In the Provincial Court of Alberta

Citation: R. v. Pawlowski, 2009 ABPC 362

Date: 20091207
Docket: A08139530E, A06303706K, A06303754K, A06300394K, A08546123E, A08652604E, A06322702K
Registry: Calgary

In the matter of s.24(1) of the *Judicature Act*, R.S.A. 2000, c.J-2 and s. 52, Part VII of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11; and in the matter of an application pursuant to ss. 2(a), (b), (c) and (d), 7, and 24(1) and (2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*.

Between:

Her Majesty the Queen

- and -

Artur Pawlowski

- and -

The Attorney General for Alberta
(Intervenor)

Reasons for Decision of the Honourable Judge A. A. Fradsham

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Introduction

[1] The accused is charged with five violations of City of Calgary bylaws and two violations of Province of Alberta traffic safety legislation. All of the allegations arise from actions undertaken by Artur Pawlowski in his work with Street Church Ministries (hereinafter "Street Church"). Street Church is a multi-denominational Christian organization that is registered as an active religious society, and is incorporated in Alberta. Street Church has attempted to address certain important social issues, ministering to, *inter alia*, people who are homeless, who are impoverished financially, who may be abusing drugs, or who may be involved in criminal misconduct.

[2] While there is little dispute that the accused engaged in most of the impugned behaviours which form the subject matter of these charges – though some dispute exists with respect to the provincial charges – what is at particular issue is whether prohibitions on those behaviours result in infringements of various rights of the accused under the *Canadian Charter of Rights and Freedoms*[1] (hereinafter the "*Charter*"). The Court is asked to determine whether the rights of the accused to freedom of religion and to freedom of expression have been infringed beyond the point of reasonable limits as can be demonstrably justified in a free and democratic society. Further, the Court is asked to determine whether the accused's rights to life, liberty, and security of the person have been infringed in a manner not in accordance with the principles of fundamental justice.

[3] At the outset, the parties agreed that the trials relating to the various tickets would run concurrently in that, while the factual evidence relating to each of the tickets would, obviously, vary, the *Charter* arguments were essentially the same in relation to all the tickets. Further, the parties agreed to proceed by way of a *voir dire* on the admissibility of evidence, with the entirety of the evidence presented in the *voir dire* and, subject to my decisions regarding admissibility, no further evidence to be called in the trial proper.

Facts

[4] The charges before the Court relate to incidents said to have occurred in the City of Calgary on or about April 13, 15, 27; May 23; and, June 3, 18, 2007.

[5] The parties agreed on the following facts (either by way of Exhibit 1 (Agreed Statement of Facts) or subsequent oral admissions):

1. On each of the relevant dates, the accused did not have a permit (nor did anyone affiliated with Street Church) to use a sound amplification system in a park nor did he (or anyone affiliated with Street Church) have a permit to place materials on a street, sidewalk, or boulevard.

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[1] Part I of the *Constitution Act, 1982*.

2. On April 13, 2007, the accused used a microphone and sound speakers to amplify his voice. The amplification lasted for approximately 30 minutes. At the time, the accused was standing in Triangle Park, a public park. As a result of these actions, a City of Calgary Bylaw Officer issued a ticket to the accused for operating an amplification system in a public park, an offence under the *Parks and Pathways Bylaw*, 20M2003.

3. On April 15, 2007, the accused placed or allowed to be placed two large sound speakers on a sidewalk. As a result of these actions, a City of Calgary Bylaw Officer issued a ticket to the accused for placing material on a street, an offence under the *Street Bylaw*, 20M88.

4. On April 27, 2007, the accused used a microphone and sound speakers to amplify his voice. At the time, the accused was standing in Triangle Park. As a result of these actions, a City of Calgary Bylaw Officer issued a ticket to the accused for operating an amplification system in a public park.

5. On May 23, 2007, the accused placed or allowed to be placed signs, tables, a large wooden cross, banners, and boxes with food, drinks and DVDs on a sidewalk in front of City Hall. As a result of these actions, a City of Calgary Bylaw Officer issued a ticket to the accused for placing material on a street.

6. On June 03, 2007, the accused used an electronic amplification system to amplify his voice. The resulting sound came from a speaker that was resting on the roof of a pickup truck. As a result of these actions, a sworn member of Calgary Police Service issued a ticket to the accused for causing unnecessary noise from a motor vehicle, an offence under the *Use of the Highway and Rules of the Road Regulation*, AR 304/2002.

7. On June 18, 2007, the accused used an electronic amplification system to amplify his voice. The amplification came through a portable speaker (a.k.a. "boom box") being held by someone during an activity on a sidewalk at the corner of 10th Avenue and Centre Street S.E.[2] As a result of these actions, a sworn member of Calgary Police Service issued a ticket to the accused for "stunting", an offence under the *Traffic Safety Act*, RSA 2000, c.T-6.

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[2] The Agreed Statement of Facts, at para. 16, states the offence occurred when the accused, "standing in the back of a 2001 Dodge pickup truck, used an amplification system to amplify his voice into Triangle Park for about 30 minutes." That statement is contradicted by the *voir dire* evidence led by the Crown.

8. Also on June 18, 2007, at the same location and during the same activity, the accused placed or allowed to be placed boxes – including boxes of food – and a large wooden cross on the sidewalk. As a result of these actions, a City of Calgary Bylaw Officer issued a ticket to the accused for placing material on a street.

[6] While these admissions acknowledge the actions of the accused in the various incidents that resulted in the tickets being issued to him, the factual foundation for these matters remains complex. Analysis of the *Charter* issues requires a detailed factual presentation.

Details Regarding the Incidents

April 13, 2007

[7] City of Calgary Bylaw Officer Kevin Ross Leith issued the April 13, 2007, ticket. The charge was for "use of amplification" in a public park. Officer Leitch testified that, for months prior to April 13, 2007, City of Calgary Animal and Bylaw Services had received citizen complaints that related primarily to noise coming from a sound amplification system being used by Street Church. While the complaints tended to be received on Friday evenings, Sunday afternoons, and Monday evenings, and the ticket was issued on a Friday evening, Officer Leitch testified that he could not say whether there was any citizen complaint on the evening of April 13, 2007.

[8] On the day in question, Officer Leitch and his partner (Officer Keith Arnt) drove toward Triangle Park. He testified that from "not quite two blocks" or, moments later in his testimony, "about a block and a half away from Triangle Park", he was able to hear voices coming from a sound amplification system that he discerned was at the Park. The volume was such that, from "about a block and a half away" from the Park, and over ambient noises created by passing cars or C-Trains, he could hear "the occasional word from -- I could make out words".

[9] As he drove closer to the Park, Officer Leitch testified that he observed a sound speaker on a stand, and he observed the accused standing beside a pickup truck. At that time, according to the Officer, "the accused was not talking on the amplification" system. The accused was known to Officer Leitch from past contacts, with Officer Leitch noting that he had approached the accused "because I recognized him". On cross-examination, Officer Leitch admitted that, at the time of his arrival, he had already decided he was going to issue a ticket. "Arrival" at the Park, "beside the pickup truck" and to whom the ticket was going to be issued, were terms not further clarified.

[10] When Officer Leitch approached the accused and asked him for identification, the accused reportedly climbed into the box of the pickup truck and began speaking, using the sound speaker for amplification. The accused spoke for approximately 15 minutes. While unable to recall "exact words", Officer Leitch testified that the accused was speaking about "the actions of

the [C]ity, and [B]ylaw services, and the pending charge that he was going to be receiving". Officer Leitch further testified that, while his "attention was on the people in the park" and he was "concerned that someone in the crowd might take exception to the actions that [B]ylaw was undertaking", all of which caused his attention to be diverted, the content of the accused's speech during the time in question "was not so much religious expressions as it was about the matter at hand about the [B]ylaw enforcement." During a pause in the accused's speech, Officer Leitch again asked for identification from the accused. This was provided, and Officer Leitch then issued the summons. The accused reportedly continued speaking through the sound speaker after the ticket was issued.

[11] Officer Leitch testified that the one sound speaker that he observed was between three and four feet high, and between one-and-a-half and two feet wide. The speaker was facing southeast, from the northwest corner of the park "towards where the crowd was."

[12] Officer Leitch acknowledged having had prior contacts with the accused in relation to the use of sound speakers in Triangle Park. The officer noted that the accused, at one time, had a City-issued permit allowing him to use sound amplification in the park, but "that permit was not renewed."

[13] Officer Leitch testified that a City call centre had been receiving complaints from residents on the north side of Memorial Drive, from residents in a seniors tower near 8th Avenue and 6th Street S.W., from people in a temporary shelter at the Drop-In Centre, and from people further down 4th Avenue ("about three blocks away" from Triangle Park). The complaints apparently included people stating that they had needed to increase the volume on their televisions in order to be heard over the competing sounds coming from Triangle Park. Such complaints had been received in 2006, but, at that time, the accused still had a permit for the use of sound amplification in the park. As Officer Leitch testified, "[W]e started taking action after the permit was no longer in force, and the complaints were still coming in."[3]

[14] Officer Leitch spoke of different types of tickets issued by Bylaw Officers, including charges for illegal encampments, damaging a park by driving a vehicle through it, and allowing dogs to run off leash. He noted, with respect to the use of sound amplification in a park, that officers may charge someone for infractions that include any amplification in a park when there is a complete restriction on any amplification, any amplification during prohibited hours, or any "amplification past a certain decibel level", which would be assessed by use of a "sound meter". Typically, Officer Leitch said, Bylaw Officers "strive for voluntary compliance which means that we like to give people the opportunity to -- to change their behaviour by educating them about the infraction."

[15] In cross-examination, when asked what had made him decide, on this date, to issue a ticket to the accused, Officer Leitch replied:

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[3] No objection was taken to the hearsay nature of this evidence.

> Bringing it to his attention, asking him not to do it, instructing him to stop, had not changed his behavior, complaints had continued, it was -- the date that we decided collectively as the downtown team that we would see if enforcement, the next step up in our action, would stop the complaints.

[16] Officer Leitch later added that, having made numerous complaints about noise coming from Triangle Park during Street Church services, "the community was holding us accountable for that issue and we had to show that we were trying to resolve that issue."

[17] Officer Leitch explained that he had issued the ticket at the time he did "because of the required paperwork and reporting to complete before the end of the shift." No other factors were mentioned as having prompted the issuing of the ticket while the accused was speaking to the crowd through the use of the sound speaker.

[18] In his testimony, the accused admitted using amplified sound in a park on this date. When asked why he had done so, the accused replied:

> Well, we -- like I stated before, the need for amplified sound in that location was absolutely crucial to conducting the services and, second, we were making a statement against what we believed was unprecedented -- for us, a use of force and -- and bureaucrat -- you know, it's just we felt that we were treated unfairly and unjustly, so we were willing to stand up and fight for our rights.

[19] At the time the ticket was issued by Officer Leitch, the accused testified, he was "in the middle of a service". Regarding the interaction with Officer Leitch, the accused stated:

> At that time, I believed he asked me for my identification. I -- I -- I said I will give to him. I finished -- I was trying to explain to the people what's going on and that the -- that the officers are breaking the law as we speak right now, and the whole thing got interacted.
>
> And I went, I produced identification to -- to that gentleman. He wrote a ticket and gave it back to me.

[20] The accused clarified, that in stating, "The whole thing got interacted", he meant "Praying and giving sermons was interrupted that day."

[21] I accept Officer Leitch's description of his activities, and the level of sound he heard.

> *April 15, 2007*

[22] Officer Richard Glenn Porter was the City of Calgary Bylaw Officer who issued the ticket to the accused on April 15, 2007. The charge was for placing material on a street. Officer Porter testified that, as a result of "a concern" which had been received, he was directed to the 400 block of Riverfront Avenue, there finding "a large demonstration ... with (the accused) ... doing a service." (Later, the Officer stated that he had been directed to attend the scene in order to oversee the activities, and he testified that he was not aware of any particular complaint having been made to Bylaw Services.)

[23] Officer Porter stated that, with respect to the charge, "there was a concern brought up, right along Riverfront Avenue right across from the Drop-In Centre (the accused) had placed two large speakers and they had a podium and they were doing a demonstration. They had a bunch of singers and stuff sitting on the sidewalk." "Posts and cables" were also present. Officer Porter added:

> [W]ith the speakers and everything placed on the sidewalk the concern came up that people couldn't allow -- it wasn't allowing access for the public to get down the sidewalk and the public was actually walking out onto the road to go around rather than stepping over posts and cables.

[24] According to Officer Porter, he acted after witnessing one pedestrian, having stepped into the street to avoid the activity on the sidewalk, being almost struck by a passing car.

[25] Reportedly concerned for public safety, Officer Porter said he "requested that the speakers be moved off the sidewalk and allow access for the public." He continued:

> He -- there was an agreement. They started to remove the speakers and the stuff off the city sidewalks and they were starting to place it back onto the park itself and Artur ... came back, placed the speakers back on the sidewalk. At that point in time I chose to issue a charge.

[26] The sound speakers were three to four feet in height, and one-and-a-half to two feet in width, and were connected to an amplification system. Given the events of April 13, 2007 (described in paragraphs 7 -21 above), Officer Porter noted the following, when speaking of the discussions about moving the speakers:

> [A person identified as Bogdan Stoviecki] went over and it's my personal opinion, what happened was he took the speakers and started to place them in the park. My understanding was the Street Church Ministry was just issued a charge very recently, or prior to this, for using amplification in the park. So they really didn't wish to put the system back into the park again and be charged for that.

> So what was happening, they started to place the -- the stuff into the park area and my friend here came back over and placed it back on the sidewalk and -- and that's when I issued the charge I didn't truly have the conversation with Art himself.

[27] Officer Porter stated that, when he actually intervened and issued the ticket, the speakers were being used to amplify sound coming from people playing guitars. Those people, the Officer said, were present as part of a larger gathering related to Street Church, with the event including dancing, eating, singing, and praying.

[28] When asked how he decides to issue a ticket for the charge of placing material on a street, given the generality of that charge, Officer Porter spoke primarily of construction-related issues, such as overhead cranes or the placement of landscaping materials, adding, "You can -- you can get a permit to close off a sidewalk or place material on streets and roads and sidewalks. ... We do it with parades, we do it with everything."

[29] Officer Porter spoke of his personal support for the objectives of Street Church, and he explained some of the history leading up to the laying of charges by the Bylaw Officers. Specifically, he noted that complaints from residents of Bridgeland and Crescent Heights and from users of the Drop-In Centre had caused the City of Calgary to discontinue the issuing of permits to Street Church for the use of amplification in a park. Street Church, he said, opted to engage in further use of sound amplification, with Officer Porter offering:

> At that point in time that's when we started to come in and say you can't do this. You cannot use your amplification in the park, you do not have a permit for it. And that's where the heads started butting and they didn't wish to move anymore, where I was getting quite a bit of cooperation prior to that. I cannot do my service without my amplification, it's not going to happen. I'm going to use it anyway. No matter what we said or did, it was going to happen. So at that point in time, the charges -- in my opinion I didn't have a choice at that time.

[30] In both examination-in-chief and cross-examination, Officer Porter made multiple references to having decided to issue the summons because of the speakers being placed on the sidewalk, in apparent violation of a bylaw that prohibits the placement of material on a sidewalk (unless a permit has been granted). He also referred to the presence of a larger-than-usual crowd and of singers and dancers who had made the sidewalk busy to the point that passersby were walking out onto the roadway to obtain passage. At one point in cross-examination, for example, Officer Porter stated, "[W]ith the placement [of the speakers] and with the singers -- singers and everybody on the sidewalk, it was impeding. Not -- if you just took the speakers separately, perhaps not." Nonetheless, as the speakers fell within his definition of "material", Officer Porter said he was acting within his discretion in opting to issue the ticket.

[31] Commenting that he "wasn't there to create a riot", Officer Porter testified that he did not attempt to have the speakers removed from the sidewalk. He noted that his position was expressed to other bylaw and police officers attending the scene, reportedly telling them that to impound the speakers would be "going a bit overboard."

[32] Some attention was paid by counsel to the issue of whether the accused (or Street Church) had a permit for the impugned activity. In fact, the evidence shows that Street Church was granted a Facility Rental Permit on November 07, 2006 that covered activities occurring in 2007. (The Permit was cancelled by the City as stated in a letter dated April 24, 2007, authored by Michael Kenny, Manager, Parks Operations Central, Calgary Parks.) Although not explicit in the original Permit itself, the permission appears to have related to activities at Triangle Park and did not, in any event, allow for the placement of material on a sidewalk on the date in question at the location described above. In short, there is no evidence of Street Church or the accused having a permit to engage in the impugned activity.

[33] In his testimony, the accused noted that additional volunteers had been asked to attend the service on April 15, 2007, "because we have been advised by the authorities that they're going to seize our equipment and arrest us for what we are doing", and the accused said he "didn't want to be arrested without no one knowing or seeing. We were making a stand for our constitutional rights."

[34] The accused admitted having sound speakers on the sidewalk, explaining that he did so:

> Because I -- just two days before I received a ticket and I was that -- advised by the officers that I will receive another one, and perhaps something more severe, if I will continue to use amplification in the park.
>
> We still wanted to make a stand. We still wanted to -- to fight for our rights, but we wanted to do it in such a way that -- that we can make a stand, but also not break what they say we were breaking, so I decided to move the speakers.
>
> If we cannot use that in the park -- I moved them to the sidewalk so that they would not be an issue. Like this is a regular church Sunday. I didn't want to have just crazy stuff again, what happened two days before with the officers, so I said, surely, if we move them out of the park, the issue is gone, it's not in the park.

[35] The accused explained that he had been responsible for the placement of the speakers on that day, putting them "as closest [*sic*] to the park as possible without being charged that I have speakers in the park." He denied that there was any significant obstruction to pedestrians and

suggested that people walking on the street may have been the result of jaywalking that occurs "all the time" and "not because of the -- of the speakers."

[36] At the time that the ticket was issued, the accused testified, "I was just addressing people what's going on", an apparent reference to the reported presence of 30 police and Bylaw Officers. The accused continued:

> I was trying to -- there was media that came, lots of reporters, so I tried to tell them that our rights are being taken away from us. I was making arguments about our constitutional rights, about charter of rights, and [--].

[37] With his answer interrupted by counsel, the accused then testified that comments about constitutional rights were not "supposed to be part of [the] service on that day". As a result, he said, the issuing of the ticket meant that the "whole service was completely destroyed, except a few moments that we were able kind of to force ourselves to -- to be joyful and to -- still do something for those people."

[38] I am not satisfied that the material placed on the sidewalk by the accused caused pedestrians to step into the street.

