ongoing campaign against the Chinese government. The City of Vancouver removed the structure under section 71 of its *Street and Traffic By-Law* designed to prevent "the unregulated and haphazard proliferation of structures of a political nature on city streets". Sue Zhang, a Falun Gong practitioner, challenged the bylaw as an infringement of 2(b) *Charter* protection of freedom of expression. She succeeded in having the British Columbia Court of Appeal declare those portions of the bylaw inconsistent with the freedom of expression of no force and effect. The Court of Appeal gave the City six months to fix the bylaw.

The resulting amendments, while allowing the erection of protest structures, included requirements that they be dismantled every 12 hours and be in place for no more than 30 days. In early November, Falun Gong practitioners filed a petition with the British Columbia Supreme Court (despite its name the equivalent of a provincial court in other provinces) to have the amended bylaw struck down. (See "Falun Gong files petition to have bylaw struck down" *Vancouver Sun* 4 November 2011).

I suggest that the broad thrust of these cases, and others, is that the courts in Alberta and British Columbia have heightened the awareness among municipalities that their bylaws must not unreasonably infringe Charter rights and freedoms. And it is this heightened awareness that has seen cities across Canada, including Calgary, act with great circumspection in dealing with the Occupy Movement.