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Constitutional Concerns about Being "In the Company" of a Gang-Affiliate

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Legislation Commented On: *Gaming and Liquor Act*, RSA 2000, c G-1

Six years ago, the Province of Alberta amended the *Gaming and Liquor Act*, RSA 2000, c G-1 as part of a broader policy to crack down on gang related activity. Section 69.1 of the Act allows police officers to "exclude or remove from licensed premises any person the police officer believes to be associated with a gang." Almost immediately, the amendment raised a number of serious constitutional concerns (see here). Political pressure to shut down gangs, however, proved more powerful than any protest from civil libertarians and *Charter* enthusiasts. Despite the multitude of objections, the amendment came into effect and has been in force since 2009.

Given this history, it strikes me as odd that the provision has never been considered (or even mentioned) in any reported decision. Why is that? Perhaps the law is not being used at all. Maybe persons who resist are being charged under different provisions, or charges are being dropped before trial. It is difficult to fill in the reasons for a gap in judicial consideration, but given the constitutional concerns that were immediately evident, the absence of any case law is a puzzling cause for concern.

This post is intended to circle back on the "gangbuster" amendment to explore what has transpired since its enactment. It also reconsiders and fleshes out questions about the amendment's constitutionality.

Details of the Amendment

Section 69.1 of the *Gaming and Liquor Act* seeks to remove gang members or their affiliates from any licenced premises in Alberta. While this is a laudable goal, the means used to reach this end are problematic. Most notably, the amendment permits police officers to exclude or remove a wide range of individuals from the premises, some of whom would have very tenuous links to a gang, if any. Specifically, the law authorizes the police to remove or exclude from any licenced premises (a) gang members, (b) anyone who supports, facilitates, or associates with gangs, or (c) anyone "in the company" of (a) or (b).

This exclusionary power is triggered based on a police officer's good faith belief. This belief can stem entirely from third party information that, for example, the targeted person was present at the scene of unlawful gang behaviour, whether or not they participated in the activity. The third

party information could also indicate that a person receives benefits from a gang, or associates with someone who, in turn, associates with a gang (see subsections 69.1(4) and (5)).

If the targeted individual refuses to comply with the order of exclusion or removal, they are deemed to be a trespasser (see subsections 69.1(6) and (7)). The full text of the provision is available here (see section 69.1).

Some (Hypothetical) Fact Patterns

As outlined above, the anti-gang amendment has never been judicially considered (in a reported case at least). This interesting gap, and the consequences flowing from it, is discussed in more detail below. Before that, however, I've included a few hypothetical situations that would seem to fall within the four corners of the provision. These scenarios are theoretical, and are intended to give context to the law and highlight potential problem areas. The anti-gang amendment has the power to capture the following individuals:

- The mother of a prostitute at a bar with her daughter. Prostitution is a specified unlawful behaviour associated with gangs (see section 69.1(1)(b)(ii)). The mother is in the company of someone who participates in gang activities, and may be excluded from the premises.
- To take that example one step further, let's suppose the prostitute lives with her mother on occasion. During those times, the mother cooks and cleans for her daughter, and lets her live rent-free. In this situation, is the mother supporting her daughter's ability to engage in gang-related activities? If so, she may be excluded from the premises even if her daughter is not with her.
- The ex-wife of a drug dealer eating at a restaurant. If the drug dealer is linked to a gang, a police officer is entitled to rely on the fact that the ex-wife receives benefits (e.g. spousal support payments) from a suspected gang member to conclude she is associated with the gang. As long as the restaurant is licenced to serve alcohol, her presence would trigger the amendment.
- A former gang member at a liquor store. The law makes no reference to how recently one must have been associated with a gang in order to trigger the provision. Gang affiliation from 20 years ago may be reasonably relied on to remove a person from any licenced premises, and this would include a liquor store.
- A witness to gang-related violence. The express wording of section 69.1(4)(a)(iii) permits a police officer to rely on a person's mere presence, without involvement, at the scene of unlawful gang behaviour to conclude they are affiliated with a gang. This police officer does not need to have personal information on this point – third party information will suffice.