April 27, 2007

[39] Officer Porter was also the Bylaw Officer who issued the ticket to the accused on April 27, 2007. That charge was for using amplification in a park. He testified to having issued the ticket after, having asked to see the permit for the use of amplification in a park, none was produced. When asked what kind of sound was coming from "two large speakers", Officer Porter responded that, when he "dealt with it", the sound was that of the voice of the accused who "was doing grace at the time and stuff, when they were doing their meals and stuff in the park." When asked if what the accused was saying had affected his discretion regarding issuing the ticket, Officer Porter replied, "Not at all, I don't have a problem with somebody saying grace before they eat."

[40] When asked what he was doing when he received the ticket from Officer Porter, the accused, in his testimony, replied:

> The same thing. I -- our -- (INDISCERNABLE) in the presence it was always the same, to conduct a church service, to address the needs of the poor, to feed them, to clothe them, and -- and just to spark some hope into their hearts.

> So that's what I was doing. Either -- if I was not on the microphone I would pray with people or talk with them as a counsellor to them.
> ...
>
> ... So for that specific day, I do not remember if I was preaching from the amplification. But I was conducting a – a duty of a pastor over there.

[41] The testimony of Officer Porter and the testimony of the accused are not in conflict. I accept it.

May 23, 2007

[42] Officer Ronald Christopher Basso was the City of Calgary Bylaw Officer who issued the ticket to the accused on May 23, 2007. That charge was for placing material on a street. Officer Basso testified that, on the day in question:

> Street Church had set up tables, a cross, they had a bunch of banners, boxes of food, and we had -- our lead officer, Officer Hem (phonetic), had requested that the tables and the cross and everything be moved off of the street, and had stated that they could leave the boxes of food as they were handing out food to the street -- the homeless people that gather, or the people that had gathered but had asked that the tables and -- and other items be removed from the street.
>
> It was -- there was no action on that. We took it as a refusal to comply, and I issued a summons for material on the street.

[43] For clarity, the material was on the sidewalk in front of the west side of City Hall, not on what might more commonly be called the "street", that is, the roadway. Originally, the Officer suggested that a pedestrian using that sidewalk on that date "would have been like walking through an obstacle course", adding, "Materials were infringing on traffic also, pedestrian traffic." A collection of 28 photographs depicting the scene were entered as an exhibit. Following discussion of the contents of the 28 images, Officer Basso clarified that one factor in the "obstacle course" description was simply the number of people "milling about" on the sidewalk.

[44] On cross-examination, Officer Basso stated that, when he first arrived at the scene, he had, in the company of two other Bylaw Officers, observed the Street Church activities from a vantage point on the west side of Macleod Trail, that is, across the street from City Hall. Officer Basso acknowledged that during the 15 minutes or so that he said he was at that location, he did not ask any pedestrians whether or not they had crossed the street (presumably Macleod Trail) as a result of the alleged obstructions on the east side of the street. Pressed as to whether "this

whole comment you made earlier about people had to cross to the other side of the street" was "just an assumption", Officer Basso replied, "I guess." When reviewing photographs of the scene, Officer Basso conceded that a width of approximately five metres down the length of the sidewalk remained open and unobstructed, available for the use of pedestrians. In fact, there was potentially more space on the sidewalk that day than on most sidewalks in the City of Calgary, which, Officer Basso said, are usually one-and-a-half to two metres wide.

[45] Officer Basso testified that he personally did not ask the accused to remove the materials, but, the Officer said, he witnessed Officer Hem doing so. Officer Basso stated that he chose to issue the ticket to the accused because "He is basically the head of the Street Church ministry, and has been the one in care and control." The accused apparently did not accept personal service of the ticket, so Officer Basso left the ticket on one of the tables.

[46] The accused testified that the event of May 23, 2007, occurred in response to the previous police and Bylaw Officer involvement in Street Church events. Specifically, the accused stated, "Well after that incident with 30 officers, we just decided that it's time to do a peaceful demonstration."

[47] The accused stated that tables were placed in a manner that attempted to "not cause any stumbling block for the people. It's -- it's a traffic area. People are walking around, it's a sidewalk. So we put them between the posts and the -- and the flower pot.[4]" He added, "That's why I placed the tables in [that] specific location, that when the people will come, they will not block the entire sidewalk."

[48] Commenting that he believed that Bylaw Officers had targeted him as the supposed leader of Street Church, the accused noted that he "didn't want to talk to the officers" that day and that "the officers were actually chasing me."

[49] Again, the testimony of Officer Basso (as clarified in cross-examination) and the testimony of the accused are not in conflict.

[50] I accept the evidence of both Officer Basso and the accused, save that I do not accept that the officers were literally chasing the accused. I find that the evidence does not establish that pedestrians were prevented or unduly hindered in their use of the sidewalk as a result of the accused's placement of material thereon.

June 3, 2007

[51] Constable Mike Hagen was the City of Calgary Police Officer who issued the ticket to the accused on June 03, 2007. The charge was for causing unnecessary noise from a motor vehicle contrary to s. 82 of the *Traffic Safety Act*. The incident leading to the charge occurred at

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[4] These are flower pot decorations in the open space in front of City Hall.

Simmons Park, near 5th Avenue and 5th Street, in southeast Calgary, essentially adjacent to Triangle Park.

[52] Cst. Hagen testified that he and his partner attended the scene in response to a noise complaint. On arrival, the officer determined that the sound was coming from a red pickup truck that, he said, "[W]e know is associated with the street ministries." The truck was parked on the south side of 5th Avenue. From two blocks away from the park, with the windows down and Cst. Hagen inside his police vehice, he testified, he "could hear a male's voice loud enough that certain words were -- were heard, but not enough to put together any sentences." He added, "We observed large speakers on top of the vehicles that are facing a crowd of people on the north side of the street."

[53] Cst. Hagen testified that he and his partner spoke briefly with Bylaw Officers who were present at the park. Cst. Hagen stated that he and his partner then drove slowly past the front of the speaker and found that the volume was so loud that "sitting beside my partner we could not hear each other talking in our car." However, on cross-examination, Cst. Hagen clarified that, when driving past the speaker, "[I]n order to speak to my partner, yes, I would have had to have raised my voice." When asked whether he needed only a "slightly raised voice" in order to communicate with his partner, Cst. Hagen answered affirmatively. After driving past the sound speaker, Cst. Hagen and his partner turned their car around in a cul-de-sac and paused to observe the scene.

[54] Cst. Hagen stated that he and his partner left their police vehicle and approached the accused who, at the time, "had the mike in his hand". The officer noted that the accused "wasn't turning down the volume. He had spoken with bylaw and had refused to lower the volume." As a result, Cst. Hagen testified, "I issued a summons to Mr. Pawlowski at this time for unnecessary noise, loud and unnecessary noise coming from a motor vehicle." The summons was issued at 3:21 p.m. Cst. Hagen stated that, after he gave the summons to the accused, the sound "was turned down or off", such that the laying of the charge "obtained the objectives" that were being sought. However, on cross-examination, Cst. Hagen conceded that it was "possible" that "nothing had changed from when [he] arrived" at the scene, that is, that the activities of Street Church, including the use of sound speakers, continued.

[55] On cross-examination, Cst. Hagen reported that the information on the summons was completed before he and his partner left their police vehicle, meaning that Cst. Hagen had opted to write the ticket before having had any direct contact with the accused.

[56] Regarding "the mike in his hand", Cst. Hagen later testified that while he saw the accused with a microphone, the microphone may have been attached to a camera and not to the sound speaker. In fact, Cst. Hagen testified, the accused held the camera-related microphone to the officer's mouth during the interaction regarding service of the summons.

[57] Cst. Hagen testified further about the volume of the sound coming from the speaker, offering:

> And then from the distance from the people that he was speaking to, to -- from where he was, I don't know if they've had -- it didn't have to be that loud that they could not hear him. That to me was excessive when you're less than 50 feet away that they, those speakers have to be that high.

[58] Cst. Hagen later added that he deemed the noise to be "unnecessary" because of "the volume being that loud" when addressing "the crowd across the street" and "unnecessary that people like I'm going to estimate six blocks away are hearing this noise." The volume of the sound, Cst. Hagen summarized was "not necessary ... for his purpose".

[59] Cst. Hagen commented that the accused was "speaking into a microphone" that was "connected to an amplifier that was in the back of the truck which I believe went to the speakers." He testified that two speakers, approximately 2 feet high and 18 inches wide, were located "on top of the hood of the -- truck." Having reviewed photographs taken at the scene by someone else, Cst. Hagen clarified that one speaker was located on the hood of a pickup truck and the other speaker was located on the roof of a van.

[60] Cst. Hagen testified that he acted as a result of the noise level itself and not because of any concern over the effect of the noise on traffic. He noted that there was "very, very little motor vehicle traffic in this area." Asked about his understanding of the particular law, Cst. Hagen responded:

> Any sound emitting from a motor vehicle whether it be from a stereo, whether it's a squealing of tires, a horn of the vehicle that's -- that is loud and unnecessary to the point that it's a distraction to other drivers or pedestrians or the public in general is my -- my interpretation, the reason that this -- this was chosen as the --.

[61] When asked about the concept of noise that is "necessary", Cst. Hagen testified:

> Necessary noise would be sometime -- well, for me to understand, the unnecessary part of this particular charge was the size of the speakers from this particular vehicle that that's not a normal part of vehicle equipment. That it again, for what's considered reasonable noise coming from a vehicle, whether it be a stereo, this was again excessive as far as what's required --.

[62] Cst. Hagen stated that he has the ability to lay bylaw charges, but, "This particular day I did not have a bylaw spec penalty book, so, I relied on my traffic spec penalty book to -- choose

the charge." Cst. Hagen said that, in his nine-year career with Calgary Police Service, this was the sole occasion on which he had ever laid the charge of loud and unnecessary noise coming from a motor vehicle.

[63] The accused testified that Street Church opted to leave Triangle Park between April 15 and 27, 2007, as a good faith gesture to bylaw officials who, the accused suggested, told him "if I will not show up in the park, in Triangle Park for three days, and publically [*sic*] say I respect the authorities of the city officials, then he says all the tickets will be revoked." The accused stated that an initial period of one week without activities by Street Church at Triangle Park was then extended into a second week as the situation remained dormant until a scheduled meeting with City officials.

[64] At the meeting, the accused testified, he was told that a total of eleven complaints had been received about noise related to Street Church activities, and he was told that permits previously issued to Street Church for activities in Triangle Park were being revoked. (That information was presented not for the truth of its contents, but as part of the narrative.)

[65] As a result of the meeting, the accused testified, Street Church agreed to move its activities to Simmons Park. After being asked when the move took place, the accused responded, "I believe it was May [2007]." No sound amplification was used for the first month of Street Church activities at Simmons Park, and no tickets were issued by Bylaw Officers or by the police. Attendance at services was lower ("probably half the people") than when Street Church had been using the Triangle Park location, but, in any event, the accused said, "We were not able to communicate with them, because amplified sound was taken."

[66] Reportedly unable to disrupt alleged drug trafficking activity without the use of sound amplification, Street Church decided to rent a property adjacent to Simmons Park and "put the speakers in the private property, in that's gentleman's backyard." However, after "two or three" services conducted in that manner, the accused testified, the property owner "broke the contract with us", allegedly having been contacted by City officials. There is nothing before me to substantiate this allegation.

[67] Another rental arrangement was made with a nearby property owner , but "less than five" services took place with sound amplification before intervention by Bylaw Officers. In addition, the accused testified, the second rental property was some distance from Simmons Park, with the accused describing, "I would have to crank the speakers to the point that I -- I knew I would be disturbing other people." Instead, according to the accused, a Bylaw Officer suggested that placement of speakers on a vehicle would be an alternative approach "as long as -- as it's within the law decibel acceptable level".

[68] At the time the June 3, 2007, ticket was issued, the accused testified, he was "praying with people. I was talking to people. I was welcoming people. Usually my -- my job was to welcome people and pray for food, so I would just grab microphone, welcome everybody, put the

music on.” When asked again about activities when the ticket was actually issued, the accused replied:

> Lord’s Supper was conducted by a pastor from Centre Street Church, Lawrence Irving. And when he was in the middle, when we were all in the middle of -- of partaking in Lord’s Supper, that’s when the officers decided to come in and -- and we were not able to do it.
>
> I had to -- I had to go to them and talk, because they were -- they were asking for me. And then the service stopped, because then Lawrence Irving didn’t know what to do.
>
> Like all the -- all the people that should partake in the Lord’s Supper are talking to the police officers right now, so he stopped, waiting for this whole issue to be solved. And -- and that’s what happened.

[69] On cross-examination, the accused acknowledged that the sound from the speakers was “loud enough that it could be heard over the traffic”. He further acknowledged that the truck belonged to him, and that the speaker was powered by a connection to the truck’s battery. Later in cross-examination, the accused was asked whether “your noise on that occasion was not necessary to the operation of the vehicle, or the safety of the vehicle in any way?” He responded that sound was “necessary, in my view, to address those people.”

[70] Asked repeatedly whether, in reference to the Bylaw Officers, “Did they stop you from saying a message? I -- I’m not talking about the means?”, “You were otherwise able to deliver your religious message, but not in the means you wanted. Is that accurate?”, and “Were you able to deliver your religious message, perhaps not in the means you wanted?”, the accused eventually responded that, after the interruption caused by the issuing of the ticket, “We finish [*sic*] it, yes.” The content of the message, however, the accused said, “trying to explain to people in the park what was going on ... was shifted from a religious message to a political message, which I hated.”

[71] The only factual issue to be resolved relates to the level of sound coming from the speakers. I find the level of sound was that described by Cst. Hagen in cross-examination: the level of sound required the officer to slightly raise his voice to speak to his partner in the police vehicle.

June 18, 2007

[72] Constable Blaine Ellerby was the City of Calgary Police Officer who issued the ticket on June 18, 2007. The charge was for “stunting”, with the summons issued pursuant to provisions of

the *Traffic Safety Act*. The incident occurred just south of the intersection at 10th Avenue and Centre Street, in southwest Calgary, adjacent to a facility known as the Mustard Seed, which provides services to homeless individuals. Cst. Ellerby testified that he was at the scene having simply happened upon it while on patrol, not in response to any complaint.

[73] Cst. Ellerby testified that he had approached the scene in a marked police unit, parking close to 12th Avenue and Centre Street and hearing “a loud public address system”. The officer then relocated to the west side of the intersection at 10th Avenue and Centre Street and, he said, “observed several motor vehicles traveling east and westbound, many of them slowing down to observe what was going on on the street corner.” Cst. Ellerby added that he also observed the accused “and his associates” “utilizing a public address system to address the crowd in the area there.” He continued:

> It was in my belief that the utilization of that public address -- excuse me -- public system, due to its loudness, was distracting drivers on 10th Avenue east and westbound, as well as northbound Centre Street -- north and southbound Centre Street.

[74] Cst. Ellerby added that he issued the summons due to:

> ... my belief that (the accused’s) actions on the street corner there were interfering with the motor vehicles -- the drivers of the motor vehicles that were traveling up and down that road and taking their attention away from the roadway and onto their meeting on the street corner.

[75] Further, Cst. Ellerby stated that, by “interfering”, he meant, “[B]ecause it was so loud, they were -- rather than pay attention to the road they were directing their attention over to the side of the road where [the accused] and his associates were gathered there.”

[76] When asked about the specific activities of the accused, Cst. Ellerby testified that he observed the accused “with a microphone in his hand, speaking, and one of his associates walking around with a loudspeaker hoisted on his shoulder, broadcasting messages over the public address system there.” The messages, the officer said, were “religious” in content.

[77] When asked why he opted to issue a stunting ticket instead of a noise ticket, Cst. Ellerby replied:

> It was of my opinion that -- there’s a number of different summonses I could write there from city bylaw to rules of the road regulation or under the Traffic Safety Act. So it was my choice at that time to write a stunting summons which is kind of laymans’ terms, stunting is under the Traffic Safety Act 115(2)(e), a person

> causing -- or disturbing -- I can't recall the wording now. A person on the side of the road causing a driver to take his focus or attention away from the roadway. Causing a traffic hazard basically.

[78] Cst. Ellerby said, the summons was issued to the accused because he "is the leader of the Street Church, therefore in my opinion the leadership of that, so that's why I issued the summons to him." Cst. Ellerby stated that he had not issued any warning to the accused as "my personal taste is I don't issue warnings for stunting summonses, I just write them", doing so because stunting "is a danger to others, other motor vehicles or pedestrians in the area."

[79] For what he estimated to be 30 minutes before the issuing of the summons, Cst. Ellerby took photographs at the location, and those photographs were admitted as Exhibit 8 in these proceedings. At least one of the photographs shows a person with a speaker on his shoulder. Cst. Ellerby acknowledged that none of the photographs depicted a driver being distracted by the actions of the accused. Cst. Ellerby admitted that, during the time he was taking pictures and after he had issued the summons to the accused, the act that he considered to be "a danger to others" was allowed to continue.

[80] Asked about the purpose of the law, Cst. Ellerby testified:

> I would like to think it would discourage those from performing or engaging in something on the roadside that would cause me, as an operator of a motor vehicle, to become distracted and therefore perhaps miss a pedestrian crossroad in front of me, miss a motor vehicle stopping in front of me, therefore me running into the back of him.

[81] The officer testified that the provisions of subsection 115(2)(e) of the *Traffic Safety Act* were not difficult for him to interpret and apply either in general or in this case. Cst. Ellerby noted that, even if the participants had a permit, were engaged in religious activity, were engaged in political protest, or felt that they were participating in democracy, if they were engaged in an activity that was distracting to drivers and they would not discontinue the activity, then he would lay the charge against them.

[82] I do not accept Cst. Ellerby's testimony that he "simply happened" on the accused and his activities. I find it implausible that the officer would have spent the amount of investigation time that he did on such a matter, and take photographs, unless this was part of a targeted investigation.

[83] Further, I do not accept that the evidence before me supports the Constable's conclusion that operators of motor vehicles were distracted by the activities of the accused. I reject the Constable's testimony that those activities distracted or startled any motor vehicle operators.

[84] Finally, I reject the Constable's statements that the accused, by his activities, was creating a danger. Apart from issuing a ticket, the Constable did nothing to stop the accused from what he was doing. If the accused was creating the danger alleged by the officer, surely the officer would have taken proactive steps to eliminate the danger.

[85] Also on June 18, 2007, the accused was ticketed for placing material on a street. Officer Basso was the Bylaw Officer who laid that charge. He first testified that "beverage containers and boxes of food" had been "set up" at the sidewalk location by the Mustard Seed, and described immediately above. He later added that a cross and a red cooler were also on the sidewalk.

[86] As this was a "narrow" sidewalk, the Officer said, the placement of the materials had the effect that "basically they were blocking the entire sidewalk", though the Officer said that he could not recall any pedestrians either walking into the street or crossing the street. No warning was given to the accused prior to the issuing of the ticket nor were the materials moved after the issuing of the ticket. Officer Basso suggested that "past history" with the accused, including that the accused "hasn't -- when requested to do something it wasn't done", led to his decision to issue the summons without first giving a warning or other opportunity for the accused to move the materials. On cross-examination, Officer Basso stated that the material was blocking "part of the sidewalk", leaving room for people to pass through, to stand, and to pray.

