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Selling Drug Paraphernalia a Pithy Criminal Substance

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Case considered:

Smith v St. Albert (City), 2012 ABQB 780

In January, 2013, Alberta Court of Queen's Bench Justice Terry Clackson ruled that a recent St. Albert bylaw that restricted the sale of drug paraphernalia must be struck down, because the bylaw fell outside the jurisdiction of the municipality (i.e., it was *ultra vires*). The bylaw in this case prohibited the display or sale of more than two products from a list of banned items, including pipes, marijuana grinders or products which display an image of a marijuana leaf. Business establishments that sell these and other forms of drug paraphernalia are sometimes referred to as "bong" or "head" shops, and exist in many municipalities across Canada.

It is significant to note that *Criminal Code* (RSC 1985, c C-46) section 462.2, addresses drug paraphernalia when it provides:

> Offence
> 462.2 Every one who knowingly imports into Canada, exports from Canada, manufactures, promotes or sells instruments or literature for illicit drug use is guilty of an offence and liable on summary conviction
>
> (*a*) for a first offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding six months or to both; or
>
> (*b*) for a second or subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding one year or to both.

Section 462.1 provides the following pertinent definitions:

> *"consume"* includes inhale, inject into the human body, masticate and smoke;
> *"illicit drug"* means a controlled substance or precursor the import, export, production, sale or possession of which is prohibited or restricted pursuant to the *Controlled Drugs and Substances Act*;
> *"illicit drug use"* means the importation, exportation, production, sale or possession of a controlled substance or precursor contrary to the *Controlled Drugs and Substances Act* or a regulation made under that Act;
> *"instrument for illicit drug use"* means anything designed primarily or intended under the circumstances for consuming or to facilitate the consumption of an illicit drug, but does not include a "device" as that term is defined in section 2 of the *Food and Drugs Act*;
> *"literature for illicit drug use"* means any printed matter or video describing or depicting, and designed primarily or intended under the circumstances to promote, encourage or advocate, the production, preparation or consumption of illicit drugs;

> *"sell"* includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration.

The Saskatchewan Court of Appeal in *R v Spindloe*, 2001 SKCA 58, [2002] 5 WWR 239, held that section 462.2 did not offend section 7 of the *Canadian Charter of Rights and Freedoms* for being too vague or overbroad. In particular, the definition of "instrument for illicit drug use" was not unconstitutionally vague, as the Court could determine on a case by case basis whether section 462.2 applied, after it was refined and restricted by them as necessary. Mr. Spindloe also argued that the definition was overbroad, as it encompasses and prohibits instruments designed for other legal purposes. However, in criminal matters the Crown bears the burden of showing that an instrument is designed primarily or intended for illicit drug use, and the Court held that this permits legal items to be set apart from the ones intended for illicit drug use in any given case (*Spindloe*, para 90).

Ironically, part of the motivation for passing the drug paraphernalia bylaw was the perception of the St. Albert City Council that the *Criminal Code* section 462.2 prohibitions of manufacturing, promotion or sale of instruments for illicit drug use were "ineffective" at curbing the trade in goods or devices that may be used in conjunction with illicit drug use, because the vendors could argue that these items were not illegal, and would often sell them with a disclaimer that they were to be used in "conjunction with tobacco or legal herb" smoking (*Smith,* para 5). Further, councillors were concerned that the drug paraphernalia establishments were "moving out from 'big city' Alberta to smaller cities and towns" (*Smith,* para 2).

