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Charter Freedoms and Government Duties around Street Preaching: An (Overly?) Expansive View

By Jennifer Koshan

Cases Considered:

R. v. Pawlowski, 2009 ABPC 362

Earlier this month, Judge Allan Fradsham of the Alberta Provincial Court handed down a lengthy and far reaching judgment dealing with religious freedom, freedom of expression, and government duties to write laws that are not vague or overbroad. Numerous charges against Artur Pawlowski for actions associated with ministering in public spaces were dismissed by Judge Fradsham. I have been a fervent critic of the courts' extreme deference to government in several *Charter* cases, but the level of government accountability and limits on government action established in this case may go too far the other way.

Introduction

Pawlowski was charged with five violations of City of Calgary bylaws and two violations of provincial legislation, all alleged to have taken place between April 13 and June 18, 2007. Pawlowski heads up the Street Church Ministries (SCM), a Christian organization incorporated in Alberta. Pawlowski's *modus operandi* is to hold religious services and give away meals to the homeless, drug dealers, prostitutes and other disenfranchised members of society in downtown Calgary parks. This was not Pawlowski's first time before the courts. In March 2007, SCM sought and was denied an injunction against the City to allow it to continue using amplified sound in the parks (*Pawlowski v. Calgary (City of)*, 2007 ABQB 226). Various other court appearances culminated in the City making application for an injunction and civil contempt against Pawlowski, who had continued using amplified sound in spite of having no permit. The City's applications were granted by Madam Justice Bonnie Rawlins in April 2008 (*Pawlowski v. Calgary (City)*, 2008 ABQB 267), and led me to predict that the eventual trial and *Charter* arguments would be won by the City. I was wrong.

Judge Fradsham's decision deals with the trial of the bylaw and provincial infractions and Pawlowski's arguments that the charges and actions of the governments violated his *Charter* rights. Numerous witnesses were called, including a number of bylaw and police officers, Pawlowski himself, and two persons who provided testimonials in support of the SCM. The first

thirty pages of the judgment recounts the evidence of the incidents underlying the charges and Judge Fradsham's findings of fact. I will refer to the facts as necessary below.

Issues

Pawlowski was charged under four different provisions. In relation to each of those provisions, he argued that:

- The law was unconstitutionally vague or overbroad,
- The law violated his freedom of religion, contrary to section 2(a) of the *Charter*,
- The law violated his freedom of expression, contrary to section 2(b) of the *Charter*,
- The law could not be justified as a reasonable limit under section 1 of the *Charter*.

Pawlowski also argued that the actions of the bylaw officers and police officers involved in his case amounted to abuse of process.

The Law

The provisions under which Pawlowski was charged are as follows:

> *Use of Highway and Rules of the Road Regulation,* AR 304/2002
>
> 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.

****

> *Traffic Safety Act*, R.S.A. 2000, c. T-6
>
> 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, City of Calgary Bylaw No. 20M2003

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.

****

Street Bylaw, City of Calgary Bylaw No. 20M88

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) 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; …

After setting out these provisions as well as the relevant sections of the *Charter*, Judge Fradsham describes the relevant constitutional case law for over 25 pages. This part of the judgment is not very reader friendly. It consists largely of long passages quoted from Supreme Court of Canada cases with little analysis. The law is not applied to the facts until later in the judgment, causing the reader to have to flip back and forth quite a bit. The decision would have been much clearer analytically if the relevant law under each section of the *Charter* had been set out, then analyzed with reference to the provisions at issue and the facts of the case.

After describing the relevant *Charter* decisions, Judge Fradsham turns to an interpretation of some (and only some) of the relevant statutory provisions. This part of the judgment also seems oddly placed, and would have been more helpful in the section dealing with arguments of vagueness and overbreadth where all of the provisions are looked at in detail.

Analysis

At page 73 of the judgment, Judge Fradsham finally turns to the application of the law to the facts.

