R v Keshane (2012): Edmonton's Bylaw Prohibiting Fighting is Constitutional

Introduction

On November 16, 2012, the Alberta Court of Appeal issued its judgment on whether the City of Edmonton's bylaw prohibiting fighting in public went beyond the municipal authority prescribed by the Constitution.[1] The Court ruled that the Public Places Bylaw (hereinafter referred to as the "Bylaw") did not go beyond the municipal government's power because it dealt with a matter over which the province has power under the *Constitution Act, 1867*.[2] This article examines the Court's analysis on the scope of municipal authority in relation to the Bylaw and the federal jurisdiction over criminal law.

Facts

On May 27, 2009, Ms. Keshane became involved in a fistfight on a sidewalk outside a bar in Edmonton. The police arrived and determined that the fight was consensual, and it did not constitute an offence under the *Criminal Code*, such as assault or public disturbance. However, the Police issued Ms. Keshane a violation ticket of $500 for fighting in public which was prohibited under section 7 of the Bylaw.[3] Ms. Keshane challenged the Bylaw, alleging it was unconstitutional because the City of Edmonton had no authority to regulate public fighting.

Division of legislative authority under Constitution Act, 1867

Section 91 and 92 of the *Constitution Act, 1867* divide matters over which the federal Parliament and the provincial legislatures have authority to legislate.[4] Section 91(27)[5] gives Parliament the authority to legislate over criminal law. Section 92 gives provincial legislatures authority to legislate over matters of a local nature, such as property and civil rights, direct taxation, education, natural resources, and administration of civil/criminal justice.[6]

The *Constitution Act, 1867* gives no formal recognition to municipalities as it did for Parliament and the provincial legislatures. Some pushed to have municipalities recognized as a distinct, third level of government in what would become the *Constitution Act, 1982*, but to no avail. Section 92(8) of the *Constitution Act, 1867* still specify municipalities as entities controlled by the Provincial legislatures.

Hence, under section 92(8), the Provincial legislature can delegate its legislative powers to

municipalities. As a result, the City of Edmonton, subject to the *Municipal Government Act*, has the authority to pass bylaws dealing with people, activities and things in a public place, including some types of nuisance.[7]

However, because legislation and bylaws often involve multiple subjects, the provincial legislature (including municipal government) or Parliament are sometimes challenged for having exercised its legislative power over a matter falling under the other's jurisdiction. In such cases, the court must decide whether the federal or provincial legislation (including bylaws) at issue intruded on the other's jurisdiction in a manner that is not justifiable.

Procedural History

On September 10, 2010, the Alberta Provincial Court found section 7 of the Bylaw unconstitutional.[8] The Court ruled that the section infringed the Federal Government's jurisdiction over criminal law under section 91(27) of the *Constitution Act, 1867*.[9] The Court recognized that the purpose of the Bylaw was to capture public fighting not covered by the *Criminal Code*. However, the word "fighting" in section 7 had no set definition which could include types of fighting that fall under the *Criminal Code*.[10] Moreover, the Court determined that the main purpose of the section dealt with the safe and orderly conduct of people in public, which is a federal jurisdictional matter,[11]

As a result, the Alberta Provincial Court dismissed the charge against Ms. Keshane. The City of Edmonton appealed the decision to the Court of Queen's Bench of Alberta, claiming that the Constitution gave the municipality power to enact section 7 of the Bylaw.

On August 24, 2011, the Alberta Court of Queen's Bench overturned the Provincial Court decision and found section 7 of the Bylaw constitutional.[12] The Court ruled that the section dealt with property and civil rights or local concerns, both of which fall under the provincial jurisdiction.[13] Therefore, the municipality had valid jurisdiction to legislate section 7 of the Bylaw. The Court imposed the fine of $500 on Ms. Keshane for violating the Bylaw.

Ms. Keshane appealed the decision to the Alberta Court of Appeal on the basis that the municipality went beyond its authority to regulate activities in public space.

Issues

1. Was section 7 of the Bylaw within the City of Edmonton's legislative jurisdiction?

A. Step 1: What is the dominant purpose (pith and substance) of section 7?

I. Purpose of section 7

II. Legal and practical effects of section 7

B. Step 2: Which jurisdiction has power over the matter dealt with by section 7?

C. Does the double aspect doctrine apply to section 7?

Decision

On November 16, 2012, the Alberta Court of Appeal upheld the Court of Queen's Bench decision and found section 7 of the Bylaw constitutional. The Court found that the main purpose of the section was to provide safe and enjoyable public places. This matter dealt with property and civil rights or local concerns, both of which fall under the provincial jurisdiction. The Court also recognized that there were criminal aspects prohibited by the section, but they were held to be of roughly equal importance to the property and local matter aspects. Therefore, the Court determined that the section concerned a matter over which both federal and provincial (municipal) governments had valid jurisdiction. The Court of Appeal dismissed Ms. Keshane's appeal.

Court's Analysis

1. Was section 7 of the Bylaw within the City of Edmonton's legislative jurisdiction?

The Court of Appeal goes through a two-step analysis: the first step determines the true meaning of the provision, also referred to as its pith and substance; the second step allocates the subject dealt by the provision under the appropriate jurisdiction.