[87] When asked about the apparently different procedure followed on May 23, 2007, compared to June 18, 2007, with the accused, in the earlier of the two incidents, being allowed by Bylaw Officers to leave the food on the sidewalk (but being asked to remove the tables and other items), but being ticketed for having food on the sidewalk in the later incident, Officer Basso suggested that he was simply following directions given on each occasion by Officer Hem.

[88] When asked whether the "religious paraphernalia" that he had seen had any impact on his decision to issue the summonses (on May 23 and on June 18, 2007), Officer Basso answered in the negative.

[89] The accused testified that he had become involved in longstanding activities at the Mustard Seed location at the request of a person identified as Steven Cotam, and in response to increasing intervention by police and bylaw officials. (While on examination-in-chief, the accused said that Street Church was asked to help at the Mustard Seed location, on cross-examination he said that the invitation had come through Centre Street Church.) The accused commented that a decision was made not to serve the food from tables as "I didn't want to have again another ticket for having tables over there". Instead, the accused stated, boxes containing the food were placed "as far to the curb as possible so it would not be blocking anything."

[90] On cross-examination, the accused admitted having been at the scene, using a "small ghetto blaster" as a public address system, with volume that was "sometimes ... louder than the

traffic”. He acknowledged that, due to being “very busy” with the activities, his “attention wasn’t solely focussed on traffic”.

[91] When asked, “On that day were you able to say what you wanted, perhaps not in the means you wanted?”, the accused spoke at length about the magnitude of the police response to this and other activities of Street Church, offering, “So no, I was not able to do what I was there to do.”

[92] I accept Officer Basso’s description (as modified on cross-examination) about the placement of the boxes of food. Pedestrian traffic flow was not significantly impeded.

Artur Pawlowski

[93] The accused testified in the *voir dire* and described moving to Canada, from Poland, and starting Street Church in 2005. The activities of Street Church were a further expression of the volunteer work that he had been doing since 2002, with a group from Centre Street Church, with the accused describing:

> We were distributing food in the park of 17th and 8th. We were distributing literature. We were praying for people, preaching the gospel. We would interfere with drug trafficking. What I mean by this we would literally go in the middle of drug dealers and -- try to interfere with what they were doing, at the same time impacting them and the clients to stop that activity.

[94] Initially, the accused was involved in one-on-one interventions, that is, with one church volunteer interacting personally with one park user. Typically, the number of volunteers was exceeded by the number of park users. Other volunteers “decided to introduce amplification system.” The accused noted, “Later on, I believe it was 2003 or 2004, I started to address the people as well.”

[95] While Centre Street Church, according to the evidence of the accused, attempted to help the homeless off the streets by bringing them to the church facility itself, the accused stated that he “made a decision to join that other group that would literally go to where ... those people were and -- and bring the church to them instead of trying to bring those people into the four walls.”

[96] Regarding the use of sound amplification, the accused testified that, while working with Centre Street Church in the park at 17th Avenue and 8th Street in southwest Calgary:

> What we found out, at that time, that it made it made totally a huge difference. Instead of being able to talk one on one with few, we were able to impact 100 people or 50, whatever -- how -- whatev -- whoever was over there was able to hear it, clearly.

> We would have 50 people around us and it was impossible to address them. When they brought the -- the speakers suddenly everybody could hear it, everybody was at the same time impacted. So the same leaders from Centre Street Church decided to use the speakers in crack cul-de-sac, as well.

[97] “Crack cul-de-sac” was identified as an area just east of City Hall, behind the Salvation Army Centre of Hope. There, the accused and other volunteers “wanted to impact the drug trafficking business”, with the accused describing:

> So interfering with their activity, that’s what I mean, going in the middle of what’s going on and try to speak to the clients that would come, try to tell the stories and testimonies that drugs will kill you.
>
> Either you sell or buy; you fight with the sword, you will die by the sword. For that we end up in, sometimes, big troubles with the drug dealers, of course. They didn’t like us very much, but -- but then we found out that their lives slowly have been changed.
>
> And -- and the clients got scared, on many occasions, because there was a bigger group of volunteers, and they never wanted to be caught on tape or, you know, being witnessed buying or selling that -- that stuff.

[98] The first church service organized by Street Church occurred in May 2005, at Triangle Park. Soon, reportedly in response to having faced many requests from attendees for food, the accused described:

> So we started to bring food. And then the -- the need was bigger, so we brought more food and more drinks. Always preaching was conducted, preaching the word of God. There was always music being played and prayer.

[99] When asked what religion is the basis of Street Church’s activities, the accused replied, “It’s Christianity; we are followers of Christ.” When asked about “anything in Christianity that talks about a need for amplified sound”, the accused responded:

> Well, Jesus Christ himself used amplification, and let me explain it before the arrows will come. For example, when Jesus preached and there was a bigger amount of people he would go to the top of the mountain. Why?

> Because of the amplified sound goes further, so he reach more people. Then he would go in the middle of the boat, for example, because the amount of people he was addressing was too big for his voice to reach them, so he would go in the middle of the boat and the water would it's amplify [*sic*] sound.
>
> So, yes, in the time of the [B]ible people used amplification.

[100] Sound amplification was used by Street Church members in their activities at Triangle Park and at the "crack cul-de-sac", but not at 17th Avenue nor at Olympic Plaza. The accused commented that, because the amount of alleged drug trafficking at Olympic Plaza involved "only a few" drug dealers and "few" clients, "the amplification was absolutely not needed."

[101] After citing several Biblical references that supported his works ministering outside the "four walls", that is, "out where the need was", the accused testified:

> I believe personally now that the church's job is to take care of the poor, the orphans, the widows, the brokenhearted, not the government's job. The government doesn't really know how to deal with those broken people.
>
> So, when I read the[B]ible, and finally it got to me that we are all missing the boat, we are all missing the picture, we are to go to them like Jesus did.

[102] The accused repeatedly stated that, "It's a commandment" that he "assist the poor". Enacting that commandment, he said, led Street Church to "the locations that we chose, we chose where the poor were", adding, "We choose the worst possible locations in the city, where the need was greatest." When asked whether these were "your preferred places to go, or -- to obtain those objectives?", the accused replied:

> Well, yes, I -- as a church, like I said, our commandment is to take care -- take care of the poor. So we just simply looked where is the biggest amount of the poor, the biggest need.
>
> So we went where it was the biggest need. I could chose another place where it was not as big of a need, but to our view was let's go where we need it the most. And we were needed the most in Triangle Park.

[103] When asked about his use of sound amplification during activities at Triangle Park, the accused spoke of the physical layout of the park (and its perimeter) and continued:

> When you try to communicate to 50 people at the same time and get their focus and their attention, it was absolutely impossible to do it without any sort of amplification.
>
> So that was the basic reasons why -- why we used it. It was to communicate with them in such a way that every one of them would be able to -- to hear it. Second reason was the music. It was impossible to play music and instruments without any sort of amplification.

[104] The accused later added:

> There is a – there is one more big reason behind amplification, as well. When you speak to drug dealers, and your message is not, I would like to buy whatever you're selling, but your message is you are killing people, you're murderers. When you sell and give drugs you're killing, actually, people. And don't do it. And the message is very negative in their way. They would -- they would really be very aggressive with us. And I felt that the speakers were giving us this buffer of protection.
>
> Yes, we were not face to face with those extremely dangerous people. If would be with amplification, they could keep their distance, we were keeping their -- our distance, they could still hear the message.
>
> And that was the -- the biggest point; the drug dealers were able to hear it. And -- and yet we felt safe because of the distance.

[105] On cross-examination, when asked whether the use of sound amplification and the park setting were "practical means for you to accomplish what you want to do", the accused responded:

> I -- considering that locations, I consider a necessity. Speakers were giving us a buffer of protection from the most extremely dangerous people. It was always a lot safer. Instead of being face-to-face with a drug dealer, I could keep my distance from that person.
>
> You gotta to [*sic*] imagine that I always spoke against drugs, trafficking and crime. I was not their favourite guy during that time. So I needed -- I -- I always considered them a necessity, not an option.

[106] When later asked, “Do you view this amplification as a religious requirement of your beliefs, or a preferred method or a suggestion?”, the accused replied:

> Well it’s -- it’s again, like I said, in different locations, I would not need to use amplified sound, and I don’t if it’s not needed. I only use amplified sound when it is absolutely needed and essential to deliver the message.
>
> If I don’t need it, I don’t need it. Like for example, we are in a court. The court has amplif -- amplification system here, and it’s not really needed, but it’s convenience, and so all the people can hear clearly what the person has to say.
>
> So at different locations I didn’t need it, amplified system. Everyone that was there could hear me. No problem. In areas that need it, we just need it.

[107] When asked, “Is it your belief that if a law prevents you from using amplified sound at all, that that specifically violates your belief?”, the accused answered,

> No. I don’t believe that. I believe that I -- I am a citizen of the country that stands for all the law. I uphold the law. I like the law. I have a problem with application of some of those laws.

[108] Either late in 2005 or early in 2006, the accused testified, he and other leaders of Street Church were invited to a meeting with City of Calgary officials. At the meeting, the accused said, the officials expressed their appreciation for the activities of Street Church, offered to provide assistance with garbage removal and with supplying water, and spoke of permits. The accused described:

> They ask us only for -- for insurance, and -- and that we would clean after, and they provided the garbage bins and the garbage bags. And everything was beautiful. Like, we couldn’t believe it that -- that, you know, the City stepped in assisting us.

[109] In late 2006, someone who the accused believed to be a Bylaw Services supervisor came to Triangle Park and advised the accused that the City had received complaints about the Street Church activities. Specifically, the accused reported, the unnamed Bylaw Officer “says, would you take two speakers down. They say they’re so loud that they can hear you on the other side of the river.” The accused stated that two speakers (which usually faced southeast, towards an area of alleged drug trafficking) were removed. Two speakers (which faced north, to the river) remained, “connected to a battery of a car -- truck.”

[110] When reportedly told by Bylaw Officers that noise complaints were still being received, and apparently following the officers' suggestion, the accused altered the set up of the Triangle Park activities, aiming the speakers to the south. He testified, "For a few -- few weeks we had no problem."

[111] Then, the accused testified, late in the Summer or at the beginning of the Fall of 2006, a Bylaw Officer identified as "McKenzie" again informed the accused of noise complaints and asked if the speakers could be aimed in a different direction. The accused testified that the Bylaw Officer proposed aiming one of the speakers so that the sound "will go under the bridge where this concrete will bounce back again to the park." However, the accused said Bylaw Officers attended "the next few meetings", again stating, "the same story, we still receive numerous complaints."

[112] The accused testified that he was contacted by someone from the City, and asked to attend a meeting with Alderman Druh Farrell. When the meeting took place in the Winter of 2006, also present were a man identified as Timothy Wild (who was described by the accused as someone who "works with the community associations to make sure they're all satisfied"), Andrew Bissett, Michael Kenny (from City Parks Department), and Bylaw Officers. The accused testified that he was told at that meeting, "because of the number of complaints ..., I will not be allowed to use amplified sound whatsoever." No changes to Street Church's activities occurred as a result of this meeting, with the accused noting that Street Church still had permits for their activities.

[113] The accused commented:

> The church operated as usual, except I was personally monitoring that the noise will be monitored of the volume. We had two speakers. The speakers were directed according to Mr. McKenzie, the by -- the bylaw officer, exactly in the place he wanted me to keep it.
>
> I was personally always checking if it's placed according to his wishes. And they advised us that if I will continue, then our permit will be revoked.

[114] The hearsay evidence contained in the accused's testimony was not offered as proof of the truth of its contents. It was provided as part of the narrative, and as evidence of what the accused understood the facts to be. I accept it for those purposes.

[115] The rest of the evidence of the accused I accept unless I have specifically indicated otherwise.

Testimonials in support of Street Church

[116] As one indication of the effect of Street Church's activities, the Court heard from Maurice Joseph Boyer. He admitted to having abused various drugs, including crack cocaine, and to trafficking in drugs at Triangle Park. Those behaviours reportedly came to an end in August 2006, shortly after Mr. Boyer had heard the sound-amplified testimony of Dawid Pawlowski (the brother of Artur Pawlowski) regarding his own challenges with drug abuse and homelessness. Initially, Mr. Boyer stated, he had wanted to kill Dawid Pawlowski after hearing him speak, but, within a short period of time, Mr. Boyer found himself praying and opting to change his life. Mr. Boyer indicated that he "tried to go into church", but, "I felt I was not comfortable because I was a dealer, and I was an addict, and I was an alcoholic, and there -- no church was there for me." As of the day of giving his evidence, Mr. Boyer remained active as a volunteer with Street Church.

[117] I accept Mr. Boyer's testimony.

[118] As a further indication of the effect of Street Church's activities, the Court heard from Louis Formaz-Preston. He spoke of his early family conflicts and later abuse of alcohol and of other drugs. Mr. Formaz-Preston described occasionally having driven past the Street Church events at Triangle Park until, one Sunday afternoon, he stopped to observe what was going on. He heard the testimony of a man who "pulled up on a Harley Davidson motorcycle, I remember this, with -- with leathers, and tattoos, and everything" and "thought to myself, this is real. This guy is not making it up. Nobody's asking him to be here. He's not -- like it was amazing." Mr. Formaz-Preston described having a period of close to three months during which he "actually managed to be clean." A significant relapse followed. In July 2006, Mr. Formaz-Preston recalled, he happened onto another Street Church event at Triangle Park, which he remembers as being a daily event, adding, "And to be honest, I probably wouldn't be here if -- if they hadn't have done that." Mr. Formaz-Preston offered, "For all of July I pretty much sat on the edge of this -- of this park ... and I would just listen to these people. Person after person would come and talk about their life change." At the end of July, Mr. Formaz-Preston stated, he was baptized in the Bow River, which flows adjacent to Triangle Park. He continues his involvement as a volunteer with Street Church.

[119] I accept Mr. Formaz-Preston's testimony.

History regarding permits

[120] Michael Patrick Kenny testified for the Crown. Mr. Kenny is the Parks Operations Manager for the City of Calgary. He described his interactions with Street Church as beginning in 2006, in response to "a number of complaints ... regarding the level of sound from Triangle Park by Street Ministry." Mr. Kenny clarified that "in excess of 15" complaints had come to the City's 311 telephone service with "in excess of 60" complaints received at the Aldermanic Offices. Additionally, Mr. Kenny said that he had received correspondence (including e-mails from residents) about the sound level. After telephone conversations with the accused and with Mr. Irwin (in whose name the Street Church permits had been registered), a meeting was

convened in November 2006, attended by Bylaw Officers, by representatives from Parks, and by people from Street Church.

[121] At the November 2006 meeting, Mr. Kenny stated, Street Church was told that sound amplification would not be permitted in 2007. Other site options were discussed. After being asked if there had been any discussion in November 2006 about the use of Simmons Park, Mr. Kenny resumed his narrative, stating:

> So in April of 2007, based on the number of complaints and based on our meetings and phone calls with the ministry, I was basically left in a position where I had to revoke the permit (for use of the park space) because of noncompliance in terms of -- a permit had been issued with -- without sound amplification.
>
> The ministry chose to -- to use sound amplification; therefore, I revoked the permit because they were in noncompliance with the permit. We met at Mr. Irwin's office with Mr. Pawlowski, and bylaw representatives, and myself to chat about other options. That was in May of 2007.
>
> I issued a permit for four or five weekends on a trial basis for the ministry to utilize Simmons Park, again, without amplification, and the ministry tried it out, but, essentially, it -- it wasn't working for them so they didn't request an extension.

[122] Mr. Kenny added, "They felt, without the amplification, we were basically shutting down their -- their operation." Mr. Kenny also spoke of efforts made by Street Church in September and October 2006 to alter the sound from the amplification system, including reducing from two speakers to one or repositioning the speakers. But, he summarized, "Whatever they tried, without reducing the actual volume, the position of the speakers didn't make a lot of difference, it generated ongoing complaints." Mr. Kenny signed the letter of April 24, 2007, which informed Street Church of the revocation of the park-use permit.

[123] At one point in his testimony, Mr. Kenny referred to the Court of Queen's Bench matter involving the accused and the City of Calgary, commenting:

> It was I -- I think – yeah, it was the fall of 2006 Madam Justice Rawlins issued an injunction which prohibited the Street Ministry from utilizing amplification of sound in any city park.
>
> So when I issued the park permit, it was issued, of course, without sound, without amplification. They could use sound. He was more than welcome to preach, but it just couldn't be amplified.

> So, on that basis, obviously, with the -- with the Judge having that ruling, I -- I wasn't in a position to allow amplification of sound and be in contravention of the Court, so the permit was issued with that condition.

[124] On cross-examination, Mr. Kenny clarified that his "best recollection" was that the Queen's Bench decision came in the Spring of 2007, though he remained confused about the nature of the decision. Mr. Kenny read into the record an e-mail he said he received from David Lewis, "the manager of litigation" in the legal services area of the City of Calgary administration. The e-mail indicated that the City had been successful in opposing an application by this accused for an injunction. The e-mail continued:

> What does this mean? It means that we can now operate pursuant to the terms of the 2007 permit. Because of that, Street Church is to be treated like any other entity with a permit that is using a city park. Since their permit does not allow the use of amplified sound, if they are caught using amplified sound they are to be dealt with accordingly.

[125] Mr. Kenny essentially retracted his earlier suggestion that the decision of the Court of Queen's Bench caused his refusal to allow sound amplification by Street Church, stating that the decision "simply reinforced what conditions were already on the permit."

[126] Also, on cross-examination, Mr. Kenny clarified that none of the complaints related to sound levels that "exceeded the noise levels in the Community Standards Bylaw." Instead, the complaints related to what Bylaw Officers said "was a concern that in their professional opinion the amplification was excessive and disturbing". Mr. Kenny also conceded that, "as the person writing these permits" he "would have been prepared to continue to allow the permits for amplification system in a park" had the issue of the volume of the sound been adequately addressed.

[127] Mr. Kenny significantly altered his testimony when he was cross-examined. I am concerned about the reliability of his recollection, and I give his testimony little weight.

[128] The accused testified that he asked City officials for documentation regarding the supposed noise complaints. He noted that Bylaw Officers "are saying that we are not breaking any noise violations here. They checked it. We are within our rights. This is -- we are within the law." A second meeting occurred in the Winter of 2006 involving, among other parties, the accused and the Mayor of Calgary, Dave Bronconnier. Although the accused testified that the meeting went well and that the Mayor expressed his support for the activities of Street Church, "I received a letter two weeks later totally contradicting what I've heard from the mayor. It was a shock." The accused added, "So the mayor says, no, you're not allowed to use amplified sound."