Vagueness and Overbreadth

Earlier in the judgment, Judge Fradsham noted that vagueness and overbreadth arguments can arise under section 1 of the *Charter* as a threshold issue (i.e. where the law is so vague that the government limit on *Charter* rights is not “prescribed by law”) or in terms of whether the law is

a reasonable limit on *Charter* rights or freedoms (at paras. 152-3). However, he failed to note another way in which vagueness arguments can arise, and that is as a violation of the principles of fundamental justice under section 7 of the *Charter*. This third approach seems to be the one that Judge Fradsham takes when he gets to the application of the law to the facts, as he finds that two of the four provisions are vague, in violation of the principles of fundamental justice under section 7.

There is a major problem with this finding, however. The principles of fundamental justice are not a freestanding right under section 7 of the *Charter*. That section provides:

> 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.

In order to find a violation of section 7, a court must find both a violation of the right to life, liberty or security of the person and a violation of the principles of fundamental justice (*Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429). Judge Fradsham does not address whether there is a violation of the first part of section 7 at all, thus stretching that section beyond its accepted meaning.

Even if we assume that a violation of liberty could have been found in this case, Judge Fradsham's conclusions that particular laws are vague and thus contrary to the principles of fundamental justice also stretch the limits of section 7. A law will be found unconstitutionally vague when it does not provide an "intelligible standard" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 983, as cited in *Pawlowski* at para. 154) or where it "so lacks in precision as not to give sufficient guidance for legal debate" (*R. v. Nova Scotia Pharmaceutical*, [1992] 2 S.C.R. 606 at p. 643, as cited in *Pawlowski* at para. 155). The purpose of this doctrine is to ensure that individuals know what consequences their actions will provoke, and that the discretion of law enforcement officials is constrained by clear legal standards (*Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code (Manitoba)*, [1990] 1 S.C.R. 1123 at p. 1152, as cited in *Pawlowski* at para. 149). Vagueness may also overlap with overbreadth when laws that are not sufficiently precise capture more conduct than necessary to fulfill the purpose of the law (*R. v. Heywood*, [1994] 3 S.C.R. 761 at 792-3, as cited in *Pawlowski* at para. 147). As Judge Fradsham notes (at para. 158), decisions finding laws to be void for vagueness are fairly uncommon. So on what basis does he find that two of the laws at issue in *Pawlowski* meet the test?

First, section 17(1)(a) of the *Street Bylaw* is found to be unconstitutionally vague. Recall that this section provides that "no person shall … 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." "Material" is defined as follows:

> "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 (*Street Bylaw* section 2(16)).

Judge Fradsham refers to but dismisses the *ejusdem generis* principle of statutory construction, which provides that where "a list of specific words [is] followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it" (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029). He finds that while "one might be tempted to conclude that "material" refers only to waste-related objects or articles, … clearly, the definition refers to "any object or article"" (at para. 221). Further,

> 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 (at para. 221).

In my view, Judge Fradsham was too quick to dismiss the *ejusdem generis* principle. "Object or article", a general term, should have been interpreted with reference to the more specific terms "animal waste, ashes, building waste, dry refuse, garbage, industrial chemical waste, refuse and yard waste." What the more specific "materials" have in common is that they are things that do not belong on the street and are potentially harmful. An interpretation that narrowed "object or article" in this fashion would have given the law an intelligible standard, and also would have fulfilled the presumption that laws are enacted in compliance with the Constitution. It is a common technique to read down a law so that it does not violate the *Charter* (see e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697), and it is unclear why Judge Fradsham does not take that opportunity here.

Further, if the section had been interpreted as I have suggested, Pawlowski might still have been acquitted of this charge. His actions involved placing speakers, tables and boxes of food, and a cross on the sidewalk, and Judge Fradsham finds as a fact that these items did not impede pedestrians or otherwise cause harm (at paras. 38, 50, 92). Judge Fradsham's holding that section 17(1)(a) of the *Street Bylaw* was vague, overbroad and in violation of section 7 of the *Charter*, and that it could not be justified under section 1 (at para. 223) thus seems unnecessary, as the accused could have been acquitted of the alleged infractions under this section based upon classic principles of statutory interpretation.

