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Making Noise: Loudspeaker Preaching to Homeless Leads to Contempt and Injunction

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Cases Considered:

Pawlowski v. Calgary (City), 2008 ABQB 267

The Street Church Ministries ("SCM") and its leader, Artur Pawlowski, have been active and controversial participants in Calgary's response to homelessness for the last few years. The SCM holds religious services in downtown Calgary parks and gives away free meals to the homeless there. Pawlowski uses amplified sound during his sermons "to reach out to drug dealers, prostitutes and others who have fallen through the gaps" of Calgary society, and believes it is God's command that he feed and provide hope for the poor (Graeme Morton and Richard Cuthbertson, "Ban on preacher's loudspeaker upheld", *Calgary Herald*, May 1, 2008, p. B7). However, use of amplified sound without a permit is banned by Calgary's *Parks and Pathways Bylaw*, Bylaw No. 20M2003. While originally the City permitted the SCM to use amplified sound, after receiving noise complaints from nearby residents (including those at the Calgary Drop-In Centre) it would only permit use of the parks without amplification, although it offered to find an alternative site where such sound could be used. Pawlowski refused the offer and continued his loudspeaker preaching, leading to bylaw tickets, injunction applications, and eventually, in this most recent case, a civil contempt order.

The SCM was first before the Alberta courts in March 2007, seeking an injunction against the City to allow it to continue to use amplified sound in the parks (*Pawlowski v. Calgary (City of)*, 2007 ABQB 226). Madam Justice Bonnie Rawlins of the Alberta Court of Queen's Bench denied the injunction, applying the three part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. First, she found that there was a serious issue to be tried. While the City conceded this point, Rawlins J. expressed some doubt about the strength of Pawlowski's argument that his *Charter* rights to freedom of religion, freedom of expression and freedom of peaceful assembly were violated by the City's refusal to permit amplified sound, noting that Pawlowski was still free to hold and express his beliefs and share them with others. Regardless of these concerns, she found that the first criterion required a low threshold, and had been satisfied. The City also conceded that the second criterion for an injunction had been met: Pawlowski would suffer irreparable harm if the injunction were refused. Again, Justice Rawlins expressed her doubts about this concession, noting that the City's position essentially collapsed the first and second criteria. On the third criterion, Justice Rawlins stated that the balance of

convenience must weigh individual rights against the public interest. Here, she found that given the noise complaints, "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" (at para. 43).

A second application by the SCM for an injunction against the City, this time to prevent it from enforcing its bylaws against members of the SCM, was also denied in April 2007.

On May 1, 2007, Justice Rawlins ordered that Pawlowski and the SCM would require leave of the Court to bring forward any further interlocutory applications; she fixed costs of the earlier injunction application at approximately $7000 (to be paid in the cause); and she ordered that if the SCM used amplified sound again pending trial, those costs would be payable forthwith and she would entertain a contempt application by the City.

After this order, the SCM continued to provide its services using amplified sound, although rather than using loudspeakers in the park as it did previously, it mounted the speakers on a vehicle outside the park. This resulted in 108 noise complaints to the City between April 2007 and February 2008. On another occasion, the SCM held a festival in a downtown park on July 29, 2007, and used loudspeakers right in the park. These violations led the City to seek an order for civil contempt against Pawlowski and the SCM and an injunction to prevent further violations of the bylaw.

On April 29, 2008, Justice Rawlins allowed both the contempt and injunction applications.