The bylaws were passed under the *Municipal Government Act* of Alberta (RSA 2000, c M-26), which allows municipal councils to pass bylaws for municipal purposes respecting the health, safety and welfare of people and the protection of people and property (MGA, s 7) (*Smith,* para 5). The local RCMP were consulted about creating a list of goods and practices that, if available or practiced at a single place of business, may have the cumulative effect of encouraging the use and trade of illicit drugs (*Smith,* para 5). The Business Licencing Bylaw was amended to include (*Smith,* para 7):

> h) "restricted product" means any of the following:
>
> (i) a product that displays a marijuana plant,
> (ii) a device intended to facilitate smoking activity, including a pipe (metal /glass blown, plastic, wood), water bong or vaporizer,
> (iii) a type of grinder (electric or manual),
> (iv) a type of digital weigh scale,
> (v) a detoxifying product (including a drink, pill or other product) marketed for masking drug effects or making such effects undetectable through tests; (BL9/2012)

In the Chad Smoke Shop, the owner sold a number of items which could be categorized as "restricted products" in his store. Smith wrote to the City asking for guidance about how he might comply with the new bylaw. The City then sent him a copy of the amended bylaw, together with a Notice to Comply. He was also notified that his store would be inspected on May 15, 2012, to ensure that he had complied with the notice (*Smith,* para 8).

After the inspection on May 15, 2012, Smith was issued a violation ticket under the new bylaw. On May 18, 2012, the City issued a notice that effective May 26, 2012, Smith's business licence

would be seized and would be suspended for five days. The City also notified him that he could appeal this action to the "Appeal Committee" (*Smith*, para 10).

While Smith did appeal the ticket, he also applied to the Court of Queen's Bench under section 536(1)(a) of the *Municipal Government Act* to quash the amended bylaw on four grounds. Three of the grounds were that the bylaw(s) violated his rights under the *Canadian Charter of Rights and Freedoms* (sections 2(b), 7 and 15). However, the Court did not rule on these grounds, because it found that the bylaws were *ultra vires* the City's jurisdiction because they are in pith and substance legislation relating to criminal law, which is under the federal government's jurisdiction.

Justice Clackson first looked at the pith and substance of the legislation. He examined the intrinsic purpose and extrinsic evidence regarding the legislative history and actions of the City in implementing the bylaw. While the City argued that the purpose of the bylaw was to promote safety, health and welfare of the citizens, the court found that the bylaw had the "look and feel of a morality legislation" (*Smith*, para 20). In addition, the Court found that the legislation was "plainly designed to address the perceived enforcement difficulties associated with the *Criminal Code* provisions relating to items which might be considered drug paraphernalia" (*Smith*, para 20). The Court was further supported in this view by the fact that the City had consulted with the police in the drafting of the bylaw. All of this supported the conclusion that the amending bylaw was in pith and substance criminal law legislation (*Smith*, para 20).

With regard to the effect of the bylaw, Justice Clackson held that the legal effect of the bylaw was to prohibit certain items from being sold in a certain way and at a certain location. He noted that enterprises of a certain size were not captured by the bylaw, at least not as intended targets (*Smith*, para 23). The practical effect was to preclude the licensing or successful operation of "bong or head shops" (*Smith*, para 25). He noted that while it was possible that the health and welfare of St. Albert citizens might be improved by the bylaw because they may not have easy access to some of the tools which might assist their involvement with narcotics, this indirect effect was quite uncertain (*Smith*, para 25).

A further practical effect of the bylaw is that the conduct addressed by the ineffective *Criminal Code* provisions was more effectively addressed by the amending bylaw. Justice Clackson noted that the imposition of criminal type penalties are within the authority of the province to enact, provided they had a legitimate and constitutional provincial purpose (*Smith*, para 26).

Because the impugned bylaw was about criminal law, in both legal and practical effect, the Municipal Council had exercised a power that was plainly beyond the competence of the municipality and therefore *ultra vires*. Thus, the bylaw amendment must be struck down. (*Smith*, para 27).

It is interesting that there were both division of powers and *Charter* arguments raised in this case, but the division of powers issue held the day. It demonstrates that both types of issues are important in constitutional law cases.

The City of St. Albert has indicated it will be appealing this case. See: Mariam Ibrahim "St. Albert to appeal ruling that struck down bylaw" (18 January 2013) Edmonton Journal online here.