Judge Fradsham next looks at section 21 of the *Parks and Pathways Bylaw*, which prohibits the operation of an "amplification system" in a park. Although the term is not defined, Judge Fradsham holds that it provides individuals with sufficient notice of what conduct is prohibited, particularly in light of the evidence that Pawlowski had previously obtained a permit in order to use his sound system in City parks. This law is therefore not seen as vague or overbroad (at para. 226).

The third provision is not so lucky. Section 82 of the *Use of Highway and Rules of the Road Regulation* prohibits "the emission of any loud and unnecessary noise" from a motor vehicle.

"Loud and unnecessary noise" is not defined in the *Regulation*. Judge Fradsham considers the judicial interpretation of a similar bylaw from Red Deer in *R. v. Gabrielson*, [1986] A.J. No. 645, 76 A.R. 81 (Q.B.), where "loud" and "unnecessary" were not seen as vague because the bylaw explicitly applied only to noise that "annoys, disturbs, injures, endangers or detracts from the comfort, repose, health, peace or safety of other persons within the limits of this City" (at para. 213). Judge Fradsham notes that "all noise has some degree of loudness", yet "loud" can be narrowed by looking at a dictionary definition: "strongly audible, esp. noisily or oppressively so" (at para. 227, citing the *Canadian Oxford Dictionary*). However, he finds that "unnecessary" can not be defined as easily – it could mean "unnecessary for the operation of the motor vehicle", or could be broader than that (at para. 228). Judge Fradsham concludes that the term is "at best, vague, offering no intelligible standard, and at worst, overbroad" (at para. 228). Since the section is seen as overbroad, it fails the minimal impairment test under section 1 of the *Charter* as well (at para. 230).

Judge Fradsham also refers to the fact that Pawlowski was using a non-operating motor vehicle as a stand for a sound speaker. This is seen as beyond the sort of conduct that the legislature could have intended to include in a provision dealing with "Operation of Vehicles" (the heading preceding section 82 of the *Regulation*). While this may be so, this is an argument for finding that the accused did not breach the section, rather than finding the section unconstitutionally vague and overbroad. Once again, classic principles of statutory interpretation would have sufficed here.

The last provision Judge Fradsham considers is section 115(2)(e) of the *Traffic Safety Act*, the "stunting" provision. Judge Fradsham interprets this section with lengthy reference to two Alberta cases, *R. v. Jones*, [1983] A.J. No. 763, 149 D.L.R. (3d) 727 (C.A.) and *R. v. Tremblay* (1974), 23 C.C.C. (2d) 179, 58 D.L.R. (3d) 69, [1975] 3 W.W.R. 589 (A.S.C.(A.D.)). Based on these precedents, Judge Fradsham holds that the provision should be 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 (at para. 212).

Interpreted this way, the stunting law is seen to provide a sufficient legal standard, as it requires "that other users of the road are distracted, startled, surprised, confused, or shocked" (at para. 231).

The judges in *Jones* and *Tremblay* thus did exactly what judges are supposed to do, and that is interpret the law to give guidance to members of the public and law enforcement officials. With respect, Judge Fradsham fails to do so when he finds section 17(1)(a) of the *Street Bylaw* and Section 82 of the *Use of Highway and Rules of the Road Regulation* vague and overbroad. These are not sections incapable of reasonable interpretation or reading down, and to find them unconstitutionally vague is unnecessary.

This is particularly so in light of the jurisdiction of a Provincial Court judge under the *Charter*. As Judge Fradsham acknowledges, "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" (at para. 196). Rather, "[a]s a statutory court, the Provincial Court is limited to interpreting or applying the law necessary to deal with the issues before it" (at para. 196, quoting from *Alberta v. K.B.*, [2000] A.J. No. 1570 (QL)).

Freedom of Religion

For the test for a violation of section 2(a) of the *Charter*, Judge Fradsham relies on the recent Supreme Court decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 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.