[129] Acknowledging that Street Church continued to use amplified sound, the accused was asked about the rationale for the decision to do so. He replied:

> I believe that we have been picked on. I believe that we were bullying [*sic*] by the City bureaucrats. I have not been presented with any proof that those alleged complaints were actually true.
>
> I conducted my own investigation. I -- after talk -- talks with the bylaw officers, I just believed that someone -- someone there is bias, is not following his own rules, is not following the law, and -- and our rights are being literally taken away from the -- from us by bureaucrats unreasonably.
>
> So the need for amplified sound was needed. We were following the law. We were following the permits. The City said, no. And we said, this is the only way we can stand up and -- and fight for our rights, to challenge them, to -- to not only to challenge our own rights, but also challenge the rights of the homeless to hear the message.
>
> So we decided to just keep going until we receive any sort of proof, and we continued as we did it for the previous years.

[130] Later, in cross-examination, the following was put to the accused: "So it's fair to say at some point you decided bylaws didn't apply to you because of your interpretation of the constitution, or what you just in -- indicated, some counsel told you?" The accused responded:

> I believed that the bylaws are unconstitutional. Those particular bylaws are against the Charter of Rights. I believe that to this day. They are un -- unconstitutional. Bylaw officers themselves didn't know how to apply them, because there's so much confusion about this bylaw, that's subject to an interpretation of this officer versus this officer.

[131] The accused noted that the number of Bylaw Officers and Police Officers at Street Church events then showed a dramatic increase. He said:

> Like -- like I didn't know what's going on. I knew there was something bigger than just the issue of amplification. I -- I just saw some political issue here. I don't know, it was at that time political correctness. Whatever it was, it was just crazy. Bylaw and police officers were constantly following us, coming to the Street Church events.

[132] After permits previously issued to Street Church were revoked on April 24, 2007, no further applications for permits were made by the Ministry, because, the accused said, "We were told that the permit will not be given to us." To be clear, though, there is evidence that the accused and Mr. Stoviecki, in November 2008, attempted to submit applications for the use of space at Olympic Plaza, but, in violation of the City's own procedures, these applications were rejected at the customer service counter at the City of Calgary Operations Centre and were not forwarded to Mr. Kenny or his designate.

[133] In April or May of 2008, according to the accused, an injunction was placed against Street Church and the accused personally, prohibiting either from using sound amplification within the City limits. In reality, the injunction did not prevent use of sound amplification by the accused if he obtained the appropriate permit from the City.

[134] When asked about the use of tables to serve food, the accused noted, "Well, the answer is very easy, when I eat with my family I don't eat from the ground. I eat from the table." He added:

> And in a church, what you have is, you have music, you've got preaching, and also you have tables with food, so people can come and participate.
>
> And what we did, we literally wanted to give people a church and yet a church without walls. So they would kind of enter the park and they feel, hey, this is a church. Yes, it doesn't have walls and you can come in and go out anytime you want -- but it doesn't have walls.

[135] As various areas previously used by Street Church (e.g., Triangle Park, Simmons Park, and the area under the overpass) have since been fenced off by City officials, Street Church now conducts its services four times per week on the steps of City Hall. Attendance is reportedly "a lot smaller" than when services were being conducted at Triangle Park or at Simmons Park. The accused testified that, since June 2007, he made multiple attempts at submitting applications to the City for permits to use various locations and, on each occasion, was told that his application would not be accepted.

[136] Asked whether, in the current activities of Street Church, at City Hall, he "can still say the same things, the same words, the same message you could as before?", the accused replied, "Except now people cannot hear me. But yes, I -- no one is stopping my mouth from speaking, if that's what you're asking. I was not stopped from giving my message."

Issues

[137] As expressed primarily in the Brief of the accused, the issues before the Court are these:

1. Is section 17(1)(a) of the City of Calgary Street Bylaw, 20M88 constitutionally valid?

    (a) Is s. 17(1)(a) impermissibly overbroad or vague?

    (b) Does s. 17(1)(a) offend section 2(a) of the *Charter*, respecting freedom of religion?

    (c) Does s. 17(1)(a) offend section 2(b) of the *Charter*, respecting freedom of expression?

    (d) If the answer to (a), (b), or (c) is yes, then can s. 17(1)(a) be saved by section 1 of the *Charter*?

    (e) If the answer to (d) is no, then what is the appropriate remedy?

2. Is section 21(e) of the City Calgary Parks and Pathways Bylaw, 20M2003, constitutionally valid?

    (a) Is s. 21(e) impermissibly overbroad or vague?

    (b) Does s. 21(e) offend section 2(a) of the *Charter*, respecting freedom of religion?

    (c) Does s. 21(e) offend section 2(b) of the *Charter*, respecting freedom of expression?

    (d) If the answer to (a), (b), or (c) is yes, then can s. 21(e) be saved by section 1 of the *Charter*?

    (e) If the answer to (d) is no, then what is the appropriate remedy?

3. Is section 115(2)(e) of the *Traffic Safety Act*, RSA 2000, c.T-6, constitutionally valid?

    (a) Is s. 115(2)(e) impermissibly overbroad or vague?

    (b) Does s. 115(2)(e) offend section 2(a) of the *Charter*, respecting freedom of religion?

(c) Does s. 115(2)(e) offend section 2(b) of the *Charter*, respecting freedom of expression?

(d) If the answer to (a), (b), or (c) is yes, then can s. 115(2)(e) be saved by section 1 of the *Charter*?

(e) If the answer to (d) is no, then what is the appropriate remedy?

4. Is section 82 of the *Rules of the Road Regulation*, AR 304/2002, constitutionally valid?

(a) Is s. 82 impermissibly overbroad or vague?

(b) Does s. 82 offend section 2(a) of the *Charter*, respecting freedom of religion?

(c) Does s. 82 offend section 2(b) of the *Charter*, respecting freedom of expression?

(d) If the answer to (a), (b), or (c) is yes, then can s. 82 be saved by section 1 of the *Charter*?

(e) If the answer to (d) is no, then what is the appropriate remedy?

5. Considering all of the evidence before the Court, has there been an abuse of process?

(a) Does the evidence support a finding of abusive conduct by City of Calgary Bylaw Officers or Police Officers?

(b) If the answer to (a) is yes, then what is the appropriate remedy?

[138] There is one further issue to be resolved:

6. Considering all of the evidence still before the Court -- having resolved issues 1, 2, 3, 4, and 5 -- has the Crown proven the accused guilty beyond a reasonable doubt on any or all of the seven counts?

Law

Legislation

Constitution Act, 1982

[139] The relevant section of the *Constitution Act, 1982*, reads as follows:

> 52. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Charter of Rights and Freedoms

[140] The relevant sections of the *Charter* read as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Use of Highway and Rules of the Road Regulation

[141] The relevant section of the *Use of Highway and Rules of the Road Regulation*, as in force on the date of the alleged offence, read as follows:

> 82. A person shall not create or cause the emission of any loud and unnecessary noise
>
> (a) from a vehicle or any part of it, or
>
> (b) from any thing or substance that the vehicle or a part of the vehicle comes into contact with.

[142] Section 82 falls within Division 5 of Part 2 of the *Regulation*. The Division is labelled "Miscellaneous"; the Part is labelled "Operation of Vehicles". The terms "loud" and "unnecessary" are not defined within the Division, the Part or the *Regulation*.

Traffic Safety Act

[143] The relevant section of the *Traffic Safety Act*, as in force on the date of the alleged offence, read as follows:

> 115. (2) A person shall not do any of the following:
>
> ...
>
> (e) perform or engage in any stunt or other activity that is likely to distract, startle or interfere with users of the highway;
>
> ... .

Parks and Pathways Bylaw

[144] The relevant section of the *Parks and Pathways Bylaw*, as in force on the date of the alleged offences, read as follows:

> 21. No Person, while in a Park, shall:
>
> ...
>
> (e) operate an amplification system
>
> ...

except in an area where such activity is specifically allowed by the Director.

[145] While the terms "Person" and "Park" are defined within the *Bylaw*, as is "Director", no definition is given for "amplification" nor for "amplification system".

Street Bylaw

[146] The relevant sections of the *Street Bylaw*, as in force on the date of the alleged offences,[5] read as follows:

2. In this Bylaw

...

(16) "*Material*" means any object or article, animal waste, ashes, building waste, dry refuse, garbage, industrial chemical waste, refuse and yard waste as defined in The Waste Bylaw, and includes sand, gravel, earth and building products.

(21) "*Street*" means any thoroughfare, highway, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway, or other place, whether publicly or privately owned, any part of which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles. [*sic*]

(a) and includes:

(i) a Sidewalk (including a Boulevard portion thereof),

... .

17. (1) Except to the extent specified in and subject to the conditions of a permit signed by or on behalf of the Traffic Engineer, no person shall:

---

[5] I note that Section 17(1)(a) of the *Street Bylaw* was amended in November 2008 and now reads as follows:

17. (1) Except to the extent specified in and subject to the conditions of a permit signed by or on behalf of the Traffic Engineer, no person shall:

(a) No person shall, [*sic*] except in a Receptacle, dispose of Litter on any portion of a Street.

Provisions regarding "material" on a street now appear in s. 17(4) and, essentially, are unchanged from those presented here. Further, there has been no change to the definition of "material".

(a) place, dispose, direct or allow to be placed, directed, or disposed, any Material belonging to that person or over which that person exercises control, on any portion of a Street;

... .

Constitutional issues

Vagueness and overbreadth

[147] Unquestionably, when drafting statutes or bylaws that constrain human behaviour, lawmakers have an obligation to do so with sufficient precision that an individual may know what is or is not prohibited. While the Supreme Court of Canada, in *R. v. Heywood*, [1994] 3 S.C.R. 761 [hereinafter *Heywood*], emphasized that courts should give "a measure of deference"[6] to the means selected by lawmakers, so as to leave policy decisions within the purview of elected officials, the Court also said that judges "have a constitutional duty to ensure that legislation conforms with the *Charter*."[7]

[148] A statutory provision may fail to pass *Charter* scrutiny if, *inter alia*, the law is overbroad or too vague. As Cory J. stated in *Heywood*, at pp. 792 - 3:

> In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective. If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary and disproportionate.

[149] In discussing the notion that a law may be declared void if the language is so vague that "men of common intelligence"[8] would be left to guess at the statute's meaning, Lamer J., as he then was, in *Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code (Manitoba)*, [1990] 1 S.C.R. 1123 [hereinafter *Prostitution Reference*], stated, at p. 1152 that such principles:

> ... are based on the ancient Latin *maxim nullum crimen sine lege, nulla poena sine lege* -- that there can be no crime or punishment

---

[6] *Heywood* at p. 793.

[7] *Ibid.*

[8] *Prostitution Reference, infra* at p. 1151.

> unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standard.

[150] Lamer J. cited the Ontario Court of Appeal's language in *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, at pp. 125-26, regarding the distinction between vagueness and overbreadth, namely:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad. Vagueness or overbreadth, for the purpose of determining the permissibly regulated area of conduct, and whether freedom of expression under s. 2(b) of the *Charter* has been breached, may be different from vagueness or overbreadth for the purpose of applying the criteria in *Oakes* as to the application of s. 1 of the *Charter*.

[151] Lamer J. concluded, in *Prostitution Reference*, at p. 1155:

> It would seem to me that since the advent of the *Charter*, the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal, is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Clearly, it seems to me that if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of fundamental justice. Second, where a separate *Charter* right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the *Charter*.

[152] As the accused notes, there are two distinct ways in which vagueness or overbreadth of a particular piece of legislation may negatively affect the constitutionality of that legislation. First, in what has been called the "threshold" approach, a piece of legislation may be so vague that it fails to constitute a "limit prescribed by law", preventing any reasoned analysis under s.1 of the *Charter*. Sopinka J., in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, described the problem thusly, at p. 94:

> A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s.1 analysis is necessary as the threshold requirement for its application has not been met.

[153] Second, Sopinka J. has stated that a piece of legislation, despite having passed this "threshold" test "may not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth."[9]

[154] Importantly, Sopinka J. noted that statutory vagueness leading to wide discretionary powers should not, in and of itself, disentitle a law to s.1 scrutiny. Only when a law, as a result of vagueness, "could truly be described as failing to offer an intelligible standard"[10] would a circumventing of the s.1 balancing analysis be justified. His Lordship also noted (*Osborne, supra*, at p. 96), as stated in the majority's decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*] at p. 983:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

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[9] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at pp. 94-95.

[10] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at p. 956.

[155] *Irwin Toy, supra*, also refers to the notion of "a sensible construction"[11] that can be given to a particular statutory regime so as to avoid confusion and contradiction. Similarly, in *R. v. Nova Scotia Pharmaceutical*, [1992] 2 S.C.R. 606 at p. 643, Gonthier J. concluded that vagueness exists when a law "so lacks in precision as not to give sufficient guidance for legal debate."

[156] In short, statutory language may be imprecise, and yet not fall into the category of unconstitutional vagueness unless the provision, subject to "a sensible construction", still fails to provide even an "intelligible standard" or "sufficient guidance" for its application. Further, though, the discretion of law enforcement officials must be limited within the law – not merely by the application of the law – with the restraint on government power being clear from a reasonable interpretation of the impugned statute. Conversely, the law itself should provide fair notice to an individual whether his or her conduct falls within the scope of some legislative scheme.

[157] In *Alberta v. The Edmonton Sun*, [2003] A.J. No. 5, 221 D.L.R. (4th) 438, for example, the Alberta Court of Appeal determined that the test for publication contempt was not void for vagueness, stating, at para. 53:

> The current test, which requires that the court be satisfied beyond a reasonable doubt that the publication of the material constituted a real and substantial risk of prejudice to the administration of justice, provides a predictable standard against which proposed conduct can be measured.

[158] Decisions finding terms to be void for vagueness are less common, but certainly exist. In *Piikani Investment Corp. v. Piikani First Nation*, [2008] A.J. No. 1470 (Alta. Q.B.) [hereinafter *Piikani*], McIntyre J. found a provision prohibiting "participation by a director in dissemination of inaccurate, misleading or subversive information involving the Piikani Chief and Council, ..."[12] to be void for vagueness as the provision left "unclear what information may be given by a director",[13] including, for example, how to address information that was accurate, but subversive. Notably, though, this case dealt with corporate bylaws, not with government action, so no analysis under s. 1 was applicable.

[159] In his submissions, the Attorney General argues that "similar noise by-laws have not been found to be vague" and then relies on the decision in *Québec (Ville) c. L'Heureux*, 1996 CarswellQue 626 (C.A. Que.). That citation, however, provides only a headnote and no reference to the actual bylaw provision. The full decision is reported at *R. c. L'Heureux*, [1996] J.Q. No.

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[11] *Irwin Toy, supra* at p. 982.

[12] *Piikani, supra* at para. 111.

[13] *Ibid.* at para. 117.

2135 or [1996] Q.J. No. 2135 (in English), with the decision containing the language of the bylaw, namely:[14]

> Le bruit perturbateur produit par un instrument de musique ou un appareil destiné à reproduire ou à amplifier le son:
>
> > qui trouble la paix ou la tranquillité des personnes qui résident, travaillent ou se trouvent dans le voisinage
> >
> > ou
> >
> > dont le niveau dépasse, dans un lieu habité, le niveau maximal prescrit par le chapitre III
>
> constitue une nuisance et la personne qui émet un tel bruit, qui est le propriétaire, l'opérateur, l'usager ou qui a la garde ou le contrôle de la source de ce bruit ou qui en tolère l'émission, commet une infraction.

[160] Further, “bruit perturbateur” is defined within the bylaw as “tout bruit repérable distinctment du bruit d’ambience”,[15] which roughly translates as “all noise clearly identifiable from ambient noise”.

[161] According to the Supreme Court of Canada in *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, the translation of this bylaw is as follows, *per* Binnie J., in dissent, at p. 194:

> Disruptive noise produced by a musical instrument or equipment the purpose of which is to reproduce or amplify sound constitutes a nuisance if:
>
> > it disturbs the peace or tranquillity of the persons who reside, work, or are present in the vicinity,
> >
> > or
> >
> > its level exceeds, in an inhabited place, the maximum level prescribed by Chapter III....

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[14] *R. c. L’Heureux*, [1996] J.Q. No. 2135 at para. 8.

[15] *Ibid.* at para. 9.

[162] In fact, the Supreme Court's translation is truncated, as the full provision continues, "constitutes a nuisance and the person who makes such a noise, who is the owner, operator, user or having custody or control of the source of the noise or who allows the noise commits an offense."

[163] To say that this is a bylaw "similar" to the provincial statute before me which refers only to "loud and unnecessary noise" is, in my respectful opinion, inaccurate. No other judicial consideration of "similar" bylaws was provided by the Attorney General.

Freedom of conscience and religion

[164] The parties agree that the test to be applied in analysing an alleged breach of the *Charter*'s s. 2(a) right of freedom of conscience and religion was most clearly and recently stated by McLachlin C.J., writing for the majority of the Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [hereinafter *Hutterian Brethren*], where she stated the following, at para. 32:

> An infringement of s. 2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*.[16] "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 759, *per* Dickson C.J.:
>
>> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with the religious belief or practice. In short, legislative or administrative action which

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[16] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [hereinafter *Multani*].

> increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314.

[165] In *Multani*, *supra*, sometimes known as "the kirpan case", the Supreme Court held that a school board's Code of Conduct, prohibiting the carrying of weapons and dangerous objects, infringed the applicant's freedom of religion, and could not be saved under a s. 1 analysis, discussed below, because the respondent failed to show that the prohibition only minimally impaired the applicant's rights.

[166] Writing for the majority in *Multani, supra*, and discussing infringement of freedom of religion, Charron J. stated, at pp. 279-80:

> This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp. 336-37 and 351:
>
>> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>>
>> ... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>>
>> ...
>>
>> ... With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.

It was explained in *Amselem*,[17] at para. 46, 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. [Emphasis added.]

In *Amselem*, the Court ruled that, in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (*Amselem*, at para. 52). In assessing the sincerity of the belief, a court must take into account, *inter alia*, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (*Amselem*, at para. 53).

[167] In *Amselem*, *supra*, a majority of the Supreme Court found that condominium bylaws, while seeking to ensure the harmonious rights of co-owners by prohibiting the appellants from erecting succahs (temporary huts used during the Jewish festival of Succot) on their balconies, infringed on the right of freedom of religion. As the case originated in Quebec, much of the argument focussed on a section of the Quebec *Charter of Human Rights and Freedoms* that states the exercise of an individual's right of freedom of religion must be balanced against other rights, including the right of another individual to peaceful enjoyment of his property. Still, the Supreme Court, as noted above, offered important language regarding the interpretation of the

[17] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [hereinafter *Amselem*].

right of freedom of religion, particularly in terms of the distinction between religious dogma and personal beliefs.

[168] At pp. 579-580 of *Amselem, supra*, Iacobucci J., writing for the majority, stated:

> 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.
>
> But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.

