Vancouver (City) v. Abdiannia, 2015 BCSC 1058 (CanLII)

Date: 2015-06-19
Docket: S26641; S26644
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver (City) v. Abdiannia*,
2015 BCSC 1058

Date: 20150619
Docket: S26644
Registry: Vancouver

Between:

City of Vancouver

Respondent

And

Abdolabbas Abdiannia carrying on business as Ahwaz Hookah House

- and -

Docket: S26641
Registry: Vancouver

Between:

City of Vancouver

Respondent

And

Abdolhamid Mohammadian carrying on business as Persia Smoke Shop also known as Persia Tea House

Appellants

Before: The Honourable Mr. Justice Leask

Memorandum: Paragraph 15 was adjusted to reflect a non-quote, and Counsel for the Respondent was modified on June 22, 2015

On appeal from: the Provincial Court of British Columbia,
August 11, 2014 (*Regina v. Abdolhamid Mohammadian* carrying on business as Persia's Smoke shop, also known as Persian Tea House, Vancouver Registry, Docket No. 31458 and *Regina v.*

Abdolabbas Abdiannia, carrying on business as Ahwaz Hookah House, Vancouver Registry, Docket No. 31430)

Reasons for Judgment

Counsel for the Respondent:	R. LeBlanc
Counsel for the Appellants:	D.P. Davison D.R. North
Place and Dates of Hearing:	Vancouver, B.C. April 20 and 21, 2015
Place and Date of Judgment:	Vancouver, B.C. June 19, 2015

I. INTRODUCTION

[1] This is an appeal from Provincial Court. After hearing counsel's submissions I dismissed the appeal with Reasons to follow. These are my Reasons for Judgment.

[2] The two appellants were separately charged (but tried together) with violating Vancouver Health Bylaw 9535 for allowing customers in their commercial premises to smoke hookahs. Mr. Abdiannia carries on business as Ahwaz Hookah House and Mr. Mohammadian carries on business as Persia Smoke Shop also known as Persia Tea House. Both appellants are Iranian Muslims whose businesses were hookah cafés or lounges where customers would attend to experience an environment modelled after a traditional Middle Eastern hookah lounge.

[3] A hookah is a water pipe with a bowl in which a substance referred to as shisha is placed in the bowl and tubes run from the bowl through water to the user who inhales through tube and then exhales. In the Middle East it is common for the shisha to contain a mixture of substances, including tobacco.

[4] Both appellants have been operating their business for some time and originally served and sold tobacco shisha. After passage of the provincial *Tobacco Control Act*, R.S.B.C. 1996 c. 451 which banned tobacco smoking in most commercial spaces, both appellants switched to selling herbal shisha.

[5] On October 2, 2007, Vancouver City Council enacted Health Bylaw 9535 banning all indoor smoking or burning of any substance in commercial establishments. When enacted, the Bylaw contained an exemption for hookah lounges and cigar lounges. On July 10, 2008, Vancouver City Council removed the exemption.

[6] The charge against these appellants involved events on January 19, 2009 and February 13, 2009.

[7] The appellants made four principal arguments that in all four (a)-(d):

a. the Appellants did not violate the Bylaw because the Bylaw prohibits smoking where the

substance being smoked is burned, and the shisha in a hookah is not burned, but only warmed;

b. the Bylaw is overbroad and vague as the definition of "smoking" bans unintended activities;

c. the Bylaw is *ultra vires* the powers of the City of Vancouver (the "City") under the *Vancouver Charter* [SBC 1953] CH 55) ("*Vancouver Charter*") as the Bylaw is to protect public health, but no detrimental health effects of smoking all substances had been proven by the City; and

d. the Bylaw and its enforcement violates the rights of the Appellants under the *Canadian Charter of Rights and Freedom* ("*Charter*"), under ss 2(a), 7 and 15(1).

A. Was the Shisha burning?

[8] The Provincial Court trial judge found "that the shisha in hookah smoking gets burned in the ordinary meaning of the word." At trial the respondent City argued that the word "burn" covered "the situation when the substance is heated in the hookah, such that smoke is produced, which is inhaled and exhaled by means of a hookah pipe." The respondent City also relied upon several dictionary definitions of the word "burn".