Section 703 of the *Alberta Rules of Court*, Alta. Reg. 390/1968 provides that "Every person is in civil contempt who … fails, without adequate excuse, to obey any order of the court, other than an order for the payment of money…." The City contended that the Court's May 1, 2007 order had been breached by Pawlowski and the SCM. The SCM countered by challenging Justice Rawlins' authority to grant the order because it was issued on an application by the SCM for an injunction, and noted that all the order did was require payment of costs in the event of a breach. Justice Rawlins rejected the SCM's arguments, and noted that if her authority to issue the May 1 order was in question, the proper remedy was an appeal, "not … linguistic gymnastics" (at para. 17). Further, she found that any belief on the part of Pawlowski and other members of the SCM that the May 1 order did not prohibit their activities was "at best a mistake of law" and not a defence to contempt (at para. 18). The order was held to have been breached by the July 29, 2007 festival, as well as the incidents when the SCM amplified the sermons using a sound system just outside the parks. Citing an earlier Alberta Court of Appeal decision, Justice Rawlins held that contempt "goes beyond a violation of the specific terms of an Order", and includes actions "designed to obstruct the course of justice by thwarting or attempting to thwart a court order" (at para. 19, citing *Litterst v. Horrey* (1995), 178 A.R. 216). Both Pawlowski and the SCM were found in contempt on this basis.

Turning to the question of penalty, Justice Rawlins reviewed the terms of Rule 704, which provide primarily for imprisonment, fines, and sanctions related to the underlying court action (such as stays of proceedings). However, after citing a number of authorities in the area, she

found that she was permitted to impose other sanctions pursuant to the inherent powers of a superior court to achieve the underlying objectives of contempt sanctions: to uphold the dignity and process of the courts and the rule of law, and to enforce the court order and punish the contemnor. With these principles in mind, Justice Rawlins held that the only way to enforce the Court's orders was to "impose a strict ban that does not allow for interpretations in respect of the location or level of sound" (at para. 27). She thus ordered Pawlowski to refrain from using or permitting anyone else to use amplified sound anywhere in the City, and from being present at SCM events where such sound was being used. She also authorized the City to seize any amplification equipment being used by Pawlowski or other SCM members, including vehicles. The contempt order was issued for a period of one month.

Justice Rawlins went on to consider the City's application under s. 554 of the *Municipal Government Act*, R.S.A. 2000, c. M-26, to the following test for an injunction applies: "the history of the matter must clearly demonstrate … an open and continuous disregard of an imperative public statute and its usual sanctions which is unlikely to be thwarted without the intervention of the court" (*Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 34 A.R. 348 at para. 13).

Counsel for the SCM argued that because the City's prosecutions for bylaw infractions against the SCM had not yet been resolved, to allow the injunction would be akin to a "backdoor conviction." Justice Rawlins rejected this argument, noting that the criminal proceeding was separate and had no bearing on the civil proceeding. She also chastised counsel for mounting a seemingly inconsistent argument that the City must choose either the criminal or civil route against the SCM. Ultimately she granted the City its injunction, calling the actions of Pawlowski "unrepentant" and "obstreperous" (at paras. 32 and 52). While the SCM suggested that an appropriate remedy would be a limit on the level of amplified sound, Justice Rawlins imposed a total ban virtually identical to the order she made in relation to the contempt application. Unlike the contempt sanction, however, the injunction will continue until the trial or until further order of the Court.

Although *Charter* issues are the subject of the ultimate trial, there is some hint in this interlocutory proceeding of how those issues might be resolved, as noted above. While Justice Rawlins agreed that a "balancing of rights" was required in the case, she distinguished the SCM's activities from other noisy events like the Calgary Stampede and Jazz Festival on the basis that the SCM "creates a persistent disturbance three times per week on an ongoing basis" (at para. 51). Clearly, the public interest was seen to win out over individual rights here, perhaps foreshadowing the outcome of the trial itself.

The other matter of note is the breadth of the orders – they constitute a total ban on amplified sound across the City by all SCM members. This goes beyond the terms of the City's bylaws, which prohibit amplified sound in parks only (although there are limits on sound levels in other locations). Justice Rawlins herself recognized that the orders could be seen as "overly broad" (at

para. 29), and stated that she would consider relaxing the injunction order if the City and the SCM could reach agreement on a venue where amplified sound could be used. Her frustration with Pawlowski, the SCM, their counsel, and the use of the court's resources was clearly apparent in her reasons, and she closed by making a plea to Pawlowski to continue his good works in a way that is more conciliatory so that "the needs of the homeless may be returned to the forefront, where they belong" (at para. 55). Pawlowski termed the ruling a "total injustice", and we are likely to hear more from the SCM before the trial is finally held.

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