[169] Iacobucci J. added, however, that "the sincerity of a claimant's belief"[18] was appropriate territory for judicial assessment. At p. 583, His Lordship summarized:

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's 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; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

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[18] *Amselem*, *supra* at p. 582.

[170] Regarding analysis of an alleged breach of one's freedom of religion, the Supreme Court noted, in *Multani, supra* at pp. 276-77:

> This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others [citations omitted]. However, the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis.

[171] Further, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, for example, a majority of the Court held, at pp. 383-84:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*. ...
>
> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(a).

[172] To summarize, the test to be applied in determining whether the state (or another third party) has infringed the right of freedom of religion consists of assessing whether the claimant sincerely believes in a belief or practice that has a nexus with his or her religious beliefs – assessed subjectively or objectively – and whether that state action leads to an impairment that is non-trivial or not insignificant. In circumstances where the claimant's right of freedom of religion may conflict with the right or rights of others, analysis under s. 1 is likely to be more appropriate than attempting to determine the scope of the freedom of religion. The process for undertaking the s. 1 analysis is set out later in these reasons.

[173] As noted, the Supreme Court has found, in particular cases, that the right of freedom of religion is impaired when an individual is prohibited from bringing a kirpan to a school (*Multani, supra*) and when a condominium plan prohibits the erection of a temporary tent on a balcony (*Amselem, supra*), but faces only minimal impairment (so is justified under s. 1 of the *Charter*) when the impugned activity is the requirement for a photograph to be taken for the purpose of obtaining a driver's licence (*Hutterian Brethren, supra*).

[174] As a further example, involving bylaws, in *R. v. Centre islamique du West Island*, [2000] Q.J. No. 7549 (Municipal Court) [hereinafter *Centre islamique*], Mondor J.M.C. held that a

zoning bylaw that restricted where religious activities could occur (but which allowed for religious activities elsewhere within the municipal area) did not infringe the defendant's right of freedom of religion.

Freedom of thought, belief, opinion and expression

[175] Given the many decisions from all levels of courts that can be cited for offering thoughtful and emphatic language regarding the particular importance given to freedom of expression in a democratic society – apart from expression that is obscene, libellous, or threatening – there is no serious argument against the notion that this right, as Cory, J.A., as he then was, stated in *R. v. Koptyo* (1987) 24 O.A.C. 81 (Ont. C.A.) at p. 91, "should therefore only be restricted in the clearest of circumstances."

[176] In *Irwin Toy*, *supra*, the Supreme Court of Canada provided an often-used template for analysing whether a particular government action infringes freedom of expression. In short, the Court presented a two-step analysis,[19] consisting of the following questions:

(1) "Was the plaintiff's activity within the sphere of conduct protected by freedom of expression?"[20]

(2) "Was the purpose or effect of the government action to restrict freedom of expression?"[21]

[177] Regarding the first question, the Supreme Court noted, "'Expression' has both a content and a form, and the two can be inextricably linked. Activity is expressive if it attempts to convey meaning. That meaning is its content."[22]

[178] Regarding the second question, the Supreme Court then cited the description provided by Dickson J., as he then was, in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 334 [hereinafter *Big M Drug Mart*], regarding how an inquiry into purpose and effect should be conducted:

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[19]The British Columbia Court of Appeal, in *Cheema v. West Vancouver (District) Police Department*, [1991] B.C.J. 2257, 82 D.L.R. (4th) 213 at p. 222 – a case involving the use of amplified sound during a political protest – suggested that *Irwin Toy, supra*, established a "three-step analysis", consisting of:

(1) Firstly, an examination of the impugned activity;
(2) Secondly, an examination of the purpose of the legislation; and
(3) Finally, an examination of the effect of that legislation on the person who is indulging in the activity.

[20]*Irwin Toy, supra* at p. 967.

[21]*Ibid.* at p. 971.

[22]*Ibid.* at p. 968.

> [T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

[179] In *Irwin Toy, supra*, the Court added, at p. 974:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.

[180] The Court then explained that a law prohibiting the distribution of pamphlets, even if purported to control litter, would be a restriction on the manner of expression. However, the Court offered, at p. 975, "a rule against littering is not a restriction 'tied to content'. It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning."

[181] In terms of assessing whether the effect of a government action was to restrict free expression, the Court stated at p. 976, "[T]he burden is on the plaintiff to demonstrate that an effect occurred. In order to so demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom."

[182] The Court said, at p. 976, that the values underlying freedom of expression:

> ... can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed

> welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis.

[183] Summarizing its approach, the Supreme Court wrote, at p. 978:

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey a meaning and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing. [Underlining in original]

[184] In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 [hereinafter *Commonwealth*], Lamer C.J. addressed the issue of expressive activity that occurs on government property – which would include sidewalks and public parks – stating, at pp. 156-57:

> Having reviewed the interests at issue, I come to the conclusion that s. 2(b) of the *Charter* cannot be interpreted so as to consider only the interests of the person wishing to communicate. As the Attorney General for Ontario properly points out, s. 2(b) of the *Charter* does not protect "expression" itself, but freedom of expression. In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.
>
> The interest which any person may have in communicating in a place suited for the purpose cannot have the effect of depriving the citizens as a whole of the effective operation of government services and undertakings. Even before any attempt was made to use them for purposes of expression, such places were intended by the state to perform specific social functions. A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions. For example, no one would suggest that an individual could, under the aegis of freedom of expression, shout a political message of some kind in the Library of Parliament or any other library. This form of expression in such a context would be incompatible with the fundamental purpose of the place, which essentially requires silence. When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. To refer again to the example of a library, it is likely that wearing a T-shirt bearing a political message would be a form of expression consistent with the intended purpose of such a place.
>
> The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others.

> In the context of expressing oneself in places owned by the state, it can be said that, under s. 2(b), the freedom of expression is circumscribed at least by the very function of the place.

[185] Lamer C.J. went on to state, at p. 157, "[I]f the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s.2(b)." He then offered the examples of a person picketing in the middle of a highway or barricading a bridge, thereby interfering with "the principal function of the place, which is to provide for the smooth flow of automobile traffic."[23] The Chief Justice concluded discussion on this point in stating, at p. 158:

> Accordingly, it is only after the complainant has proved that his form of expression is compatible with the function of the place that the justification which may be put forward under s. 1 of the *Charter* can be analysed.

[186] In short, while the values underlying freedom of expression have exceptional importance in allowing for citizen participation in a free and democratic society, when that expression takes on certain forms (e.g., being libellous, or threatening), or occurs in places where such expression is incompatible with the fundamental purpose of the place, limits on the freedom are permissible. When considering expression that occurs in a public place, a court must undertake a balancing of rights, as between the individual seeking to express himself or herself and the members of the public who may be using the space for other legitimate purposes.

Section 1 analysis

[187] In *Irwin Toy, supra*, the majority decision of the Supreme Court commented:

> It is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation ... and that the analysis to be conducted is that set forth by Dickson, C.J. in *R. v. Oakes*[24].

[188] The two broad elements of the *Oakes* test assess whether the impugned legislation addresses a pressing and substantial concern and whether the means are proportional to the ends. On the second element of the test, a court must consider whether there is a rational connection between the impugned legislation and the concern, whether there is minimal impairment of the right or rights guaranteed under the *Charter*, and whether deleterious effects of the impugned legislation outweigh the relevance of its objectives. The party seeking, through a s.1 analysis, to

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[23] *Commonwealth, supra* at p. 157-58.

[24] [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

uphold the limitation on a right must do so at "the civil standard, namely, proof by a preponderance of probability."[25]

[189] In describing the two elements of the analysis, Dickson C.J. wrote, at pp. 138-140:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" [*Big M Drug Mart*, *supra* at p. 352]. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" [*Big M Drug Mart, supra* at p. 352]. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question [*Big M Drug Mart*, *supra* at p. 352]. Third, there must be a proportionality between the <u>effects</u> of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must,

[25] *Ibid.* at p. 137.

> however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Underlining in original]

[190] Analysis under s.1, then, asks two broad questions: (1) Does the impugned legislation seek to address a pressing and substantial objective? (2) Does the impugned legislation reflect proportionality in addressing the objective? Within the second question, a Court is called upon to ask whether there is a rational connection between the legislation and the objective, whether the legislation constitutes only a minimal impairment of a *Charter* right, and whether the benefits of the legislation are sufficient to outweigh the negatives of the infringement on the *Charter* right.

Abuse of power (Section 7)

[191] While the Supreme Court of Canada has provided more recent decisions on the issue of abuse of power,[26] none of those decisions depart significantly from the language previously provided in *R. v. Scott*, [1990] 3 S.C.R. 979, in which McLachlin J., as she then was, stated, at pp. 1006 - 07:

> This Court has recognized the doctrine of abuse of process, quite independently of the *Charter*. A judge has the power to stay or strike down proceedings which are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency. The power is to be exercised only in the "clearest of cases". As stated in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667:
>
>> A trial judge has discretion to stay proceedings in order to remedy an abuse of the court's process.

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[26] See, for example, *R. v. Regan*, [2002] 1 S.C.R. 297.

> This Court affirmed the discretion "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37, borrowing from *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.)). The judge's power may be exercised only in the "clearest of cases" (*Jewitt, supra*, at p. 137).
>
> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.)[.] It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. While Wilson J. in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59, used the conjunction "or" in relation to the two conditions, both concepts seem to me to

> be integral to the jurisprudence surrounding the remedy of a stay of proceedings and the considerations discussed in *R. v. Jewitt*, [1985] 2 S.C.R. 128, and *R. v. Conway*, supra. It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process. To borrow the language of *Conway*, the affront to fair play and decency must be disproportionate to the societal interest in prosecution of criminal cases.

[192] Where the Supreme Court has provided a different perspective from that presented in *R. v. Scott, supra* is in cases discussing the notion that abuse of process has both common law and *Charter* implications. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, having commented on the common law test (discussed in the previous paragraph here), L'Heureux-Dubé J., writing for the majority on this issue, stated, at pp. 456 - 62:

> After considering much of this case law, the Court of Appeal concluded that the preponderance of cases favoured maintaining a distinction between the *Charter* and the common law doctrine of abuse of process. The Court of Appeal may, in my view, have underestimated the extent to which both individual rights to trial fairness and the general reputation of the criminal justice system are fundamental concerns underlying <u>both</u> the common law doctrine of abuse of process and the *Charter*. This, for the following reasons.
>
> First, while the *Charter* is certainly concerned with the rights of the individual, it is also concerned with preserving the integrity of the judicial system. Subsection 24(2) of the *Charter* gives express recognition to this dual role. More significantly, however, this Court has, on many occasions, noted that the principles of fundamental justice in s. 7 are, in large part, inspired by, and premised upon, values that are fundamental to our common law. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503, Lamer J. (as he then was) observed:
>
>> ...the principles of fundamental justice are to be found in the basis [*sic*] tenets of our legal system. <u>They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.</u> Such an approach to the interpretation of "principles of fundamental

> justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters. [Emphasis added.]

...

This Court has repeatedly recognized that human dignity is at the heart of the *Charter*. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (*Rodriguez v. British Columbia (Attorney General*), [1993] 3 S.C.R. 519, at p. 592, *per* Sopinka J. for the majority), it seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

...

I also recognize that, despite these strong parallels, the common law and *Charter* analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In *R. v. Keyowski* (1986), 28 C.C.C. (3d) 553 (Sask. C.A.), at pp. 561-62, for instance, it was noted that while the burden of proof under the *Charter* was the balance of probabilities, the burden under the common law was the "clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining

a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the "clearest of cases".

Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In *Conway, supra*, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:

> [Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. See, by analogy, *Morin, supra*.

For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule,

> however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.
>
> The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the *Charter* has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

[193] Abuse of process can be said, as a result, to relate to a prosecution that offends the community's basic sense of decency and fair play and calls into question the integrity of the justice system. Whether the allegation relates to specious or malicious charges being brought against an individual, or to inappropriate actions by a prosecutor when, or example, in contact with potential witnesses, no Court can be drawn into justifying such activities by allowing a trial to proceed in the circumstances. However, undeniably, even allowing for the intersection of analyses under the common law and under the *Charter*, the granting of a stay in response to evidence of abuse of process remains reserved for only the "clearest of cases".

Remedies

[194] Somewhat surprisingly, an issue arose as to whether this Court has jurisdiction to hear the *Charter* challenges of this accused. Clearly, I do. I also have jurisdiction to make a declaration of invalidity specific to a given case or to implement other remedies if a breach of the *Charter* is found. In *Big M Drug Mart, supra*, Dickson J. stated, at p. 316, "The appellant overlooks the fact that it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute" and, at p. 353:

> If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, s. 52(1) is to give the Court not only the power, but the duty to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect".

[195] Further, as the Supreme Court of Canada stated in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at pp. 528 - 29, in reference to the power of administrative tribunals to resolve *Charter* issues:

> First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act*, 1982, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

[196] Administrative tribunals, of course, are not entitled to make declarations of invalidity as the constitutional remedies available to tribunals are limited and such a decision would not be binding on future decision makers.[27] Similarly, this Court is not empowered to make broad declarations of invalidity other than within the context of adjudicating a specific allegation of violation of the legislative provision. As Rooke J. commented in *Alberta v. K.B.*, [2000] A.J. No. 1570, 196 D.L.R. (4th) 151 at pp. 166-67:

> As a statutory court, the Provincial Court is limited to interpreting or applying the law necessary to deal with the issues before it, and cannot grant a formal declaration of invalidity, which is a remedy exercisable only by a superior court. While the Provincial Court

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[27] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at p. 530.

> has the power to determine whether the law it is authorized to interpret is constitutional, the *Charter* cannot clothe courts and tribunals with jurisdiction they would not otherwise enjoy. The Provincial Court is not, of course, incompetent to deal with *Charter* issues where the jurisdiction to do so exists. However, a statutory court can only apply the *Charter* to determine that a particular provision of an act which is relevant to the outcome of the proceedings before it is of no force or effect.
>
> There is no inherent jurisdiction in the Provincial Court to issue general declarations of invalidity.
>
> [Citations omitted]

[197] Frankly, with one exception, there is nothing particularly unique in the position of the Provincial Court *vis-à-vis* declarations of invalidity.

[198] Decisions of a judge of the Provincial Court do not bind other judges of this Court, and, of course, do not bind judges of courts of superior jurisdiction. However, decisions of the judges of the Court of Queen's Bench do not bind other judges of that Court, nor the Court of Appeal, though, if issued a part of the Court's appellate function or in exercise of its plenary jurisdiction, do bind the Provincial Court. Decisions of the Court of Appeal of Alberta do not bind courts in other provinces, but they do bind the Court of Queen's Bench of Alberta and the Provincial Court of Alberta.

[199] Accordingly, declarations of invalidity, regardless of the Court which issues them (with the exception of the Supreme Court of Canada which binds all other courts), do not have universal effect.

[200] The real difference between the Provincial Court and the Court of Queen's Bench *vis-à-vis* declarations of invalidity is that such declarations by the Provincial Court must be made within a prosecution conducted before it, while the Court of Queen's Bench, in exercise of its plenary jurisdiction, can entertain an application for a declaration of invalidity in an action brought for that sole purpose (i.e., not as part of a prosecution).

[201] Whatever remedies are available to this accused, then, are constrained by the statutory authority given to this Court. Still, in addition to a possible finding that a statute or aspects of it are of no force or effect, some other remedies exist under s. 24(1) of the *Charter*, reproduced above.

[202] In *Schacter v. Canada,* [1992] 2 S.C.R. 679 [hereinafter *Schacter*], Lamer C.J. wrote at length regarding the interplay of s. 24(1) and s. 52. He described, at pp. 695-96:

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only “to the extent of the inconsistency”. Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an “appropriate and just” remedy to “[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied”. In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

[203] Lamer C.J. continued, at pp. 717-718:

> It is valuable to summarize the above propositions with respect to the operation of s. 52 of the *Constitution Act, 1982* before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the *Charter*. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:
>
> (i) The Extent of the Inconsistency
>
> The extent of the inconsistency should be defined:
>
> A. broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a Charter right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety;

> B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or,
>
> C. flexibly where the legislation fails the second or third element of the proportionality branch of the Oakes test.

[204] Lamer C.J. further stated, at pp. 719-20:

> Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

[205] Techniques such as "reading down" the legislation and "reading in" a curative provision remain available, however, with respect to the latter, I note that in *Schacter*, Lamer C.J. (at p. 718) said that this remedy:

> ... will be warranted only in the clearest of cases, that is, where each of the following criteria is met:
>
> A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
>
> B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

> C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

[206] Thus, when a legislative provision is not, on its face, unconstitutional, before striking down the law as being in violation of s. 52 of the *Constitution Act, 1982*, consideration should be given to whether reading in, reading down, or other forms of severance may "save" the provision.

[207] If the intent of the legislative body can be determined, and if language sufficient to avoid an intrusion into the legislative domain can be found, with budgetary consequences being avoided, then the impugned provision may be saved by careful insertion of appropriate language. Particularly in the circumstances of vagueness or overbreadth, where legislation that infringes a *Charter* right is unlikely to survive a s.1 analysis (because of failing to be a limit prescribed by law and because of failing to show minimal impairment), for example, reading in may be a reasonable remedy.

Statutory interpretations

"Stunting"

[208] In *R. v. Jones*, [1983] A.J. No. 763, 149 D.L.R. (3d) 727, the Alberta Court of Appeal provided guidance for the interpretation of what is now s. 115(2)(e) of the *Traffic Safety Act*, with an important distinction being drawn between conduct that attracts the attention of a driver and conduct that distracts a driver. The case arose following a minor collision between two vehicles, with the driver of one vehicle said, at p. 728 (D.L.R.), to have been "looking at" a prostitute who was on an adjacent sidewalk.

[209] At considerable length, Prowse J.A., for the Court, wrote regarding the interpretation of the section, stating, at pp. 729-31:

> It will be noted that the section is directed at stunting "or other activity on a highway that is likely to distract, startle or interfere with other users of the highway".
>
> At common law the right of all persons, including both vehicles and pedestrians, to pass over the roadways has been recognized as the "highest right of highways". *Re Sanderson and Township of Sophiasburg* (1916), 33 D.L.R. 452 [at p. 456], 38 O.L.R. 249. In the words of the Ontario Court of Appeal in the case of *Hydro-Electric Power Commission of Ontario v. County of Grey* (1924), 55 D.L.R. 339, at p. 344:

> It has long been recognised in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount, and cannot be interfered with even by the Crown itself, but only by Parliament or the Legislature.

While the primary purpose of the highway is for public travel, (*Heslop v. Corporation of Township of McGillivray* (1886), 17 S.C.R. 479) many other uses have been upheld as legitimate. The courts have held that children may play on the highways subject to local prohibitory law and so long as their presence is not prejudicial to the ordinary user of the street (*Ricketts et al. v. Corp. of the Village of Markdale* (1900), 31 O.R. 610 (Div. Ct.)), and that a peanut vendor has as much right to use the highway as a motorist *Toleff v. Pember and Hodgen*, [1944] O.W.N. 604 (H.C.).

