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## Drug Paraphernalia Bylaw Upheld as Constitutional

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Case commented on: *Smith v St. Albert (City)*, [2014 ABCA 76](#)

University of Calgary Constitutional law students will find this case interesting and perhaps will feel vindicated when they read this decision; it may also bring back memories of the midterm exam. In an earlier blog (see [here](#)) I discussed Justice Terry Clackson's decision that portions of St. Albert's *Bylaw* "restricting the sale and display of items associated with illicit drug consumption are unconstitutional, on the ground that they are, in pith and substance, criminal law and therefore outside the jurisdiction of the municipality" (para 1).

St. Albert appealed the ruling, and Justices Jean Côté, Barbara Lea Veldhuis and Doreen Sulyma allowed the appeal. The Court of Appeal noted that the standard of review on issues of constitutionality is correctness, citing *Consolidated Fastfrate Inc v Western Canada*, 2009 SCC 53 at para 26 (para 20).

### Pith and Substance

The Court started with an analysis of the pith and substance of the *Bylaw*, by looking at the purpose and effect of the legislation in order to characterize the law and determine its essential character. Courts use both intrinsic and extrinsic evidence to decide the purpose of a law, and determine the effect of a law from the legal effect of its text and the practical effects flowing from its application (para 22, citations omitted).

The Court of Appeal noted that the *Bylaw* in question did not contain a purpose clause, but that the purpose might be informed by the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*). One of the *MGA*'s stated purposes under section 3(c) is the development and maintenance of safe communities. The Court of Appeal concluded that the overall *Bylaw* and its amendments, which address restricted products in illicit drug use were "concerned with developing and maintaining safe and viable communities through the regulation of business" (para 25).

The Court held that the available extrinsic evidence illustrated that the City wanted to "deter businesses from selling products that could act as vehicles for illegal drug use." Further, while one of the reports relied upon by the City indicated some gaps in the criminal legislation, the primary concern of the City was to "curtail the negative effects of illicit drug use on the

community and with providing a safe community by suppressing conditions likely to lead to the commission of a crime” (para 27).

The legal effect of the *Bylaw* was to “limit the range of ‘restricted products’ that a business can sell from a single location and to fine a business for selling or displaying three or more restricted products.” The Court noted that the *Bylaw* “does not outright prohibit businesses from selling restricted products”; it just limits the selling of restricted products from one location to two. There is also an exemption for licensed or regulated pharmacies to sell three or more restricted products (para 29).

Because the *Bylaw* had been in effect for only a short time, the Court of Appeal held that there was insufficient evidence to do more than speculate about its long-term practical effects, except the limitation on the businesses’ ability to sell “restricted products” (para 31).

Based on this analysis, the Court of Appeal held that the *Bylaw* created a business-licensing regime that was “designed to create safe and viable communities by restricting the cumulative sale of goods linked to drug consumption.” Since the Supreme Court of Canada has accepted that the consumption of drugs increases criminality generally (see *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1988] 1 SCR 982 at 1039), the essential character of the *Bylaw* is to suppress conditions that are likely to lead to the “commission of all types of crimes that may ultimately affect public order and safety in the community” (para 32).

### **Classification under *Constitution Act, 1867***

Next, the Court of Appeal analyzed what head of power the legislation falls under with respect to sections 91 or 92 of the *Constitution Act, 1867*. The Court noted that the *Bylaw* could fall under more than one head of power and could also fall under both federal and provincial legislative competence (para 34).

In analyzing the federal aspects of the *Bylaw*, the Court of Appeal noted that both sections 462.1 and 462.2 *Criminal Code*, RSC 1985, c C-46 (which prohibit the promotion of instruments for illicit drug use) and the *Bylaw* dealt with “vehicles for dangerous activities” (para 39) and enforced the general prohibition on illicit drug use. There is a “significant overlap” between the terms “restricted products” in the *Bylaw* and “instrument for illicit drug use” in the *Criminal Code*. The main difference is that the “*Criminal Code* provisions prohibit the promotion or sale outright, while the *Bylaw* restricts the quantity and combination of what a license-holder can sell” (para 40).