[9] As an alternative, the trial judge stated:

> Even if the herbal shisha only gets heated, I am persuaded by the City's argument that the dictionary meaning of the word burn is sufficiently clear given the object of the By-Law as it relates to the act of smoking.

[10] If this were the entirety of the evidence and submissions on this issue, I would be inclined to find that the trial judge's conclusion was clearly wrong and unsupported by the evidence. In particular, the trial judge relied upon three propositions, the second of which was:

> While there is a tinfoil separating the herbal shisha from the charcoal, I am convinced that the reason for holes to be punched in the tinfoil is to allow the heat or flame from the burning charcoal to be drawn through the holes to come into contact with the herbal shisha as the smoker inhales. If the sole purpose of the charcoal is just for heating up the shisha, there would be no need to have the tinfoil punched.

[11] The appellants submitted that the evidence showed that the holes in the tinfoil are there to allow air to pass through, not flame. The evidence of the appellants was that the charcoal's flame does not contact the herbal shisha and the herbal shisha is not on fire. There was no contrary evidence.

[12] In my view, the respondent City, on appeal, has provided a complete, and satisfactory, answer to this whole argument:

> … even if this Court concludes that the trial judge erred by finding that the herbal shisha is burned in a hookah pipe, it is inescapable that the mere burning of the charcoal in the hookah pipe is enough to result in a finding that 'any other substance' is 'burned', the smoke of which is inhaled within the meaning of the by-law. The evidence on this point is not in dispute.

[13] I agree with this submission.

B. Is the Bylaw overbroad?

[14] At trial, the appellants argued that the definition of "smoking" was so broad that it included lighting anything on fire, including a fireplace or stove.

[15] The trial judge's finding on this subject is found at para. 67:

> [67] On the evidence, I find that reasonably intelligent person would be able to ascertain what is being prohibited by the By-law. I also find that the definition of ''smoking", when benevolently read, clearly applies to the act of smoking any substance. The language is no [sic] so broad that enforcement agencies would conduct unfettered and [sic] enforcement of burning objects in the City such as stoves used for cooking, fireplaces used for the burning of wood, or civets used for the burning of incense. Bearing in mind that the object of this By-law is for the protection of the public from second-hand smoke, harmless and everyday activities are not captured by the definition as those activities do not do not [sic] involve the act of smoking with lighted equipment which are designed for the purpose of inhaling and exhaling smoke.

The Respondent submitted that the trial judge made no error of law in finding that the definition of "smoking" and the related provisions in the By-law are not uncertain or vague. …. The meaning and applicability of these provisions is ascertainable when they are taken in context with the whole of the enactment and interpreted according to law. When done so, the provisions are clear as to what conduct is prohibited and what is not. The trial judge agreed with the submissions of the Respondent that the only reasonable interpretation of the definition of smoking is that smoking means the act of smoking, being to inhale and exhale the smoke of any substance by means of a lit cigarette, pipe, hookah, or other lighted smoking equipment, and includes the carrying of any such lit smoking equipment meant or designed for that purpose. By preceding the term "smoking equipment" with "cigarette, cigar, pipe, hookah pipe, or other", City Council clearly intended that any other "smoking equipment" share the characteristics of all of those items: they all are capable of producing smoke by the burning of tobacco, weed, or other substance, they all facilitate the inhalation of said smoke by the placing of the item to the lips, and they are all designed and used for that purpose.

[16] In reaching his conclusion the trial judge referred to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485 and *Okanagan Land Development Corp. v. Vernon (City)*, [2012] B.C.J. 1651 (C.A.). I am satisfied he made no error in his analysis of the Bylaw and I agree with his conclusion.

C. Is the Bylaw overbroad because the City's power is limited to the protection of public health?

[17] Without resiling from their trial portion, on appeal the appellants strenuously argued that the Bylaw's prohibition of the smoking of "any substance" still renders it *ultra vires* the City's powers.