In *Jacobs v. Tilbury Township*, [1941] D.L.R. 456 at p. 458, [1940] O.W.N. 530, involving liability of a municipality for injury sustained by a pedestrian crossing a roadway, the Ontario Court of Appeal discussed the right of a pedestrian to use the highway:

> In an urban municipality it is lawful and customary for pedestrians to use not only the sidewalks on either side of the highway, but so much of the highway as lies between them, as occasion may warrant, subject to any restrictions imposed by law, and there were none here. No doubt the growth of motor traffic and its character have caused a great falling off in this general use of the roadway, but that arises from the exercise of discretion on the part of pedestrians and not from any alteration in their rights.

A statute should be very explicit to take away this right of common enjoyment of the King's highway: *Greig v. City of Merritt*, [1913] D.L.R. 852 (B.C.Co.Ct.). Accordingly, s. 125(1) of the *Highway Traffic Act*, which attempts to restrict the right of free passage of users of the highway, must be narrowly construed.

In *R. v. Tremblay* (1974), 23 C.C.C. (2d) 179, 58 D.L.R. (3d) 69, [1975] 3 W.W.R. 589, the court considered the nature of the offence created under this section. There the appellant had flashed the headlights of his vehicle on and off to warn other users of the

highway of the presence of a police radar trap. The appeal was allowed and an acquittal was entered.

Mr. Justice Allen, in delivering the judgment of the court, referred to the dictionary meaning of the word "stunt" and stated at p. 182 C.C.C., pp. 72-3 D.L.R., pp. 591-2 W.W.R.:

> The so-called "golden rule" as stated by Parke, B., in *Becke v. Smith* (1836), 2 M. & W. 191 at p. 195, 150 E.R. 724 at 726, is as follows:
>
>> "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."
>
> Applying this relatively simple but primary rule of construction to the words used in the section in question I cannot think that the word "stunt" could be properly used to describe the actions of the appellant in flashing his lights on and off. However, our consideration of the matter does not stop there. We must determine whether such actions can properly be brought within the meaning of "other activity upon a highway that is likely to distract, startle or interfere with other users of the highway".
>
> The words "other activity upon a highway" are not to be construed as limited to activities in the general nature of "stunts" because this would invoke the application of the *ejusdem generis* rule, and to invoke this rule there must be a distinct genus or category created by the particular words preceding the general words "other activity". These specific words must apply not to different objects of a widely differing character, but to something which can be called a class or kind of objects. Where this

> is lacking the rule cannot apply, and the mention of a single species does not constitute a genus: *per* Lord Sankerton in *United Towns Electric Co. Ltd. v. A.G. Newfoundland.* [1939] 1 All E.R. 423 at p. 428. We must therefore decide whether the actions of the appellant constituted or amounted to an activity upon a highway "that is likely to distract, startle or interfere with the other users of the highway" without limiting the interpretation of the word "activity" to things of similar character or of the general nature of "stunts".

Since the appellant's activity is not a "stunt" as defined by *Tremblay, supra*, the issue that arises is whether her activity falls within the category of "other activity on a highway". It becomes necessary to determine whether the appellant's activity was such that it would be "likely to distract, startle or interfere with other users of the highway". As was stated by this court in *Tremblay* the words of this statute should be taken to be used in their ordinary sense, and the dictionary can provide useful instruction in this regard.

The Shorter Oxford Dictionary defines "startle" as follows: "to cause to start; to frighten; to surprise greatly; to shock". The word "interfere" is defined as: "to run into each other; to intersect; to interpose so as to affect some action; to intervene".

Clearly the actions of the appellant do not fall in either of these categories; they neither frighten or greatly surprise; nor do they intersect or intervene with other users of the highway.

The same dictionary defines "distract" as: "turning aside in a different direction; to perplex or to confuse; to derange the intellect". For purposes of comparison it is helpful to examine the meaning of the word "attract", defined as: "to draw forth and fix upon oneself the attention or notice of others, to excite towards oneself the pleasurable emotions of a person who thus 'feels drawn' to one". "Activity" is defined as: "the state of being active; the exertion of action or energy".

The ordinary meaning of these words leads me to conclude that the legislation was not directed at activities that merely drew attention to oneself or excited towards oneself pleasurable emotions of those

> whose attention is drawn to them. A distraction must be more serious than an attraction. If such were not the case, one could envision everyday activities which would fall within this section, in fear that those activities might divert the attention of some careless drivers. Immediately one thinks of neon signs, a donkey, a movie star, a well-known politican [*sic*] or children doing cart-wheels or selling lemonade.
>
> The section in question is directed at particular activities not occupations and here the only activity by the appellant described in the evidence was a motion with her head and a glancing in windows of passing vehicles. Given the facts of this case I must conclude that there was no evidence on which a finding could be made that the activities related above fell within the ambit of the section. In the absence of any evidence upon which a conviction could be supported, I would allow the appeal and enter an acquittal to the charge.

[210] Referring to the definition of "stunt", Allen J. in *R. v. Tremblay, supra*, had stated as follows, at para. 8:

> In the hearing before the District Court Judge and upon the argument of this Appeal counsel for the appellant contended that the word "stunt" used in the subsection quoted should be interpreted in its ordinary and usual dictionary meaning and he referred to the definition of the word as it appears in the Shorter Oxford English Dictionary, 3rd Revised Edition, as follows:
>
> > "a. An 'event' in an athletic competition or display; a feat undertaken as a defiance in response to a challenge; an act which is striking for the skill, strength, or the like, required to do it; a feat, something performed as an item in an entertainment.
> >
> > "b. In recent use, An enterprise set on foot with the object of gaining reputation or signal advantage. In soldiers' use often vaguely: An attack or advance, a 'push', 'move'.
> >
> > "c. In wider use, an enterprise, performance. Hence Stunt: to perform stunts; spec. of a motorist, an

> airman, etc., to perform spectacular and daring feats. Stunter, Stuntist."

[211] I note that, due to the arguments advanced in each case and their respective conclusions that the acts in dispute did not fall into the designation of "stunt", neither the Court of Appeal in *R. v. Jones, supra*, nor Allen J. in *R. v. Tremblay, supra*, was required to address whether the phrase "that is likely to distract, startle or interfere with users of the highway" applied to "any stunt". It would seem odd that only "other activity" is covered by this, unless one assumes that such a distractive quality is inherent in the term "stunt". In my opinion, the proper interpretation of s. 115(2)(e) of the *Use of Highway and Rules of Road Regulation* is that the modifying phrase should be taken as referring to "any stunt" and to "other activity".

[212] In short, the offence of "stunting" has been the subject of judicial interpretation and, in that interpretation, has been defined as engaging in either a "stunt" or in another activity likely to frighten, surprise, shock, perplex, or confuse other users of the highway, and has been defined to not include activities that simply draw attention to the participant, or which otherwise attract the notice of other users of the highway.

"Noise" / "Loud and unnecessary"

[213] Counsel for the Attorney General provided the Court with uncertified copies of statutes from other jurisdictions wherein noise related to the operation or use of a motor vehicle is subject to regulation. More helpful is the judicial interpretation of such statutes, such as is found in *R. v. Gabrielson*, [1986] A.J. No. 645, 76 A.R. 81 [hereinafter *Gabrielson*]. That case is a decision on an appeal relating to a City of Red Deer bylaw that prohibits a person from making:

> ... any loud, unnecessary or unusual noise or any noise whatsoever which either annoys, disturbs, injures, endangers or detracts from the comfort, repose, health, peace or safety of other persons within the limits of this City.[28]

[214] The facts related to a backyard party in the City of Red Deer at which a police officer attended at 3:00 a.m., in response to a neighbour's complaint, and, from a block away, "he could hear voices and the stereo. He further stated that the noise could be faintly heard above the noise of his police vehicle".[29]

[215] The trial judge found that the subsection created four distinct offences, namely: making (i) any loud noise; (ii) any unnecessary noise; (iii) any unusual noise; and, (iv) any other noise whatsoever which either annoys, disturbs or detracts from the comfort peace, or safety of other persons. For clarity, I emphasize that the trial judge determined that the modifying phrase "which

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[28] *Gabrielson, supra* at p. 82.

[29] *Ibid.*

either annoys, disturbs, injures, endangers or detracts from the comfort, repose, health, peace or safety of other persons within the limits of this City" applied only to the words "any noise whatsoever" and not to the words "loud (noise)", "unnecessary (noise)" or "unusual (noise)".

[216] On appeal, the Court of Queen's Bench reversed, noting the need for precision in the drafting of bylaws and also noting the Supreme Court of Canada's then-recent decision in *Montreal (City) v. Arcade Amusements Inc. et al.*, [1985] 1 S.C.R. 368 – that bylaws should be "'benevolently' interpreted and supported if possible"[30] – and found that the modifying phrase was "intended to modify each of the four prohibitions characterized by the trial judge and not just 'any noise whatsoever'."[31]

[217] The Court of Queen's Bench decision, therefore, found that the adjectives "loud" and "unnecessary" avoided unconstitutional vagueness as modifiers for the noun "noise", but only when the additional clarifying phrase was also considered.

[218] With respect to the apparent inconsistency between the "noise" provisions of the *Community Standards Bylaw* and the "amplification" or sound provisions of the *Street Bylaw*, I note the decision of Rawlins, J. in *Pawlowski v. Calgary (City)*, 2007 A.J. No. 532, wherein she stated, at paragraphs 35 - 43:

> Notwithstanding the dispute as to the number of complaints, it is clear that the City, in refusing to allow amplified sound as part of the 2007 Permit, was responding to complaints from citizens regarding noise in Triangle Park associated with Street Church Ministries' speakers. Therefore, even without reliance on the presumption discussed above, I am satisfied that the City was acting in good faith and in the public interest in making this decision. I am bolstered in this opinion by the fact that the City met with Street Church Ministries, offered other locations and otherwise attempted to resolve the situation. As a consequence, I am of the view that I should not lightly disturb the City's decision.
>
> The Applicant takes the position that some other, more minimal restriction on amplified sound would have addressed the City's concerns. There was much discussion at the hearing about the interplay between the Parks Bylaw and the Community Standards Bylaw.

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[30] *Montreal v. Morgan* (1920), 60 S.C.R. 393 at p. 404 *per* Anglin J.

[31] *Gabrielson* at p. 85.

Properly speaking, whether the City could or should have allowed a specified level of amplified sound under the 2007 Permit is not the question before me. What I must decide is simply whether to enjoin the City from enforcing its decision not to allow Street Church Ministries to use amplified sound. Nevertheless, the two bylaws are relevant to the question of balance of convenience because they speak to the issue of the public interest. Therefore, I think it appropriate for me to make some comments about them.

The Parks Bylaw provides for a prohibition on amplified sound in City parks unless the Director allows it. The Community Standards Bylaw, by contrast, sets out allowable sound levels on all "premises", the definition of which is set out above.

The definition of "premises" appears to be broad enough to include City parks; certainly, this is the interpretation urged upon me by the Applicant. Therefore, the two bylaws seem to be contradictory in that they provide for different allowable noise levels in parks. The Applicant takes the position that he should be governed only by the noise level prescribed by the Community Standards Bylaw; the difficulty with this is that it seems to make the prohibition in the Parks Bylaw meaningless.

In my view, the seeming conflict between the two bylaws can be resolved using principles of statutory interpretation. In his text, The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000), Pierre-Andre Cote states at pp. 342-3:

> Different enactments of the same legislature are supposedly as consistent as the provisions of a single enactment. All legislation of one Parliament is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislature.
>
> This presumption of coherence in enactments of the same legislature is even stronger when they relate to the same subject matter, *in pari materia*. On the other hand, apparent conflicts between statutes should be resolved in such a way as to re-establish the desired harmony.

He goes on to make the following comments at p. 350 and at p. 354:

> It has long been recognized that statutes are not inconsistent simply because they overlap, occupy the same field or deal with the same subject matter. There is always the possibility that the[y] complement each other.
>
> ...
>
> When enactments appear repugnant, the judge must resolve the contradiction, and try to harmonize them. He has two techniques at his disposal: the apparent inconsistency can be resolved by interpreting the texts so as to reconcile the rules; or, priority may be granted to one text so as to set aside the effect of the other. Differences between the two methods are more apparent than real. It amounts to the same thing, in the case of inconsistency between a general enactment and one of only special application, to say that the general enactment should be interpreted as not applying to the case dealt with in the special text, or that the special text has priority. The same reasoning, appearing as two distinct techniques, is used to arrive at an identical result.
>
> Because the legislature is presumed consistent, any apparent repugnancy should be avoided by reconciling the two enactments whenever possible ...
>
> Most often, this is done by giving to both enactments a distinct scope or ambit, so that each produces effect without contradicting the other.

In my view, this is the correct approach to take in respect of these two bylaws. The Parks Bylaw is particular to City parks, which are public spaces, while the Community Standards Bylaw extends even to private property such as a person's home. It seems reasonable to conclude that noise levels in a public space would be regulated more closely such that all members of the public may enjoy the

> space without disturbance. In respect of private spaces, the greater concern is to avoid undue restriction on the peaceful enjoyment of one's property, subject only to those restrictions considered necessary to avoid impinging on the rights of others. Thus, the two bylaws may be reconciled by concluding that the Parks Bylaw allows for greater restriction on noise in City parks than is permitted by the Community Standards Bylaw in other places.
>
> With this in mind, I disagree with the Applicant's position that the City should have imposed some lesser restriction on Street Church Ministries' use of Triangle Park. I am satisfied that Street Church Ministries' use of amplified sound has created a disturbance in the past and that the granting of an injunction at this point will result in a continuing disturbance. In my view, the public good is better served by allowing the City's decision to stand pending trial and the balance of convenience is in the City's favour.

[219] I see no reason to differ from Her Ladyship's decision regarding the City's ability to legislate, for different purposes, two aspects of the same behaviour. Further, I see no reason to re-litigate an issue that involved the same parties, the same underlying charges, and the same facts.

Application of the law to the facts

[220] The framework presented by counsel for the accused is useful in answering the particular issues that are before the Court. However, an alternative format is more helpful in assessing the various alleged breaches of the accused's constitutional rights, and so that format will be used here. I will first address the issues of vagueness and overbreadth, followed by freedom of religion, then freedom of expression, and, finally, abuse of process. Internally, where applicable, each alleged breach will be subject to a s. 1 analysis. At the conclusion, I will comment on whether the Crown has proven the guilt of the accused beyond a reasonable doubt on each of the charges.

Vagueness and overbreadth

Material on a street

[221] What is "material"? The *Street Bylaw* does provide a definition of "material" and this has been presented above. In addition to referring to "any object or article", the *Street Bylaw* then provides a number of exemplars of the term, including animal waste, building waste, garbage, and yard waste. Applying the *ejusdem generis* principle, one might be tempted to conclude that "material" refers only to waste-related objects or articles, but, clearly, the definition refers to "any object or article". Given the scope of that reference, everything from the sole of a pedestrian's shoe, to (as posited during the trial of this matter) a briefcase placed on the ground while its

owner awaits the arrival of a bus, to, indeed, the stand used for a speaker could be captured. The term “material” is both vague and, by potentially capturing so many objects or articles, overly broad.

[222] By failing to provide notice to individuals regarding what behaviour is or is not acceptable under s. 17(1) of the *Street Bylaw,* I am inclined to conclude that the term “material” is so vague as to constitute a breach of fundamental justice, and that the breach fails to meet the threshold for a s. 1 analysis, as described in *Osborne, supra*. I will, however, out of an abundance of caution, address the s. 1 issue.

[223] While there is a pressing and substantial concern regarding litter and other items that may interfere with the use of city streets or with the aesthetics of those streets, there is no proportionality between the breadth of the term “material” and the purposes of the *Street Bylaw*. Specifically, there is no rational connection between such a broad term and the aims of the *Street Bylaw*, nor does the deprivation of s. 7 rights occur in accordance with the principles of fundamental justice. The breadth of the term also means that the potential for abuse of the law, as seen in this case, outweighs the possible benefits. In short, the violation created by this vague and overly broad law cannot be saved under s. 1 of the *Charter*.

Amplification system in a park

[224] While the term “amplification system” is not defined in the *Parks and Pathways Bylaw*, that does not mean that the term fails to provide an “intelligible standard”.

[225] In this case, the accused had, for a significant prior period of time, sought and obtained the permit required under the *Parks and Pathways Bylaw*. In his testimony, he acknowledged being well aware of the need for such a permit in order to lawfully operate a sound speaker in his activities at Triangle Park. The permit process reportedly broke down for this accused amidst allegations of his failure to restrain the volume of the speakers he was using. (I will address issues related to abuse of power below. Here, I note simply the chronology relating to the accused’s use of an “amplification system”.) It is not credible to say that there is no “intelligible standard” or that sufficient debate would be precluded by vagueness in the law. Reasonable parties would have sufficient notice that the use of a sound amplification system in a city park, without a permit, could result in an infraction. The law is not vague nor overly broad.

[226] Given the finding that the law is not vague or overly broad, no s. 1 analysis is necessary.

Loud and unnecessary noise from a motor vehicle

[227] Sound must be sufficiently “loud” in order to be audible. As a result, the use of the term “loud” is very broad as, in effect, all noise has some degree of loudness. Still, *The Canadian*

Oxford Dictionary defines "loud" as "strongly audible, esp. noisily or oppressively so",[32] thereby reflecting a particular volume that may offer some precision as to what sort of noise is captured by the impugned provincial statute.

[228] But what of "unnecessary"? What does that term impute? If "unnecessary" is construed as meaning, for example, "unnecessary for the operation of the motor vehicle", then sounds such as those related to a driver speaking with a window open or to a vehicle that has a radio playing would risk falling within the ambit of the prohibition. If this construction is not what was intended, then, through the alternative, noises necessary for the operation of the motor vehicle could result in the issuance of a ticket. Clearly, a violation that stems only from the basic operation of a motor vehicle cannot possibly have been the intent of the legislature. That interpretation would result in the law being vastly overbroad. In short, then, the term "unnecessary" is, at best, vague, offering no intelligible standard, and, at worst, overbroad. Only the term "loud" offers any precision.

[229] I would note as well that I cannot accept that the legislature would have intended that a motor vehicle, used ostensibly as a stand for a sound speaker and not actually being operated in any fashion, could be captured by this provision of the *Use of Highway and Rules of the Road Regulation*, which, as noted previously, falls within a Part of the *Regulation* labelled "Operation of Vehicles".