While the *Bylaw* does consist of a prohibition backed by a penalty, this is not determinative of a dominant criminal aspect. The *Constitution Act 1867*, section 92(15) “authorizes provinces to impose ... punishment... as a means of enforcing valid provincial law” (para 41).

Further, “the fact that the *Bylaw* overlaps with the *Criminal Code* provisions does not necessarily amount to an attempt by the City to fill a perceived gap in the criminal law and to catch a broader range of conduct” than that captured by the *Criminal Code*. The Court of Appeal noted that provincial and federal offences exist alongside each other in areas related to motor vehicle offences. In addition, even if the *Bylaw* did cover a wider range of conduct, “it does not criminalize that conduct” (para 42).

In response to the Chad Smoke Shop’s argument that the *Bylaw* is criminal because it is related to the maintenance of public peace, order and security, and the trial judge’s finding that there is a morality aspect to the *Bylaw*, the Court noted that morality legislation can encompass both criminal and local morality (para 43, citing *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662)).

Thus, the Court of Appeal concluded that the *Bylaw* has certain criminal aspects: overlap with the existing *Criminal Code* provisions in sections 462.1 and 462.2; penal consequences, including imprisonment for *Bylaw* violations; the “filling in of a perceived gap in the criminal law; and a focus on morality and public order” (para 44).

The inquiry next shifted to whether the *Bylaw* was firmly anchored in a provincial head of power. The Court of Appeal held that legislating to suppress “conditions that are likely to favour the commission of crime” is within the province’s competence (para 48, citations omitted). The *Bylaw*, however, must be tied to a provincial head of power. The Court of Appeal held that the provincial aspects of the *Bylaw* were: “(a) suppression of conditions that are likely to cause crime and prevention to enforce local standards of morality; and (b) business licensing and impacts on property and civil rights” (para 52).

The Court of Appeal concluded that the pith and substance of the *Bylaw* falls under both the federal power over criminal law under s 91(27), and the provincial power over licensing and regulating businesses in the community under 92(9) and 92(13). Because the federal and provincial aspects of the *Bylaw* were “roughly equivalent” in importance, the doctrine of double aspect was triggered (paras 53-55).

Under the double aspect doctrine, a matter may for one purpose and aspect fall within federal jurisdiction, and for another purpose and in another aspect fall within provincial jurisdiction. If there is no conflict between the two, then they can co-exist. Thus, the Court of Appeal upheld the validity of the *Bylaw* and allowed St. Albert’s appeal (para 56).

Neither Court explicitly analyzed whether there was indeed any conflict between the federal and municipal laws. Generally, if there were a conflict, under the doctrine of paramountcy the (federal) *Criminal Code* provision would prevail. The question of conflict is based on a legal test examining whether the provincial law frustrated the purpose of the federal law, or whether it was impossible to comply with both laws (see *Rothmans, Benson & Hedges Inc. v Saskatchewan*, [2005] 1 SCR 188). In the circumstances of the *St. Albert* case, the *Criminal Code* provisions make it illegal to sell any instruments for illicit drug use, for the purpose of enforcing the prohibition on illicit drug use. It could be argued, however, that the *Bylaw* permits the sale of two or less instruments for illicit drug use and thus frustrates the purpose of the *Criminal Code*. The *Bylaw* would not be in conflict with the *Criminal Code* if it did not permit the sale of *any* instruments for illicit drug use. But since it is more permissive than the *Criminal Code*, the *Bylaw* may have been found inoperative to the extent of the conflict if this argument had been made.

Perhaps the Court of Appeal was concerned with using “judicial restraint” when it upheld the constitutionality of the *Bylaw* (para 56). As for the conflict argument, it would not have assisted Smith and The Chad Smoke Shop in their efforts to have a more permissive regime for drug paraphernalia, which may be why they didn’t raise it.

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