Date: 20170512
Docket: CR 16-01-35422
(Winnipeg Centre)
Indexed as: R. v. Green
Cited as: 2017 MBQB 87

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
HER MAJESTY THE QUEEN	)	Marla Bettencourt
	)	for the Crown
	)	
- and -	)	Martin Green
	)	In person/self-represented
MARTIN GREEN	)	
	)	
(accused)	)	Judgment delivered:
appellant	)	May 12, 2017

TOEWS J.

Introduction

[1] This is an appeal from a conviction entered against the appellant on June 30, 2016 under ***The Petty Trespasses Act*** C.C.S.M. c. P50 (the "***Act***"), by the Provincial Court. The jurisdiction for this appeal is set out in s. 813(a)(i) of the ***Criminal Code***, R.S.C. 1985, c. C-46. The appellant argues that the judicial justice of the peace who heard the case erred in his application of the law.

Facts

[2] The facts are set out in the Crown's factum which provides as follows:

7. On September 11, 2014 at approximately 3:55 pm the Appellant was observed by security staff at the University of Winnipeg walking on the school's campus between Wesley Bryce Hall towards Portage Avenue. He was observed to have a sign sticking out of a backpack that read "Free Omar Khadr".

8. Security guard, Christopher Rarick approached the Appellant and advised him that he was aware he was not supposed to be on campus because he had been served with a barring notice. The Appellant advised that the director of security at the University of Winnipeg, Martin Grainger, was aware that the Appellant was on the campus.

9. Mr. Rarick then contacted Martin Grainger who confirmed that the Appellant was not permitted on campus for any reason. Mr. Rarick again advised the Appellant that he was not permitted on campus, but the Appellant did not leave.

10. The Appellant then proceeded westbound to Portage Commons, crossing a campus green space between Spence Street and Young Street and then further onto Langside Street. Mr. Rarick following behind the Appellant and contacted police to report that the Appellant was on campus and refusing to leave.

11. Mr. Rarick continued to follow the Appellant to the corner of Portage Avenue and Langside Street, at Richardson College. The Appellant then stayed at this location, playing accordion with a sign for approximately 15 to 20 minutes before crossing Portage Avenue, proceeding off campus.

12. Winnipeg Police Constable, Cassandra Elizabeth Zaretski testified that on September 11, 2014 at approximately 4:05 p.m. she was dispatched to a disturbance at the University of Winnipeg, located at 515 Portage Avenue, involving the Appellant. While en route to the call there was an update indicating that the Appellant was now in front of 599 Portage Avenue, crossing the street to Langside Street.

13. Cst. Zaretski observed the Appellant walking in the middle of Langside, playing an accordion. Cst. Zaretski spoke to the Appellant, who identified himself as Marty Green, and confirmed his identity through a NICHE photo. He advised that he was exempt from his barring notice because he was protesting.

14. Cst. Zaretski took a statement from Mr. Rarick and later went to the Appellant's residence and issued him a provincial offence notice for trespass on private property.

Issue

Did the Judicial Justice of the Peace err in finding that the appellant could not rely on s. 4 of *The Petty trespasses Act* because he had been "barred" from the property?

[3] The Crown submits that where the appeal raises a question of law, it is to be reviewed on the standard of correctness and I am proceeding on that basis. In my opinion if the appellant is entitled to rely on s. 4 of the ***Act***, then the conviction was improperly entered.

Argument

[4] The relevant portion of s. 1 of the ***Act*** provides:

> 1(1) Subject to subsections (2), (3), (4), and (5), any person
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> . . .
>
> (b) who enters or in any way trespasses upon lands or premises that are the property of another and are not wholly enclosed, after being requested by the owners, tenant or occupier not to do so, or who, having entered the lands or premises or committed the trespass, refuses to leave upon being requested by the owner, tenant or occupier to do so; …

[5] Section 4 of the ***Act*** provides:

> 4 Any person who, on any walk, driveway, roadway, square or parking area provided outdoors at the site of or in conjunction with the premises in which any business or undertaking is operated and to which the public is normally admitted without fee or charge, communicates true statements, either orally or through printed material or through any other means, is not guilty of an offence under this Act whether the walk, driveway, roadway, square or parking area is owned by the operator of that business or undertaking or by any other person or is publically owned, but nothing in this section relieves the person from liability for damages he causes to the owner or occupier of the property.

[6] In this case the appellant had been asked by the owner of the property, the university, to leave the property on a prior occasion by being served with a notice on January 11, 2013 that he was "formally barred from all property, whether leased or owned, of the University of Winnipeg". That same notice advised him that: "If you return after this date you will be charged under the PETTY TRESPASS ACT." (See Exhibit 1 at page 3 of the Appeal Book)

[7] The Crown argues that s. 4 of the ***Act*** only operates to protect members of the general public who have not been specifically barred from entering upon the university property where their activity falls within the scope of s. 4. The argument of the Crown is that s. 4 does not operate so as to allow the person barred from entering the university property to enter the property. If s/he does so, that person is subject to being charged pursuant to s. 1 of the ***Act***.

[8] The appellant argues that s. 4 of the ***Act*** operates notwithstanding the fact that he has been barred from entering the university property. He states that s. 4 permits him to enter upon and remain on the university property provided that his activities fall within the scope of s. 4.

Analysis

[9] In my opinion the appeal raises a question of law, and this question of law is to be reviewed on the standard of correctness. The case here involves a matter of statutory interpretation and specifically, whether the rights set out in s. 4 of the ***Act*** are subject to the barring order made against the appellant pursuant to s. 1 of the ***Act***.