[230] If I am wrong in finding the provision to be vague or, in the alternative, overbroad, I will consider whether the provision, infringing as it does provisions of s. 7, may be saved under s. 1. I accept that there is a pressing and substantial concern relating to the need to ensure that noise pollution from the operation of motor vehicles is kept to a minimum. Other users of the road, residents in homes along busy routes, and, indeed, pedestrians on the sidewalks should not have to endure loud noise from motor vehicles. In considering the proportionality of the impugned section, I accept that there is a rational connection between the provision and the concern, but, given its potential breadth, I find that the impairment created by the section is not one that is minimal. As noted, preceding sections of the *Use of Highway and Rules of the Road Regulation* refer quite consistently to actions that, in the operation of motor vehicles, create a hazard for other users of the road. There is no such limit within the impugned section.[33]

"Stunting"

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[32]Edited by Katherine Barber, Oxford University Press, 2001, Don Mills, Ontario, at p. 850.

[33]If I am wrong in finding s. 82 to be vague or, in the alternative, overbroad, or if I am wrong in finding the provision is not saved under s. 1, then, having found that the volume from the speaker was sufficient to cause Cst. Hagen to use only a "slightly raised voice" in order to communicate with his partner, I would find that the volume from the speaker was not "loud" as it was not "oppressively" audible. Also, the photographic evidence shows other people apparently carrying on conversations in the park. Further, I find that as the volume was "necessary" for the activity for which it was intended, that of speaking to people gathered in the park. (This point further underlines the issue of the problem caused by the vagueness of "unnecessary".) On the facts, then, I would find the accused not guilty of causing or creating any loud and unnecessary noise from a vehicle.

[231] The test of whether a particular provision yields an intelligible standard does not lie in whether a testifying police officer is able to articulate his or her own version of that standard to the Court. Instead, the test is whether a person of "common intelligence" would be able to discern meaning. The impugned provision must be sufficiently precise that an officer's discretion is limited by the law, not by his or her particular view of when it should be enforced. Given the Alberta Court of Appeal decision in *R. v. Jones, supra*, there is judicial guidance on the interpretation of s. 115(2)(e) of the *Traffic Safety Act*. We know that the behaviour covered by the stunting provisions must be such that other users of the road are distracted, startled, surprised, confused, or shocked. That the charging officer in this matter was unclear on that notion does not equate with the law being vague or overbroad. There is sufficient basis for legal debate.

[232] Given the finding that the law is not vague or overly broad, no s. 1 analysis is necessary.

Freedom of religion

[233] The accused has testified – and I accept his evidence as truthful – regarding his belief in the need for, and benefit of, a street church, ministering to the homeless and impoverished and attempting to disrupt the particular scourge of drug abuse. He has stated that he believes that engaging in such conduct is a religious imperative, an obligation that stems not from the dogma of a certain faith, but from his personal interpretation of the Bible. He makes reference to behaviours reportedly engaged in by Jesus Christ, including the use of sound "amplification".

[234] As noted, the accused testified about how Christ "would go to the top of the mountain" because "the amplified sound goes further, so he could reach more people". The accused also commented on Christ's method of speaking from a boat, across water, as this method "would ... amplify sound."[34]

[235] Whether Christians believe that a particular behaviour was performed by Christ does not answer the legal question of whether that behaviour has a nexus with religion. No doubt Christ, again as understood by Christians, engaged in many behaviours that are not necessarily religious in nature, and the fact that he engaged in them does not automatically imbue these acts with religious connotations. Nonetheless, in my opinion, the choice by the accused to use amplified sound, while having additional purposes including enhancing his personal safety by maintaining

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[34]In his Brief of Argument, the Attorney General, at para. 37 stated:

> While one might be tempted to infer a religious belief regarding amplified sound from this statement, a sincerely held belief should be clear and not inferred. It would not be appropriate to assume as the burden in proving the restriction on the right (and belief in this respect) is on the claimant and it has not been discharged with regard to this aspect.

The accused also testified, though, that "the need for amplified sound in that location [Triangle Park] was absolutely crucial to conducting the services". No inference is needed regarding the connection, here, between the use of sound amplification and its religious context.

a distance between him and alleged drug traffickers, is a behaviour, in the language used in *Amselem, supra*, undertaken "as a function of his ... spiritual faith".[35]

[236] Additionally, in the circumstances of the charge arising from April 23, 2007, it was the evidence of the Bylaw Officer that, when he "dealt with" the matter, the accused was using sound amplification while "doing grace ... when they were doing their meals and stuff in the park." Clearly, this was an activity having a nexus with religious belief.

[237] Further, the efforts of the accused to bring food to the homeless and other congregants was also a function of his religious beliefs. When engaging in that behaviour, the accused had with him boxes of food which he temporarily placed on a sidewalk. The semantic distinction between bringing food to the congregants and placing boxes of that food destined for congregants on a sidewalk (or table) is not useful. As I have said, the activity was a function of the religious beliefs of the accused.

[238] Each of the charges against this accused relates either to the use of sound speakers / amplification in a religious activity (including the placement of the device transmitting the sound), or to boxes of food (and to other items such as a cross) placed on a sidewalk. While I do not believe that the legislative provisions were drafted with the intended purpose of impairing any person's right of freedom of religion, I find that interference did, in fact, occur, as an effect of the attempted enforcement of the legislation.

[239] Further, I find that, in the behaviours underlying each of the charges, the enforcement of the legislative provisions affected the accused's ability to act in accordance with his religious beliefs in a manner that was significant, that is, in a manner that was more than trivial or insubstantial. Using the language from *R. v. Edwards Books and Art Ltd., supra*, as cited in *Hutterian Brethren, supra*, the state-imposed burdens of, *inter alia*, requiring the accused to apply for City permits to use a sound amplification system in a park or to place material on a street, or the act of ticketing him while he was saying grace, were not only capable of interfering with the religious practices of the accused, they actually did so.

[240] As I have found the use of sound amplification and the feeding of the congregants (and the related behaviours) to be behaviours that were religious in nature and that, in the result, the accused's right of freedom of religion was infringed in a manner that is more than trivial or insubstantial, the analysis with respect to each of the City of Calgary bylaw charges proceeds solely on the basis of whether the provision can be justified under s. 1 of the *Charter*. This is the same analytical approach used by the Supreme Court in *Hutterian Brethren, supra*.

[241] With respect to the provincial statutory offences, in my opinion, while each law had an effect on the accused's right of freedom of religion, the effect was quite indirect and, further, was both trivial and insubstantial. Properly considered, each law addresses road-related hazards (in

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[35] *Amselem, supra* at p. 580.

the case at bar, the potential of driver distraction by the placement of the sound speakers on the motor vehicle or on the pedestrian's shoulder), but does so in a manner that does not meaningfully affect the accused's ability to practice his religious beliefs.

[242] At paragraph 89 of his Brief, the accused acknowledges:

> If the court [*sic*] considers the judicial interpretation of s. 115(2)(e) to resolve the argument of vagueness by way of overbroad legislation, then the section does not engage religious stunts or activities that only attract attention, and as such, the Applicant would have to concede that either no s. 2(a) breach could be established or that the competing interest of traffic safety would justify any infringement in relation to activities that distract drivers' attention.

[243] Having found that judicial interpretation, particularly *R. v. Jones, supra*, does resolve the issue of vagueness, I accept the accused's concession that no s. 2(a) breach can be established *vis-à-vis* the charge of "stunting".

Material on a street

[244] As stated above, there is a pressing and substantial concern regarding litter and other items that may interfere with the use of city streets or with the aesthetics of those streets, and the City is entitled, indeed expected, to take steps to address that concern. The impugned bylaw provision has a rational connection to that objective. However, given the language used in the actual provision, as it was at the time of the laying of the charge against the accused, the impairment is not within the range of what would comprise "minimal".

[245] I accept the oft-repeated admonition that I should give deference to lawmakers, and that the provision need not be the optimally least restrictive one, but only be within a range of options that minimally impairs the *Charter* right. However, under the bylaw, any preacher on a sidewalk, without a permit from the City, could not have a religious conversation with a colleague, or could not pause to chat with a group of people sitting on a park bench, because the preacher, by his physical presence on the sidewalk, would have some form of "material" on a street. As a further example, absent a permit from the City, a group singing Christmas carols could not stop on the sidewalk in front of a residence and certainly could not place on the sidewalk any case from a guitar or other musical instrument as these things would be "material".

[246] In short, the bylaw offers no precision and no guidance to those trying to comply with it and to those charged with the duty of enforcing it and, accordingly, no deference from this Court is needed.

[247] I also find that the negative effects of the bylaw (i.e., creating an infringement on the accused's religious activities, precluding him from even temporarily placing tables of food or boxes of food on a sidewalk, though they created no significant impediment to pedestrian traffic) outweighs the objective of the *Street Bylaw*.

Amplification system in a park

[248] With respect to the accused's use of sound speakers, there is a very narrow distinction to be made here between the exercise of his freedom of religion and the exercise of his freedom of expression. Necessarily, as he was expressing himself in a religious context in each of the incidents giving rise to the tickets being issued to him for using amplification in a park, there is some overlap between these two *Charter* rights. As will be discussed below, subject to a s. 1 analysis, the bylaw creates an obvious infringement of freedom of expression. Keeping that separate from the analysis of its effect on freedom of religion is important.

[249] I have already found that the use by the accused of sound amplification in a park was behaviour that, for him, had a nexus with his religious beliefs. In considering a s. 1 "defence" of that law, I accept that the City has a valid interest in wanting to ensure that its public parks are available for the use and enjoyment of a large cross-section of people in Calgary. Eliminating noise that could detract from a park user's experience in that public facility is an important concern.

[250] Tenuously, the bylaw has a rational connection to that objective. I say "tenuously" because the bylaw does not state that it prohibits the use of speakers, megaphones, or other devices used to broadcast sound, rather, it prohibits the use of an "amplification system". Sound and light are both amenable to amplification, as are other phenomenon. Does the law mean to prohibit the use of a flashlight in a park, or, as was questioned in this trial, a personal audio device? As Dickson, C.J. wrote in *Oakes, supra*, "the measures adopted must be carefully designed to achieve the objective in question." This bylaw lacks that careful design.

[251] The bylaw is not vague and, though imposing a limit on the right of freedom of religion, may still effect only a minimal impairment of that right, given the potential structure of the permit process. However, as seen here, the permit process, in the absence of clear rules and policies, can become arbitrary. Individuals making sounds significantly louder than those alleged to have been made by the accused are, the City admits, granted permits because the duration of their respective event is limited. But what are the standards being applied? Further, there is evidence, which I have accepted, that the City began to refuse to even consider applications that the accused was attempting to make for permits. As such, the permit regime failed, and can no longer qualify as a minimal impairment.

[252] The effect of the bylaw is to prohibit any religious expression that occurs over a sound amplification system unless a permit has been granted for such activity. A public park offers a site for a gathering of people. Some of those gatherings may take on a religious nature, including,

for example, church picnics with multiple generations of a single family interacting with others in a religious context. Someone may play music over a radio. Another may use a megaphone to gather congregants for a pre-meal grace. Without a permit, these activities, entirely conducive to the users' purpose for being in the park, would be prohibited.

[253] Further, there is the issue of Triangle Park itself and what I have heard to be the conditions in the Park at the times relevant to the laying of the charges against the accused. Put simply, the evidence presented before me, and which I have accepted, showed that Triangle Park was no longer a forum available for the use of the general public. The Park was populated by individuals who were homeless, who were buying and selling drugs, and who may have been engaging in other criminal behaviour. At best, other members of the public who accessed the Park did so only by using a path which lay adjacent to the Bow River and passed through the Park. Those people were en route to somewhere else. Few people lingered there.

[254] Rehabilitation of this Park may have presented a goal of "sufficient importance", but that was not the intent of the Bylaw. Instead, the effect of the Bylaw was to infringe the right of freedom of religion in a manner that, at this location, was disproportionate to the objective of reducing sound pollution.

Freedom of expression

[255] Distinct from the accused's claim of a breach of his right of freedom of religion is his claim of a breach of his right of freedom of expression. In the context of the latter claim, it matters not whether he is expressing religious beliefs or he is questioning governmental practices, only that, consistent with the Supreme Court of Canada's position in *Irwin Toy, supra*, his activity falls within the sphere of conduct protected by s. 2(b) of the *Charter*. "Activity is expressive if it attempts to convey meaning",[36] and, clearly, the activity of the accused in using sound amplification conveyed meaning.

[256] With respect to each of the two charges under the *Parks and Pathways Bylaw* and to the two charges under the provincial statutes, the fact that the impugned activity conveyed meaning answers the first of the two questions presented in *Irwin Toy, supra*. More problematic are the three charges under the *Parks and Pathways Bylaw*, for placing material on a street. Expression is not protected if it does not convey meaning. Is there meaning conveyed in the circumstances giving rise to the charges under the *Parks and Pathways Bylaw*?

[257] The three charges for placing material on a street each relate to material on a city sidewalk, being, the speaker beside the park; a cross, tables, banners, and boxes of food outside City Hall; and, a cross and boxes of food or juice adjacent to the Mustard Seed. The speaker is linked to the form of expression, so is linked to the act of conveying meaning. While tables and boxes of food may not convey any particular meaning, the content of the banners does and, I

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[36]*Irwin Toy, supra* at p. 968.

conclude, so does the presence of a cross. The meaning conveyed by a cross is that of a religious activity (or protest).

[258] The second question relates to whether the impugned government action had as its purpose or effect the restriction of freedom of expression. I find that the various provisions in question in the case at bar did not have the purpose of limiting expression nor of controlling access to content. Their purposes each related to attempts, by the government, to control the physical consequences of human behaviour.

[259] The accused is left, then, to rely on an argument that the effect of the *Street Bylaw*, *Parks and Pathways Bylaw*, *Use of Highway and Rules of the Road Regulation*, and *Traffic Safety Act* was to restrict his right of freedom of expression. As stated in *Irwin Toy, supra*, when the claim is based on the effect of the legislation, the applicant must make reference to the principles and values that underlie freedom of expression.

[260] Here, I find that the accused's expression occurred in the context of social activism – that is, attempting to minister to the homeless, to drug addicts, and to individuals allegedly engaged in criminal activity – and in the context of attempting to influence political decision making. There is a significant nexus between the activity of the accused and the second of the three values the Supreme Court identified, in *Irwin Toy, supra*, as underlying freedom of expression (i.e., "participation in social and political decision-making"[37]).

[261] The remaining issue to be resolved with respect to the accused's claim of infringement of the right of freedom of expression relates to the fact that all of the charges stem from activities occurring on government property, being public parks, streets, or sidewalks. As stated in *Commonwealth, supra*, "the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place."[38] As compatibility is quite situation-specific, I can address that issue only by reference to each of specific charges. Where necessary, s. 1 analyses are presented.

Material on a street

[262] The primary purpose of a sidewalk is to allow for the flow of pedestrian traffic. In the circumstances relating to the speaker on the sidewalk and to the materials in front of City Hall, I have found that there was no significant impairment to pedestrian traffic. As a result, the actions of the accused were compatible with the principal function of the government space. In the circumstances relating to a cross and boxes of food on the sidewalk adjacent to the Mustard Seed, I find that those materials did not create a significant impairment to pedestrian traffic,

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[37] *Ibid*. at p. 976.

[38] *Commonwealth, supra* at p. 156.

though the gathering of people at that site may have done so. The materials, conveying meaning, were a form of expression, again, compatible with the principal function of the sidewalk.

[263] Turning, then, to a s. 1 analysis, I find that the concern of the City for maintaining safe and efficient access to and use of streets and sidewalks was a pressing and substantial concern. Prohibiting the placement of materials on a street (including a sidewalk) is rationally connected to that objective. The fact that the City had in place a process for obtaining a permit to place materials on a street means that, in some circumstances, the objective of safe and efficient access can be overridden. Given the transient nature of the activities identified in the charges in this matter, the blanket prohibition against placing material on a street is very broad.[39] In light of my earlier comments regarding vagueness and overbreadth of the bylaw provision, I do not believe that it can be said to create only a minimal degree of impairment. As such, the provision fails to proportionality assessment and cannot be saved by s. 1.

[264] In the result, then, the bylaw provision regarding placing material on a street is found to unconstitutionally infringe on the accused's right of freedom of expression and the provision cannot be saved under s. 1.

Amplification system in a park

[265] As discussed above, Calgary parks are intended to be places available for the use of all people. The City has, as a reasonable concern, a desire to control certain activities that may take place in such parks, including the use of amplification systems. But the purpose of certain downtown parks, including Triangle Park, according to the evidence before me, had drifted far away from being places of rest or activity for the general public. The principal function of Triangle Park had become that of a gathering place for the homeless, for those buying and selling drugs, and for others who may have been engaged in criminal activity. Those activities share a general characteristic of disrupting the usual function of the park, and there is nothing in the accused's use of sound amplification that is incompatible with that corrupted usage.

[266] Put another way, when the accused states that he wanted to use sound amplification in order to disrupt some of the activities occurring in the park, he is suggesting that his intent was to restore the park to its original condition and purpose. In short, either his activity was not incompatible with the principal function of a City park or the principal function had already been perverted to an extent that the actions of the accused could cause no further incompatibility.

[267] I find, therefore, that the accused's use of sound amplification in the City parks passes the test described in *Commonwealth, supra*. As a result, I find that the accused's right of freedom of expression was infringed by the *Parks and Pathways Bylaw*.

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[39] Compare to *Vancouver (City) v. Maurice*, 2005 BCCA 37, wherein the parties occupied the sidewalk for a period in excess of two months.

[268] Although sometimes overlooked in a s. 1 analysis, when describing the need, in the first stage of the analysis, for an objective that relates to a pressing and substantial concern, Dickson C.J. in *Oakes, supra*, quoting from *Big M Drug Mart* (at p. 352), stated, at p. 138, that the objective "must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'".

[269] The accused states, at para. 78 of his brief, that "The objective of the provision is to regulate possible negative consequences of amplification systems in parks", but makes no argument against this being an objective of sufficient importance to justify infringement of a *Charter* right.

[270] Conversely, the City, at para. 124 of its Brief, states:

> City Respondent submits that the purpose of the bylaw is to ensure that City parks and pathways remain safe and accessible for enjoyment of all Calgarian [*sic*] and that is a pressing and substantial concern. The City Respondent relies on the 'Salutary Effects' portion of its brief in support of this submission.

[271] In the absence of rebuttal from the accused, with the City having the burden of proof in a s. 1 analysis, I accept, for these purposes (without deciding), that the objective of the *Parks and Pathways Bylaw* is pressing and substantial.

[272] Further, I accept that there is a rational connection between the bylaw provisions and the objective. However, as with the previous discussion regarding the right of freedom of religion, by failing to establish known standards for the granting of permits and, later, by refusing to accept applications from the accused for the use of an amplification system in a park, the impairment created by the City's provisions and policies is no longer minimal. The negative effect of the provision on the right of freedom of expression outweighs the salutary effects of the bylaw.

[273] In the result, then, the bylaw provision regarding use of an amplification system in a park is found to unconstitutionally infringe the accused's right of freedom of expression, and the provision cannot be saved under s. 1.