These examples highlight two issues, each of which will be discussed in more detail below:

1. The constitutional concerns raised by this legislation, namely, overbreadth and guilt by association. Efforts to crack down on gang-related activity are undoubtedly an important and pressing objective for legislators. Having said that, section 69.1 may cast the net too wide to accomplish its goals while respecting our rights.

2. The lack of oversight attracted by the provision. Section 69.1(5) requires police officers to act in good faith – a requirement that hopefully would weed out many of the examples provided above. One of the conundrums presented by this law, however, is that there has

been no public oversight or accountability to gauge how these powers are being exercised.

Questions of Constitutionality

On its face, the anti-gang provision raises two constitutional red flags.

(a) Guilt by Association

Section 69.1 plainly targets association. Its goal is to remove or exclude persons who are associated with a gang – a conclusion reached if a police officer believes that a person is "in the company" of (a) a gang member, or (b) a person who supports, facilitates or participates in gang activities.

Freedom of association is protected by section 2(d) of the *Charter*. It protects people's right to associate with others "both to satisfy [their] desire for social intercourse and to realize common purposes" (*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC) at para 152, as cited in *Fraser v Ontario (Attorney General)*, 2011 SCC 20 at para 20). While the vast majority of section 2(d) cases deal with labour disputes (see a post on several recent decisions in that area here), freedom of association is not constrained to that sphere. Any law that targets association itself will draw section 2(d) scrutiny. As Chief Justice McLachlin explained in a non-labour context, "[s]ection 2(d) will be infringed where the State precludes activity because of its associational nature" [emphasis in original removed] (*Harper v Canada (Attorney General)*, [2004] 1 SCR 827 at para 125).

Like all *Charter* provisions, section 2(d) is not limitless. The first relevant limit is implicit within Chief Justice McLachlin's quotation above. Section 2(d) inquiries in a non-labour context are focused on the state's attack on the association itself, not the activities flowing from the association (*Harper* at para 126). In the present situation, however, the anti-gang amendment appears to be squarely targeting the association itself. The provision is triggered by being in the company of a suspected gang affiliate.

In addition, the right to free association only protects the freedom to join with others in *lawful* common pursuits (*Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 14). Thus, gangs have no constitutionally protected freedom to associate with each other. The anti-gang amendment, however, appears to target association that is not necessarily unlawful. It targets people who are merely in the company of others that may be gang members. Moreover, it specifically targets these individuals while they are partaking in legal activities. Thus, the amendment stands on a shaky foundation as a result of interference with the *Charter*-protected freedom of association.

(b) Overbreadth

The second constitutional red flag raised by the anti-gang amendment is overbreadth. A law's potential overbreadth is relevant in two areas of *Charter* law.

First, it arises under section 7 of the *Charter*. Section 7 provides that any deprivation of life, liberty or security of the person shall not occur except in accordance with the principles of fundamental justice. An overbroad law offends the principles of fundamental justice (*R v*

Heywood, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) [*Heywood*]; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5).

Second, the government would have a difficult time demonstrating that an overbroad law is minimally impairing under the section 1 proportionality analysis. An overbroad law is neither minimally impairing nor proportional.

Section 69.1 may be characterized as overbroad in a number of ways:

- It targets facilities where there is little or no threat or evidence of gang activity. One can conceptually understand why the Province would want to limit the presence of gang activities in locations like clubs, bars, or casinos. However, the law permits police officers to remove or exclude persons from any "licenced premises". This would include liquor stores, as well as many hotels and restaurants.
- It captures a wide spectrum of persons with very tenuous links to gang members, if any. The law applies to any person in the company of a gang member, affiliate, facilitator, or supporter. It is not difficult to imagine situations where this law could adversely impact someone who has done nothing wrong other than knowing (or standing near) a suspected gang affiliate or supporter. The relatives or former relationship partners of suspected gang affiliates would be particularly vulnerable to unfair targeting.
- The source of information used to form the basis of the police officer's good faith belief may not be reliable. Police officers are entitled to rely on unverified third party information to reach their belief that someone is associated with a gang. The potential for racial profiling and stereotyping to influence this process is significant. Sadly, this is not just a hypothetical problem. In 2012, the Alberta Human Rights Commission held that an Edmonton establishment discriminated against a complainant when they refused to admit him based on his race. The Panel accepted evidence that on at least one evening, bar staff were not admitting persons who looked Asian because of a "tip" about possible Asian gang activity (*Simpson v Oil City Hospitality*, 2012 AHRC 8). While this example involved bar staff, and not the police, it demonstrates the broad racialized undertones influencing unconfirmed "tips" about gang affiliation. It also demonstrates that such outrageous and egregious acts of discrimination and racial profiling are not theoretical, imaginary, or confined to the past.

