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Leave to Appeal Granted in Street Preacher Case

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Cases Considered:
R v Pawlowski, 2011 ABCA 267

On September 27, 2011, Justice Patricia Rowbotham of the Alberta Court of Appeal granted Artur Pawlowski leave to appeal certain elements of the decision in *R v Pawlowski* , 2011 ABQB 93 (per Justice R.J. Hall). (For a description of the facts, the laws that are being constitutionally challenged by Pawlowski, and the decision appealed from see here). Pawlowski's challenges to City of Calgary bylaws restricting his street preaching activities were largely successful at the Alberta Provincial Court level (see *R v Pawlowski*, 2009 ABPC 62 and here), but he lost some ground in the City's summary conviction appeal to the Court of Queen's Bench. Pawlowski sought leave to appeal (1) the Queen's Bench decision granting an extension to the City of Calgary to serve its Notice of Appeal on Pawlowski, and (2) his conviction under section 21 of the City's *Parks and Pathways Bylaw*, 20M2003 (using an amplification system in a park), arguing that Justice Hall made several errors in his decision. It appears the City has not sought leave to cross-appeal Justice Hall's holding that section 17(1)(a) of its *Street Bylaw* (placing material on a street) violated Pawlowski's section 7 *Charter* rights because it was vague and overbroad. This post will review Justice Rowbotham's decision to grant leave, and consider the issues for appeal in light of the Supreme Court of Canada's recent judgment in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, released on September 30, 2011.

The Leave to Appeal Decision

Justice Rowbotham noted that leave to appeal summary conviction appeal matters to the Court of Appeal can only be granted on questions of law, and that four factors should be considered in deciding whether to grant leave: "(1) Whether the issue involves well settled principles of law; (2) Whether there are injustices that flow from clear errors of law; (3) Whether the issues have arguable merit; and (4) The significance of the proposed question of law to the administration of justice beyond the specific case at bar" (at para 11, citing *R v Chaluk*, 1998 ABCA 253 at para 7 and *R v Appleby*, 2011 ABCA 118 at para 3).

Applying these criteria to the case at hand, Justice Rowbotham quickly dismissed Pawlowski's procedural ground of appeal. The Court of Queen's Bench had granted the City an *ex post facto* one day extension for serving its appeal notice on Pawlowski after it had made efforts to do so within the required time period, but discovered Pawlowski was away. Justice Rowbotham noted that decisions on extension of time involve an element of discretion and are therefore more

difficult to appeal. Here, the one day extension did not implicate the broader administration of justice, and thus did not warrant leave to appeal (at para 15).

She did, however, find that leave to appeal was merited on two of Pawlowski's substantive arguments regarding section 21 of the *Parks and Pathways Bylaw*. At the Court of Queen's Bench, Justice Hall accepted Pawlowski's argument that the City's ban on amplification in parks violated his freedom of expression contrary to section 2(b) of the *Charter* (in fact this was conceded by the City), but found that this violation could be saved under section 1 of the *Charter* as a reasonable limit on his rights. Justice Hall also rejected Pawlowski's argument that section 21 violated his freedom of religion under section 2(a) of the *Charter*, finding this to be a trivial and insubstantial breach not meeting the threshold for a *Charter* violation. In his leave to appeal application, Pawlowski argued that Justice Hall's decision (1) failed to consider the Provincial Court judge's finding that the enforcement of section 21 against Pawlowski was arbitrary; (2) erred in reviewing the section 24(1) *Charter* remedy; (3) erroneously relied upon orders issued in a civil proceeding against Pawlowski as evidence; and (4) erroneously convicted Pawlowski without proof beyond a reasonable doubt on the elements of the offence (at para 13).