[274] In finding that the accused's right of freedom of expression was infringed, I am aware of the language of Toy J.A. in *Cheema v. Ross, supra*, at p. 222:

> It may well be that in some other context it could be argued that controlling the volume of a person's voice may deprive the listener of the true meaning of the message, but I do not believe there is any foundation in the evidence for such an argument to be advanced here.

> In my judgment, the plaintiff's free-standing, fundamental freedom of expression was not infringed and, accordingly, there is no need to proceed further with a s. 1 analysis.

[275] However, in the case at bar, it is my opinion that the City of Calgary bylaw provisions regarding the use of amplification in parks do have the effect, with respect to this accused, of controlling the volume of his message, and of depriving some potential listeners of the true meaning of his message. The s. 1 analysis, as I have found, shows that the impugned provisions do not reflect minimal impairment of the right of freedom of expression, so must be declared to be unconstitutional.

Loud and unnecessary noise from a motor vehicle

[276] As stated previously, the objective of the *Use of Highway and Rules of the Road Regulation* is to address road-related hazards. That is a pressing and substantial objective and one that justifies interference with the right of freedom of expression. There is a rational connection between the provision and that objective. Again, though, the provision fails to demonstrate proportionality by infringing only minimally. The provision leaves wide open for interpretation the notion of what qualifies as "unnecessary" noise and, clearly, that breadth for interpretation could create a significant impairment on the right of freedom of expression.

[277] In this case, with the provision used to charge the accused when the motor vehicle was not being operated within the usual meaning of the *Regulation*, overbreadth is evident. The provision, therefore, has a demonstrated negative effect on the right of freedom of expression and cannot be saved under s. 1.

"Stunting"

[278] The accused argues, in para. 91 of his Brief, that "There are [*sic*] a multitude of expressive activities that are otherwise constitutionally protected which are prohibited by this provision." In my opinion, only the limited range of activities likely to distract, surprise, frighten, shock, or confuse other users of the highway are captured when the provision is properly interpreted. Two people having a conversation by the side of a road, for example, are not engaged in "stunting", so their right of freedom of expression is not infringed by the provincial statute. In contrast, though, if the two people were engaged in a stunt, they would be interfering with the safe operation of the highway or, put another way, they would be engaged in the very activity that the law has identified as a pressing and substantial concern.

[279] Here, the accused was engaged in expressive activity at a roadside. If he was truly engaged in "stunting", then his conduct would, in my opinion, be incompatible with the principal function of the roadway and no legitimate argument could be made that the law created an unconstitutional infringement of his right of freedom of expression. If he is not engaged in

"stunting", as defined in *R. v. Jones, supra*, then the law, properly interpreted, does not affect his right of freedom of expression.

[280] Nonetheless, while finding that the provision, properly applied, does not affect the accused's right of freedom of expression, in case I am in error on this point, I will proceed with a s. 1 analysis.

[281] In my opinion, there is a legitimate concern for the safety of the users of the highway; there is a rational connection between the impugned provision and that concern; narrowly interpreted, as the "stunting" provision was in *R. v. Jones*, *supra* there is a minimal degree of impairment on the right of freedom of expression; and, the benefits of promoting public safety on the highway are significant and outweigh the isolated negative circumstances in which an infringement can be said truly to exist.

[282] I note that, at para. 91 of his Brief, the accused offers the following comment:

> The Applicant concedes that if the section passes scrutiny for vagueness and overbreadth, that it would otherwise be saved by a s. 1 analysis. That is to say, if only stunts or other activities which distract drivers and cause traffic safety risks are the subject of the legislation, **in both purpose and effect**, then limits on s. 2(a) and (b) rights are necessary. [Emphasis in original]

[283] In the result, then, I find the "stunting" provision of the *Traffic Safety Act* does not offend the right of freedom of expression and, relative to this issue, is constitutionally valid.

Abuse of power

[284] On April 13, 2007, the accused was ticketed for use of amplification in a park (use of a speaker while in Triangle Park). Two days later, on April 15, 2007, when another person began to move the speakers from a sidewalk into a park adjacent to Riverfront Avenue, the accused intervened and put the speaker back on the sidewalk. As the charging Bylaw Officer (Porter) stated in his *viva voce* evidence, "[T]hey really didn't wish to put the system back into the park again and be charged for that." Instead, the accused was ticketed for placing material on a street.

[285] On April 27, 2007, the accused was again ticketed for use of amplification in a park. That ticket was issued by Bylaw Officer Porter, who testified that, when he issued the ticket, the accused was saying grace. The accused testified that he did not use sound amplification at Triangle Park between April 13 and April 27 because he was trying to show good faith towards the City in advance of a meeting he was scheduled to have with City officials.

[286] On May 23, 2007, the accused was in front of City Hall, distributing food to homeless and other people. A cross, tables, banners, and boxes of food were present, but no significant

obstruction to pedestrian traffic resulted from the placement of these things. Bylaw Officer Basso testified that he observed another Bylaw Officer tell the accused that the tables and the cross and "everything" or "the other items" had to be moved, but that the accused (and his associates) "could leave the boxes of food as they were handing out food". When the accused took "no action on that", a ticket was issued to him for placing material on a street.

[287] On June 03, 2007, the accused was ticketed for "loud and unnecessary noise" from a motor vehicle, because of his use of a vehicle, parked adjacent to Triangle Park, as a stand for sound speakers. By that date, he twice had been ticketed for having the speakers in the Park and once for having the speaker on a sidewalk adjacent to a park. Whether one views the actions of the accused as being progressive efforts at compliance with the law while still using sound amplification or as consistent efforts to thwart Bylaw Officers, in either event he was not doing the same thing over and over and expecting to get a different result.

[288] On June 18, 2007, the accused was ticketed for "stunting", with the charge relating to activities that included the use of a sound speaker that was being carried on someone's shoulder. Having been ticketed over the previous two months, as set out in the charges before the Court, for using sound in a park, having placed a speaker on a sidewalk, and having used a speaker while it rested on a motor vehicle, the accused, in the Court's opinion, was, by having someone carry the speaker, attempting to find another lawful remedy in his ongoing battle with the City over his use of amplified sound.

[289] On June 18, 2007, the accused was also ticketed for placing material on a street, with the charge relating to activities that included placing boxes of food on a street, that being the very thing that Bylaw Officer Basso said the accused was given permission to do in front of City Hall some three weeks earlier.

[290] Without a doubt, the conflict between the accused and the City was escalating. More Bylaw Officers and police officers were responding to his activities. He was taking steps to avoid being charged repeatedly for the same impugned behaviour. He did not acquiesce and he testified that he chose his course of action because he believed that his rights were being unfairly infringed and because his religious mission was important enough that he would risk certain penalties.

[291] While there is no argument before the Court of "officially induced error", some of the six constituent elements of that defence, as described by Lamer J. in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, are clearly evident in this case. Specifically, this accused appears to have had a misunderstanding regarding the breadth of the law relating to sound amplification and regarding the rules relating to placing materials on a street; he appears to have considered the legal consequences of his actions; he appears to have been acting in response to advice or comment from an appropriate official; the advice presented was reasonable; the advice was erroneous (in that any material placed on a sidewalk could result in a charge being laid under s.17(1)(a) of the *Street Bylaw* and simply moving the sound amplification system out of the park did not alleviate

the problem of using sound amplification); and, the accused appears to have relied on the advice. Again, in the absence of specific evidence relating to this rarely successful defence, I do not mean to be taken as accepting the defence. Rather, I note only the similarity between the defence of officially induced error and the actions undertaken by the accused that, in my opinion – except for his actions on April 27, 2007 – constituted a good faith effort to avoid incurring further tickets.

[292] While finding that the accused acted in good faith, I am concerned by the actions of certain City officials. It is worth recalling that these matters apparently began as a result of complaints received by the City over "noise" relating to the accused's activities at Triangle Park. But, he is not before this Court on any noise violations. Instead, the charges here flowed from the City's considerable efforts to curtail the impugned behaviours. Intransigence existed on both sides of the dispute, culminating in the City's refusal even to accept an application from the accused for permission to use sound amplification in a park. Perhaps not "the clearest of cases" of abuse of power, the City's attempts, through Bylaw Officers and police officers, to limit the scope of the efforts by the accused to minister to his congregants, fall precariously close to being excessive and, to any reasonable observer, an abuse of power.

Remedies

[293] "Reading in" is available as a remedy for otherwise unconstitutional legislation only when the legislative objective is obvious (or revealed through evidence), when reading in would not create a judicial intrusion into the legislative domain, and when budgetary effects are not substantial.[40] "Severance" allows for the removal of the offending element of the legislation, again, though, only when the legislative intent is not significantly altered.

[294] With respect to the impugned language contained in s. 82 of the *Use of Highway and Rules of the Road Regulation*, the legislative objective is not entirely clear. There is a temptation to find that the provision must relate to road hazards, as the preceding sections (ss. 80 and 81) use the terms "hazardous", "hazard", and "dangerous". However, the proximate subsequent sections (ss. 83 and 84), while restricting behaviour, contain no specific language relating to road hazards. Further, the Division of the *Regulation* within which s. 82 appears is labelled, simply, "Miscellaneous", offering no guidance on objective and, in fact, suggesting that, unlike other Divisions within the *Regulation*, there is no unifying theme.

[295] If we imagine the example of a driver who choses, for whatever reason strikes him or her at that moment, to so rapidly accelerate away from a stop that the tires on his or her vehicle squeal against the pavement, making a rather loud noise, then we have an example of behaviour that could be captured by the existing s. 82 of the *Regulation*. But what would be the purpose of the provision? Is it to regulate noise, contributing to the rights of nearby residents or visitors to peaceful enjoyment of their environment, or is it to maintain road safety, by indirectly prohibiting

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[40] *Schacter, supra*.

this manner of driving? Still other potential objectives may be identified including prohibiting a specific action that, in a manner comparable to the "stunting" provision of the *Traffic Safety Act*, distracts other drivers.

[296] As the legislative objective of s. 82 of the *Use of Highway and Rules of the Road Regulation* is not obvious, and has not been revealed through evidence offered pursuant to the s. 1 argument, I decline to engage in reading in or in severance with respect to the impugned provision.

[297] Also, as the City Bylaws (i.e., *Street Bylaw* and *Parks and Pathways Bylaw*) each involve a permitting process about which there is no evidence before the Court – beyond the history of the accused's interaction with that process – given the complexity of that process and the lack of clarity regarding the intent of each of the impugned provisions, I decline to use "reading in" as a remedy to save those sections.

[298] When "reading in" or other remedies are not available to repair an unconstitutional law and the law is found to be inconsistent with the *Charter*, it is, in accordance with s. 52 of the *Constitution Act, 1982*, to the degree of the inconsistency, of no force and effect. As this is the situation for the impugned provisions of the *Use of Highway and Rules of the Road Regulation* and of the City of Calgary *Street Bylaw* and *Parks and Pathways Bylaw*, I find those provisions to be of no force or effect with respect to this accused in these circumstances. As a result, he is not guilty of any valid charge under those Bylaws.

Guilt beyond a reasonable doubt

[299] Having found s. 82 of the *Use of Highway and Rules of the Road Regulation*, s. 17(1)(a) of the *Street Bylaw* to be unconstitutional, and s. 21(e) of the *Parks and Pathways Bylaw* to be unconstitutional, the sole remaining count before the Court is that of "stunting", contrary to s. 115(2)(3) of the *Traffic Safety Act*.

[300] The elements of this offence that must be proven by the Crown, beyond a reasonable doubt, are as follows:

(1) The accused did any of the following:

(2) performed or engaged in:

(3) . . . (a) any stunt; or,

(b) any other activity

likely to distract, startle, or interfere with users of the highway.

[301] In my opinion, the actions of the accused in the events that occurred adjacent to the Mustard Seed on June 18, 2007 did not constitute a "stunt" as that term was defined in *R. v. Tremblay, supra*. The accused was engaged in distributing food to certain members of the public, while using a sound amplification system to broadcast his religious message to the assembling group. His use of a cross as a visual medium was part of that activity, emphasizing its religious connotations. None of these behaviours, taken individually or collectively, could be said to constitute a "stunt".

[302] Further, I note that Cst. Ellerby testified at length regarding the circumstances that gave rise to his decision to issue a ticket to the accused for "stunting". At no time did Cst. Ellerby suggest that what the accused had done constituted a "stunt". To the contrary, Cst. Ellerby stated that the use of a public address system "due to its loudness, was distracting drivers" and that he believed "that (the accused's) actions on the street corner there were interfering with the motor vehicles -- the drivers of the motor vehicles". His contention, therefore, was that the accused had engaged in "other activity" that distracted or interfered with users of the highway.

[303] As stated above, I rejected the officer's testimony that the actions of the accused distracted or startled any operators of motor vehicles and that the actions of the accused created a danger. Further, I find that a gathering such as that described in these circumstances is unlikely to distract, startle or interfere with users of the highway.

[304] As a result of these findings, the Crown has failed to prove an essential element of the offence and the accused is found not guilty.

Conclusions

[305] Using again the presentation of the issues employed above, I give the following responses to each of the questions:

1. Is section 17(1)(a) of the City of Calgary *Street Bylaw*, 20M88 constitutionally valid?

    (a) Is s. 17(1)(a) impermissibly overbroad or vague?

    Yes

    (b) Does s. 17(1)(a) offend section 2(a) of the *Charter*, respecting freedom of religion?

    Yes, on the facts of this case, s. 17(1)(a) infringed the accused's right of freedom of religion.

(c) Does s. 17(1)(a) offend section 2(b) of the *Charter*, respecting freedom of expression?

Yes, on the facts of this case, s. 17(1)(a) infringed the accused's right of freedom of expression.

(d) If the answer to (a), (b), or (c) is yes, then can s. 17(1)(a) be saved by section 1 of the *Charter*?

No

(e) If the answer to (d) is no, then what is the appropriate remedy?

Section 17(1)(a) of the Street Bylaw *is, pursuant to s. 52 of the* Constitution Act, 1982*, declared to be of no force or effect*.

Further, s. 17(1)(a) of the Street Bylaw*, on the facts of this case, infringed the accused's right of freedom of religion, and the accused's right of freedom of expression. To the extent of the inconsistency with these* Charter *values, as pursuant to s. 24(1) of the* Charter*, the law was of no force or effect in the case at bar.*

2. Is section 21(e) of the City Calgary *Parks and Pathways Bylaw*, 20M2003, constitutionally valid?

(a) Is s. 21(e) impermissibly overbroad or vague?

No

(b) Does s. 21(e) offend section 2(a) of the *Charter*, respecting freedom of religion?

Yes, on the facts of this case, s. 21(e) infringed the accused's right of freedom of religion.

(c) Does s. 21(e) offend section 2(b) of the *Charter*, respecting freedom of expression?

Yes, on the facts of this case, s. 21(e) infringed the accused's right of freedom of expression.

(d) If the answer to (a), (b), or (c) is yes, then can s. 21(e) be saved by section 1 of the *Charter*?

No, the permit process has no apparent criteria, so is arbitrary. As a result, the provision fails the proportionality test as being not minimally restrictive.

(e) If the answer to (d) is no, then what is the appropriate remedy?

S. 21(e) of the Parks and Pathways Bylaw *is found to have infringed the accused's right of freedom of religion, and to have infringed the accused's right of freedom of expression. To the extent of the inconsistency with these* Charter *values, and pursuant to s. 24(1) of the* Charter*, the law was of no force or effect in the case at bar.*

3. Is section 115(2)(e) of the *Traffic Safety Act*, RSA 2000, c.T-6, constitutionally valid?

(a) Is s. 115(2)(e) impermissibly overbroad or vague?

No

(b) Does s. 115(2)(e) offend section 2(a) of the *Charter*, respecting freedom of religion?

No

(c) Does s. 115(2)(e) offend section 2(b) of the *Charter*, respecting freedom of expression?

No

(d) If the answer to (a), (b), or (c) is yes, then can s. 115(2)(e) be saved by section 1 of the *Charter*?

Not applicable as the answers to (a), (b), and (c) are each No.

(e) If the answer to (d) is no, then what is the appropriate remedy?

Not applicable as the answer to (d) is not No.

4. Is section 82 of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002, constitutionally valid?

(a) Is s. 82 impermissibly overbroad or vague?

Yes

(b) Does s. 82 offend section 2(a) of the *Charter*, respecting freedom of religion?

No

(c) Does s. 82 offend section 2(b) of the *Charter*, respecting freedom of expression?

Yes, on the facts of this case, s. 82 infringed the accused's right of freedom of expression.

(d) If the answer to (a), (b), or (c) is yes, then can s. 82 be saved by section 1 of the *Charter*?

No

(e) If the answer to (d) is no, then what is the appropriate remedy?

Section 82 of the Use of Highway and Rules of the Road Regulation *is, pursuant to s. 52 of the* Constitution Act, 1982, *declared to be of no force or effect.*

Further, s. 82 of the Use of Highway and Rules of the Road Regulation *is found to have infringed the accused's right of freedom of expression. To the extent of the inconsistency with this* Charter *value, and pursuant to s. 24(1) of the* Charter*, the law is of no force or effect in the case at bar.*

5. Considering all of the evidence before the Court, has there been an abuse of process?

(a) Does the evidence support a finding of abusive conduct by City of Calgary Bylaw Officers or Police Officers?

Yes, but the conduct does not fall within the category of "the clearest of cases".

(b) If the answer to (a) is yes, then what is the appropriate remedy?

This is not "the clearest of cases", and so a stay of proceedings is not suitable. The abusive conduct could be considered it were necessary to consider the matter of penalties to be imposed on the accused (if the accused were convicted).

6. Considering all of the evidence still before the Court -- having resolved issues 1, 2, 3, 4, and 5 -- has the Crown proven the accused guilty beyond a reasonable doubt on any or all of the seven counts?

The sole remaining count is that of "stunting" and there is insufficient evidence to prove beyond a reasonable doubt that the actions of the accused were likely to distract, startle or interfere with users of the highway. As a result, the accused is found not guilty.

[306] As a result, the findings in these matters are as follows:

With respect to the charges of placing material on a street, I find the accused not guilty on each of the three counts.

With respect to the charges of operating an amplification system in a public park, I find the accused not guilty on each of the two counts.

With respect to the charge of causing loud and unnecessary noise from a motor vehicle, I find the accused not guilty.

With respect to the charge of "stunting", I find the accused not guilty.

[307] I wish to express my appreciation to counsel for their thoughtful submissions. I particularly wish to record my debt of gratitude to Dr. Patrick Baillie, Student-at-Law, who worked tirelessly in the preparation of these Reasons.

Dated at the City of Calgary, Alberta this 7th day of December, 2009.

A. A. Fradsham
A Judge of the Provincial Court of Alberta

Appearances:

Michael Bates and Rebecca Snukal
for Artur Pawlowski

Sarah Clive
for the Crown

Roy Verma
for the City of Calgary

Donald Padget
for the Attorney General for Alberta
(Intervenor)