Judge Fradsham also points out the subjective nature of this test, quoting from *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at 579-80:

> … 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 … *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.

Thus while it is appropriate for a court to inquire into the sincerity of the claimant's beliefs, it should not assess those beliefs according to whether they are objectively viewed as part of a particular religion's official dogma (*Amselem* at 583, as cited in *Pawlowski* at para. 169).

Applying the law to the facts of the case, Judge Fradsham finds that the behaviours for which Pawlowski was charged were motivated by sincerely held religious beliefs: "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" (at para. 233). More specifically, the use of amplified sound is found to have a nexus with religion, as this practice was undertaken to attract followers to Pawlowski's sermons. So too are Pawlowski's efforts to bring food to the homeless seen as flowing from his religious beliefs.

The City bylaws prohibiting amplified sound and the placement of materials on city sidewalks are seen to have a more than trivial or insubstantial effect on Pawlowski's religious practices (at paras. 238-9). Judge Fradsham points to the requirement to obtain a permit to use amplified sound and the act of ticketing Pawlowski while saying grace as support for this conclusion (at

para. 239). No support is given for the conclusion that the bylaw prohibiting Pawlowski from placing boxes of food on the sidewalk amounted to a significant rather than trivial breach of his freedom of religion.

This part of the judgment is very broad in its application of the test for freedom of religion. *Amselem* certainly opened the door for Judge Fradsham's findings with respect to Pawlowski's subjectively held beliefs. However, it is significant that in all of the Supreme Court's freedom of religion cases, there has never been any question that the claimant's religious beliefs or practices were both subjectively held and objectively part of an established religion. In *Hutterian Brethren*, for example, a violation of freedom of religion was assumed on the basis that a photo requirement for driver's licences offended the Hutterian Brethren of Wilson Colony's interpretation of the Second Commandment. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, the wearing of a kirpan by a Sikh student was also clearly within the scope of freedom of religion, as was the erection of a succah by Jewish condominium residents in *Amselem*. The Supreme Court has not yet had to grapple with a case where the religious practices in question were based on the claimant's unique subjective interpretation of a religious text. *Pawlowski* shows how far the *Amselem* decision might extend by including the use of amplified sound and the placement of food on sidewalks within the protected scope of religious freedom.

Judge Fradsham's judgment is also expansive in its finding that the violations of Pawlowski's freedom of religion imposed by the City's bylaws are not trivial or insubstantial. This is especially so with respect to his finding that the requirement of a permit to use amplified sound is a significant violation. In *R. v. Jones*, [1986] 2 S.C.R. 284, the Supreme Court held that a provincial requirement that religious-based home schools be certified as providing "efficient instruction" was a trivial breach of freedom of religion that did not offend section 2(a) of the *Charter* (as opposed to a case where, for example, a child was forced to attend a school that did not provide religious instruction). Judge Fradsham does not distinguish or even refer to *Jones* in his reasons even though the facts are quite similar. He does, however, find that the provincial laws at issue – relating to emission of noise from a vehicle and stunting – amount to only indirect and thus trivial or insubstantial breaches of freedom of religion (at paras. 241-243).

Given the finding of section 2(a) violations, both the bylaw prohibiting the placement of material on the street (*Street Bylaw* section 17) and the bylaw prohibiting the use of amplified sound (*Parks and Pathways Bylaw* section 21) required justification under section 1 of the *Charter*. Judge Fradsham finds that neither bylaw can meet the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. *Street Bylaw* section 17 is seen to have a pressing and substantial objective – the prevention of litter and other items that interfere with the usage or aesthetics of city streets (at para. 244). However, consistent with his earlier finding that this bylaw was vague and overbroad, Judge Fradsham holds that it fails the minimal impairment stage of the *Oakes* test. Again eschewing the opportunity to read down the law, Judge Fradsham notes that a group of Christmas carollers with instruments placed on the street would be captured by the bylaw (at para. 245). It thus cannot be justified by the City as a reasonable limit on Pawlowski's freedom of religion.