Justice Rowbotham found the first argument to meet the criteria for leave to appeal. She noted that Pawlowski had not appealed any rulings under section 7 of the *Charter*, so his arguments concerning arbitrariness were relevant under section 1 of the *Charter*. Pawlowski's contention was that the City's denial of permits for his use of amplification in Triangle Park was arbitrary. At trial, the City had presented evidence regarding its permit process, and Judge Allan Fradsham found that the process and its application to Pawlowski, which essentially amounted to a blanket denial of permits, were arbitrary, and therefore not a reasonable limit on his freedom of religion and expression. Justice Hall did not reference this finding of arbitrariness, and directed his section 1 analysis to the substance of section 21 of the *Parks and Pathways Bylaw* rather than its application to Pawlowski. Noting that "[b]oth a law's substance and effects must be considered in a *Charter* analysis," and finding that there was "arguable merit" to this ground and that it had "significance beyond this appeal," Justice Rowbotham granted Pawlowski leave to appeal on this issue (at paras 19 - 20).

As for the other grounds of appeal, the only one that was found to have some merit (and only "little arguable merit" at that) was (4), that Justice Hall erred in convicting Pawlowski without hearing submissions from counsel as to whether the elements of the section 21 offence were made out beyond a reasonable doubt (at para 24). After finding that the breach of Pawlowski's freedom of expression was justified under section 1 of the *Charter*, Justice Hall proceeded to convict him based on the agreed statement of facts, which acknowledged that Pawlowski had used amplification in a park without a permit on several occasions. In his leave to appeal application, Pawlowski argued that Justice Hall failed to consider whether his use of amplification "interfered with the public's peaceful enjoyment of the park" (at para 23). Justice Rowbotham noted that this was not actually an element of the section 21 bylaw offence, which "only requires the City to demonstrate that a person operated an amplification system without a permit while in a park" (at para 24). However, because she had granted leave to appeal on the *Charter* issue, she decided to grant leave to appeal on this ground as well so that the parties could make submissions on conviction / acquittal based upon the record (at para 25).

Commentary

In my post on the Q.B. decision in *Pawlowski* I also noted that Justice Hall had not engaged with Judge Fradsham's finding of arbitrariness in the application of the law. In the case of *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141, the Supreme Court upheld a similar noise bylaw (banning sound projected outside) in part because permits were available for exemptions from the bylaw. The noise ban was thus seen as partial rather than absolute, a factor supporting a finding of minimal impairment of freedom of expression. Justice Hall's failure to discuss the City's blanket denial of permits to Pawlowski, and the fact that the ban on amplification was effectively absolute for him, therefore seems to be a proper basis for hearing Pawlowski's appeal in relation to section 1 of the *Charter*.

The Court of Appeal hearing in *Pawlowski* will provide an important opportunity to consider whether, even though a law may on its face meet the requirements of the *Charter*, a state actor is nevertheless in violation of its *Charter* obligations in its application of the law. This issue has been brought into even sharper relief since the Supreme Court released its ruling in *Canada (Attorney General) v PHS Community Services Society*. In that case, the Supreme Court considered the constitutionality of section 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (*CDSA*), which prohibits the possession of narcotics. Section 56 of the *CDSA* allows the federal Minister of Health to grant exemptions from section 4(1) for medical or scientific purposes or for any purpose deemed to be in the public interest. For a time, such an exemption was granted to Insite, a supervised safe injection site in Vancouver for intravenous drug users. The exemption expired in 2008, shortly after the proponents of Insite launched constitutional litigation, and the Harper government has refused to renew the exemption.