[18] The respondent City's response to this submission was primarily procedural:

> The authorities are clear that in a proceeding in which the validity of a by-law is attacked, the by-law is presumed to have been validly enacted until the contrary is established. See for instance *Macmillan Bloedel Ltd.* v. *Galiano Island Trust* (1995), 1995 CanLII 4585 (BC CA), 126 D.L.R. (4th) 449 at para.144 (Leave to appeal to SCC denied, [1995] S.C.C.A. No. 439)

> Furthermore, if the party against whom a by-law is being enforced challenges the validity of the by-law, the onus is on him or her to show that the by-law is invalid. See *114957 Canada Ltee (Spraytech)* v. *Town of Hudson,* 2001 SCC 40 (CanLII) at para. 21 and *Macmillan Bloedel Ltd.,* Supra at paras. 134 and 146.
>
> If the Appellants wanted to argue that the by-law was unreasonable because it captured the smoking of benign substances (including, presumably, herbal shisha), then the onus was clearly on the Appellants to adduce evidence in support of that contention. As it was, no such evidence was presented and it was incumbent on the trial judge to highlight that fact, especially in light of the uncontroverted evidence of the two experts put forward by the City.

[19] While conceding that there was some merit in the respondent City's submissions, counsel for the appellants put forward the view that it was *manifestly obvious* that smoking *any* substance cannot be harmful to health.

[20] I accept the respondent City's procedural submission which forms a sufficient basis for rejecting the appellants' ground of appeal. If I have fallen into error, I am also of the view that the evidence of the expert witness called by the respondent City provides a second basis for rejecting the appellants' submissions.

D. Does the enforcement of this City ByLaw violate the appellants' *Charter* Rights?

[21] Although the appellants' sought to invoke Charter ss. 2(a), 7 and 15(1) under the *Canadian Charter of Rights and Freedoms*, the only submission made forcefully by their counsel focused on s. 2(a) - freedom of conscience and religion. Both counsel and the trial judge relied on the Supreme Court of Canada decision in *Syndicate of Northcrest v. Amselem*, 2004 SCC 47 (CanLII) in which para. 46 of the judgment said:

> [46] To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

[22] Although the trial judge made reference to the proper legal authorities and made reference to the appellants' evidence on this subject as well as reviewing the appellants' expert's evidence from which he quoted two extracts.

[23] The trial judge quoted two extracts from the appellants' expert's evidence relevant to their argument:

a) social hookah smoking in cafès is to a significant extent a cultural practice in Middle Eastern culture.

b) hookah smoking cannot be considered a religious activity.

[24] The trial judge also made reference to the proper legal authorities and the appellants' evidence on this subject. Despite this, appellants' counsel submitted that he committed reversible error when he said, at para.90:

> … even if one is to accept that the Defendants and some of their customers may have a subjective, honest or sincere belief the [sic] hookah smoking has a reasonable connection to Islam, the officers who paid the Defendants to smoke the hookah pipes on the offence dates in question obviously did not.

[25] In my respectful view, taking that one sentence out of the judgment by itself could lead to a conclusion favourable to the appellants but, reading the judgment as a whole, I am satisfied that the trial judge reached a conclusion that was open to him on the evidence:

> The evidence of the Defendants and the patrons fall short of establishing that they sincerely believe that hookah smoking is a practice which has a nexus with their religion as the term has been defined by the Supreme Court of Canada in the case of *Syndicate Northcrest v. Amselem*, para. 92(a).

[26] Before coming to that conclusion, the trial judge reviewed the evidence in the case, the legal authorities and the submissions of counsel. In the circumstances, I believe it is my duty to give deference to the trial judge's findings as summarized in *R. v. Ferris*, 2013 BCCA at para. 32:

> [32] A trial judge's findings of fact and the inferences drawn from those findings are entitled to considerable deference on appeal. The standard of review is a high one. I had occasion to discuss that standard in *R. v. Caron*, 2011 BCCA 56 (CanLII), 269 C.C.C. (3d) 15:
>
> > [26] In both the *Charter* and non-*Charter* contexts a trial judge's findings of fact are entitled to considerable deference on appeal. As Chief Justice McLachlin and Madam Justice Charron stated in [*R. v. Grant,* 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353], in considering whether evidence has been properly admitted under s. 24(2), "the trial judge's underlying factual findings must be respected, absent palpable and overriding error": para. 129. In discussing this restraint on appellate intervention, Mr. Justice Fish summarized the governing principles in *R. v. Clark*, 2005 SCC 2 (CanLII), [2005] 1 S.C.R. 6:
> >
> > > 9 ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. ...

[27] In the result, I reject this submission by counsel for the appellants.

II. CONCLUSION

[28] Having rejected all four arguments made on behalf of the appellants, I dismissed the appeal.

Leask, J.