Before concluding that this overbroad law breaches section 7 of the *Charter*, however, we must first determine that section 7 applies. Section 7 is only "triggered" when there is a state deprivation of life, liberty, or security of the person. Typically, it is engaged when criminal laws impose a threat of jail time (and hence, the liberty interest). Section 69.1 does not impose a direct link of imprisonment. Instead, it deems targeted persons to be trespassers that may be levied with a fine. This creates a possible, but tenuous, link to imprisonment down the road. Nonetheless, I would argue that section 69.1 restricts liberty and engages section 7, because it prohibits people from being somewhere they are otherwise entitled to be. This reasoning was adopted in the *Heywood* decision to conclude that a prohibition on loitering engaged section 7 (*Heywood* at 789-790). While *Heywood* dealt with public property and a more direct link of imprisonment, I would argue that its conclusion on section 7's application applies to the present case.

Presuming a violation of section 2(d) or section 7 could be demonstrated, the Province would have a steep hill to climb to justify the violation under section 1. Section 69.1 has the ability to

adversely impact many people who have done nothing wrong, including the family members of gang affiliates and other people who happen to know a suspected gang member. It also has great potential to be used in a way that targets minority groups. It is difficult to imagine a situation where a court would find that this is a minimally impairing or proportional response to the threat of gangs at a licenced premise.

The Lack of Oversight

The concerns outlined above are interesting fodder, but they are so far purely academic. Whether by design, implementation, or Crown policy, this law is simply not coming before the courts. We can only speculate as to why. Maybe it isn't used at all, but somehow I doubt that. Perhaps it is being used as a trigger for the exercise of more serious police powers, including weapons searches. Maybe persons who resist are being charged under different provisions, or the charges are being dropped before trial. While it is impossible to conclusively determine the cause of this gap, given the interests at stake and the *Charter* concerns evident on the face of the legislation, the absence of any case law is unsettling.

The anti-gang amendment has the potential to be used with reasoned restraint or excessively as an abuse of power. The distinguishing feature between these two results is the requirement that a police officer act with good faith belief and on trustworthy third party information. Given the real or *de facto* policy of not prosecuting these cases, however, we have no idea whether or to what extent the law is being practically implemented. This is not meant to serve as a blanket criticism of the police officers who are acting in good faith to rid bars, casinos and other licenced premises of gang activity. There is no doubt that this is a worthy goal, and that police officers require sophisticated tools to deal with organized criminality. However, the constitutional uncertainty presented by this law serves no one. It is possible to support anti-gang policies, and yet oppose this hazy and imprecise exercise of power. In any situation where police powers are exercised, a consistent and systematic lack of oversight should always be a cause for concern and scrutiny.

Conclusion

The anti-gang amendment was sold as a tough on crime call to action (see here). It came into force amidst public support from Albertans who are reasonably concerned about curbing gang related violence. Given that no one wants to be seen siding with gang members and their possible affiliates, cries that this law went too far fell on unsympathetic ears. Six years out, however, it is time to objectively look at the amendment. How many people have likely been targeted by it despite a lack of any wrongdoing on their part? Who do you think they are, and how do you think they feel? I would imagine that they feel wronged and humiliated by a seemingly arbitrary exercise of police power. The anti-gang amendment may have a laudable goal, but its means and lack of oversight are alarming, and ought to be reconsidered.