In a judgment authored by Chief Justice Beverley McLachlin, a unanimous Supreme Court held that section 4(1) did not violate the section 7 *Charter* rights of health professionals working at Insite or their clients. The Court found that the section 7 liberty interests of both groups were engaged by section 4(1) of the *CDSA*, as they faced possible imprisonment for possessing narcotics contrary to the *CDSA* (at paras. 89-90). It also found that section 4(1) engaged the life and security of the person interests of Insite clients, as the evidence showed that being able to use Insite facilities protected their lives and health (at paras 91-92). However, the Court ruled that the availability of an exemption under section 56 of the *CDSA* to allow possession of narcotics at safe injection sites was consistent with the principles of fundamental justice. According to the Court, the exemption "acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects" (at para 113). While the law itself did not violate the claimants' section 7 *Charter* rights, the application of the law was another matter. The Court noted that the Minister's discretion to grant exemptions was not absolute, and had to be exercised in conformity with the *Charter* (at para 117). The federal government argued that it had not actually made a decision on whether to extend Insite's exemption, but the Court rejected this argument, finding that the Minister had effectively refused it (at paras 119-125). The Court then turned to the grounds for the refusal, and noted that it was not acceptable for the Minister to "simply deny an application for a section 56 exemption on the basis of policy *simpliciter";* rather the Minister's decision had to accord with the principles of fundamental justice given that section 7 rights were at issue (at para 128). Laws that are arbitrary are recognized as being contrary to the principles of fundamental justice, and although there is some debate in the case law about the appropriate test for arbitrariness, the Court found that the Minister's refusal to grant Insite an exemption was arbitrary on any definition of that term. The refusal did not promote the *CDSA*'s objectives of public health and safety, and in fact undermined them (at para 131). The Court also found the effects of the refusal and the

corresponding denial of services to Insite clients to be "grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics" (at para 133). These findings of arbitrariness and gross disproportionality meant that the Minister's application of the law was contrary to the principles of fundamental justice under section 7 of the *Charter*, and could not be justified under section 1. As is appropriate where the *Charter* violation is based on the actions of a state actor rather than the law itself, a section 24(1) *Charter* remedy was appropriate, and the Minister was ordered "to grant an exemption to Insite under section 56 of the *CDSA* forthwith" (at para 150).

The ruling in *PHS Community Services Society* can be contrasted with another, decidedly more timid ruling of the Supreme Court in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120. *Little Sisters* involved the application of customs legislation to a Vancouver bookstore specializing in gay and lesbian materials. In that case, the Supreme Court found *Charter* violations flowing from the state's targeted and discriminatory application of customs legislation to the bookstore. However, at the stage of remedy a majority of the Supreme Court declined to grant an injunction restraining future *Charter* violations by Canada Customs, and simply issued a declaration under section 24(1) of the *Charter* that the actions of customs officials had violated the claimant's rights. Interestingly, *Little Sisters* was not referred to in *PHS Community Services Society*, but the Court did explicitly reject as "inadequate" the idea of returning the matter to the Minister to make a decision that would respect the claimants' *Charter* rights (at para 147). According to the Court:

> The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. … A bare declaration is not an acceptable remedy in this case (at para 148).

Returning to *Pawlowski*, the issue for the Court of Appeal will be whether the City's application of the permit process under section 21 of the *Parks and Pathways Bylaw* was arbitrary and therefore not justified under section 1 of the *Charter*. Did the City apply a blanket denial of permits to Pawlowski without attention to the purposes behind the sound amplification bylaw, or was its refusal based on criteria that were connected to those purposes? Is it relevant to the question of arbitrariness that the particular park in which Pawlowski was using amplified sound, Triangle Park, was found at trial to be "no longer a forum available for the use of the general public" due to its occupation by drug users and homeless people (see 2009 ABPC 362 at para 253)? Was the City's refusal disproportionate in that it went further than required in relation to the number of complaints it had received about Pawlowski's amplified preaching? What of the argument that Pawlowski is essentially seeking a permanent exemption to the bylaw, rather than an exception for an isolated event? (A similar argument was raised by the federal government in *PHS Community Services Society* that exempting Insite from the *CDSA* "would effectively turn the rule of law on its head by dictating that where a particular individual breaks the law with such frequency and persistence that he or she becomes unable to comply with it, it is unconstitutional to apply the law to that person", but the Supreme Court rejected this argument at paras 139-140). Finally, if the City's refusal of a permit was arbitrary and therefore not justified, should it be ordered to grant a permit to Pawlowski or will a declaration suffice to remedy the *Charter* violation? These are some of the questions that the Court of Appeal may have to grapple with in the *Pawlowski* appeal.