[10] The evidence establishes that the activities of the appellant were restricted to "a walk, driveway, roadway, square or parking area provided outdoors at the site" of the university. At no time did he go inside any of the buildings nor did he block ingress to or egress from the university or otherwise impede others using those areas "to which the public is normally admitted without fee or charge". Had he done so, his activity would fall outside of the scope of s. 4 of the ***Act***.

[11] While the statement he was communicating, namely "Free Omar Khadr", would not on a narrow construction be interpreted as being a "true statement", it is a statement which in my opinion falls within the scope of the kinds of statements that this provision was intended to address. In this respect, I rely on the decision of the Manitoba Court of Appeal in ***Hudson Bay Mining & Smelting Co. v. Dumas***, 2014 MBCA 6, 303 Man.R. (2d) 101 (QL), where the court considered ss. 57(2) and 57(4) of ***The Court of Queen's Bench Act*** C.C.S.M. c. C280. Those provisions provide:

> 57(2) For the purposes of this section, the communication by a person on a public thoroughfare of information by true statements, either orally or through printed material or through any other means, is an exercise of the right to freedom of speech.
>
> . . .
>
> 57(4) In this section, **"public thoroughfare"** includes a walk, driveway, roadway, square and parking area provided outdoors at the site of and in conjunction with a business or undertaking and to which the public is usually admitted without fee or charge and whether or not the walk, driveway, roadway, square or parking area is owned by the person carrying on the business or undertaking or is publicly owned.

[12] Sections 57(2) and 57(4) are virtually identical to s. 4 of the ***Act***. The intent of those provisions are set out at paras. 42 and 44 of the ***Hudson Bay*** case where the court held:

> **42** The Legislature passed s. 57 of the *Act* with the clear intention of protecting a basic civil right of everyone; namely, freedom of speech (Manitoba, Legislative Assembly, *Debates and Proceedings*, 29th Leg., 2nd Sess., Vol. XVII, No. 137 (30 June 1970) at 3484, 3866). While the origins of the law lie with picketing in a labour dispute, it is not limited to that scenario (*Channel Seven* at p. 431). The law has been applied to commercial speech, which does not engage the core values of freedom of speech (*Gameday* at para. 27).
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> . . .
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> **44** Hudbay appropriately concedes that the protesting at the Lalor and Reed Projects was an exercise of the right of freedom of speech. As noted in *R. v. Zundel*, [1992] 2 S.C.R. 731 (at p. 752):
>
> > The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. ....
>
> I agree with the *obiter* comments of Devine P.J. in *R. v. Pearson*, [1999] M.J. No. 311 at paras. 23-24 (QL) (Prov. Ct.), that s. 57 of the *Act* applies to protestors publicly expressing dissent to a corporation's business, even if it is legal.

[13] At para. 54 the court also held:

> **54** Assembling and demonstrating with signs is activity squarely within s. 57(2) of the *Act*. The area where the activity occurred, being the access road and shoulder, falls within the definition of "public thoroughfare" under s. 57(4) of the *Act*. The evidence before the motion judge was that there were no restrictions on public use of the access road from Provincial Road 395 until signage just before the Chisel North Mine. This short stretch of a private road was a "driveway" between Hudbay's mining complexes and Provincial Road 395.

[14] In my opinion, the demonstration or protest of the appellant in respect of his request to "Free Omar Khadr" falls within the scope of the definition of a "true statement" in s. 4 of the ***Act*** in the same way that "assembling and demonstrating with signs is activity squarely within s. 57(2) of the [Queen's Bench] Act" even though strictly speaking it is a request or a demand and not a "true statement".

[15] As for the issue of whether s. 4 of the ***Act*** provides the appellant with a defence against a charge pursuant to s. 1 of that ***Act***, notwithstanding that he has been requested by the university to stay off the university property, in my opinion, para. 55 of the court's decision in ***Hudson Bay*** answers that question in the affirmative. The court held:

> **55** For the purposes of this appeal, questions of trespass are irrelevant. Hudbay's action for trespass is unaffected by s. 57 of the *Act*; the section simply eliminates one possible remedy, an injunction. Also, *The Petty Trespasses Act*, C.C.S.M., c. P50 (the *PTA*), does not apply in the circumstances. There is no evidence the protestors were ever asked to leave the protest site, which is an essential element of the offence of trespass in an unenclosed area (see s. 1(b) of the *PTA*). **Moreover, by virtue of s. 4 of the *PTA*, the protestors could not be charged with the offence of trespass even if they had been requested to leave.**
>
> [emphasis added]

[16] The Court of Appeal in ***Hudson Bay*** is clear that even if a protestor has previously been requested to leave property by the owner of that property, if that protestor's activities fall within the scope of the activity protected by s. 4 of the ***Act***, the protestor cannot be charged, much less convicted, pursuant to s. 1 of the ***Act*** for returning to that property.

[17] Although there may be a suspicion that this protest by Mr. Green was more in the nature of a "ruse" and, in view of Mr. Green's broader ongoing dispute with the university, simply a way to cause an additional measure of irritation to the university and its officials, it is not appropriate for me in this case to attempt to weigh the sincerity of his protest. The evidence here is straightforward and on the basis of that evidence, I am not prepared to make any finding that the protest by Mr. Green was not a *bona fide* activity.

Conclusion

[18] In conclusion, on the basis of the forgoing reasons, it is my opinion that the judicial justice of the peace erred in law in finding that the appellant could not rely on s. 4 of the ***Act*** because he had been "barred" from the property. Accordingly, I would allow the appeal and dismiss the charge against the appellant without costs to either party.

_____ J.