A. Step 1: What is the dominant purpose (pith and substance) of section 7?

I: Purpose of section 7

To determine the purpose of the provision at issue, the court examines both intrinsic and extrinsic evidence. Intrinsic evidence comes directly from the words of the provision. In this case, section 1 of the Bylaw explicitly described that the purpose is to "regulate the conduct and activities of people in public places to promote the safe, enjoyable and reasonable use of such property for the benefit of all citizens of the City".[14] As for the extrinsic evidence, various documents indicated that the Bylaw was related to the police's concern over their inability to address the types of public fighting that cannot be charged under the *Criminal Code*.[15] For example, criminal law mostly protects the immediate victims of offensive activities while section 7 was intended to protect those indirectly impacted by public fighting and maintain a safe and enjoyable public space.[16]

II. Legal and practical effects of section 7

To identify the pith and substance of the provision at issue, the court also examines its legal and practical effects. The legal effect of section 7 was the prohibition of consensual and non-consensual fighting in public places and the imposition of a penalty in case of a breach. The practical effect of section 7, which is the anticipated effects flowing from the application of the provision, concerned both provincial and federal jurisdictional matters. The fact that section 7 addressed public peace and order and caught public fighting that was also prohibited by the *Criminal Code* meant it would overlap with criminal law. On the other

hand, section 7 prohibited consensual fighting, which the *Criminal Code* would not catch and yield a criminal conviction. Therefore, the section also had practical effects related to property and civil rights or matters of local concern.

Nevertheless, the Alberta Court of Appeal concluded that neither effect showed an ulterior motive from what section 7 claimed to be, which was to regulate the conduct and activities of people in public places to promote the safe, enjoyable and reasonable use of such property for the benefit of all citizens of the City.[17] The fact that section 7 imposed legal sanctions on public fighting, which is a major feature of criminal law, did not affect the Court's conclusion. The Court concluded that section 92(15) of the *Constitution Act, 1867*[18] gave the provincial legislature authority to impose punishment in relation to valid provincial laws. Therefore, section 7 of the Bylaw addressed consensual fighting which was not covered by the *Criminal Code*.

B. Step 2: Which jurisdiction has power over the matter dealt with by section 7?

Upon finding that the dominant purpose of section 7 is to provide safe and enjoyable public places, the Court went through an analysis to determine whether that purpose fell under the federal criminal power or the provincial power over property and civil rights or local concerns. If the dominant purpose of section 7 relates to the provincial jurisdictional matter, it would be held valid regardless of some minor effects related to criminal law. However, if the dominant purpose relates to the federal jurisdiction, then the section would be invalid since the City went beyond its legislative authority.

In this case, the Court concluded that the dominant purpose of section 7 did not fall exclusively under either jurisdiction.[19] As explained in Step 1 of the analysis, the pith and substance of section 7 dealt with criminal law matters as well as property and civil rights or local matters. The Court determined that neither of the jurisdictional aspects could be undermined because they had equal importance.[20]

C. Does the double aspect doctrine apply to section 7?

When a court finds the dominant purpose of a provision to have both federal and provincial aspects of roughly equal importance, the double aspect doctrine is applied. The doctrine confirms that both Parliament and the provincial legislatures have legislative authority over the specific matter dealt with by the provision and upholds the validity of that provision.

In *Keshane*, the Court of Appeal applied the double aspect doctrine. The Court affirmed that both Parliament and the provincial legislature had legislative authority over providing safe and enjoyable public places by prohibiting public fighting. Therefore, section 7 was within the City of Edmonton's power to legislate and was thus valid.[21]

Significance of the Ruling

Following the Court of Appeal decision, Ms. Keshane submitted a request to the Supreme Court of Canada for an extension of time to prepare and file the application to appeal to the

Supreme Court. On May 9, 2013, the Supreme Court granted Ms. Keshane's request.[22] In the meantime, section 7 of the Bylaw will remain in effect.

The Alberta Court of Appeal decision in *Keshane* was significant because it expanded the extent to which municipal governments can legislate and restrict certain activities in public places. The decision reflects the growing role and function of municipalities in relation to the daily activities of citizens in Canada.

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[1] *R v Keshane*, 2012 ABCA 330 .

[2]*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 .

[3] City of Edmonton, by-law No 14614, *Public Places Bylaw*, (April 4, 2012), s 7 ("[a] person shall not participate in a fight or similar physical confrontation in a public place" s 7).

[4] *Constitution Act*, *supra* note 2, ss 91, 92.

[5] *Ibid*, s 91(27).

[6] *Ibid*, s 92.

[7] *Bylaw*, *supra* note 3, ss 7(b), 7(c); *Municipal Government Act*, RSA 2000, c M-26 (the Act lists the powers and responsibilities of municipal governments in Alberta).

[8] *R v Keshane*, 2010 ABPC 275.

[9] *Constitution Act*, *supra* note 2, s 91(27).

[10] Fighting that is criminalized under the *Criminal Code* includes assault, causing public disturbance, and common nuisance.

[11] *Constitution Act*, *supra* note 2, s 91(27); *Criminal Code*, RSC 1853, c C-46.

[12] *R v Keshane*, 2011 ABQB 525 <http://www.canlii.org/en/ab/abqb/doc/2011/2011abqb525/2011abqb525.html >.

[13] *Constitution Act*, *supra* note 2, ss 92(13), 92(16).

[14] *Keshane*, *supra* note 1 at para 22

[15] *Ibid* at para 23.

[16] *Ibid* at para 26.

[17] *Ibid* at para 33.

[18] *Constitution Act*, *supra* note 2, s 92(15).

[19] *Keshane, supra* note 1 at para 40.

[20] *Ibid* at para 41.

[21] *Ibid* at paras 41, 42.

[22] *R v Keshane*, 2013 CanLII 25240 (SCC).