Turning to the amplified sound bylaw, Judge Fradsham finds that it has a pressing and substantial objective, namely the control of noise to ensure that members of the public can use and enjoy city parks (at para. 249). Although he finds the bylaw to be rationally connected to the objective, this conclusion is "tenuous", as the bylaw prohibits the use of an "amplification system" rather than particular means of amplifying or broadcasting sound (perhaps unintentionally including, for example, personal audio devices (at para. 250)). Most significantly, while there is a permit system in place – in other words, there is no absolute ban on amplified sound – Judge Fradsham finds that it was arbitrarily applied to Pawlowski, with no clear standards for permits being apparent. He once again envisions scenarios where the bylaw may be infringed, including a church picnic where someone plays music on a radio (at para. 252). In spite of his earlier finding that the amplified sound bylaw is not overbroad, that seems to be the upshot of Judge Fradsham's conclusion regarding minimal impairment. For failing this branch of the *Oakes* test, section 21 of the *Parks and Pathways Bylaw* is also an unreasonable limit on Pawlowski's freedom of religion.

Freedom of expression

Judge Fradsham sets out the governing law on freedom of expression at paras.175 to 186 of his judgment. In order to make out a violation of freedom of expression, a claimant must show (1) that his or her activity conveys meaning and is otherwise within the protected scope of section 2(b), and (2) that the purpose or effect of the government's action is to restrict expression (at para. 176, citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 967).

In terms of the protected scope of section 2(b), Judge Fradsham notes that expression taking place on public property is subject to special considerations, including whether the form of expression is consistent with the function of the place where the expression occurs. He cites Lamer C.J.'s opinion from *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, in support of this proposition, but fails to note that Lamer's opinion was only one of three approaches to expression on public property taken in that case (where there was no clear majority). Judge Fradsham does not refer to the more recent case of *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141 in his exposition of the law on freedom of expression. In the *Montreal (City)* case, the Supreme Court consolidated its approach to expression on public property, establishing the following test:

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment (at para. 74).

The function of the place, both actual and historical, is a factor to be considered in the application of this test, but it is not the test in and of itself. Rather, the Supreme Court adopts an approach closer to that of McLachlin, J. (as she then was) in *Committee for the Commonwealth of Canada* in its reliance on the values or purposes underlying freedom of expression.

The *Montreal (City)* case is also curiously absent from the application of the law to the facts of the *Pawlowski* case, in spite of the similarity between the two cases. In *Montreal (City)*, at issue was a city bylaw prohibiting "noise produced by sound equipment" that could be heard outside. A nightclub using amplified sound to advertise its performances on the streets outside was charged under this bylaw and challenged its constitutionality. A majority of the Supreme Court held that the expression in question was within the protected sphere of section 2(b) of the *Charter*, as it conveyed meaning and did not "subvert the values" underlying freedom of expression (at para. 81). While the bylaw was found to violate freedom of expression, however, it was seen as justified under section 1 of the *Charter*, as it fulfilled an important objective (preventing noise pollution) in a way that was proportional to the restriction on expression. Key to the Court's finding of proportionality was the fact that the bylaw did not establish an absolute ban, providing for a system of exemptions from the bylaw (at para. 90). Unlike Judge Fradsham in *Pawlowski*, however, the Court found that there was no evidence of the arbitrary operation of the authority to grant exemptions. Further, the Court held that "a contextual reading of the impugned provision leads to the conclusion that [it] only captures noise that interferes with the peaceful use and enjoyment of the urban environment" (at para. 90). Thus it may be that Judge Fradsham could have distinguished the *Montreal (City)* case had he referred to it in his section 2(b) reasons for judgment.

Judge Fradsham deals with the four charges related to Pawlowski's activities – the placement of materials on the street, the use of amplified sound, loud and unnecessary noise from a motor vehicle, and stunting – separately under section 2(b) of the *Charter*.

The placement of materials on the sidewalk (a speaker, cross and banners) is found to convey meaning, namely that of religious activity (at para. 257). Further, because it did not impede pedestrian traffic, this activity is found to be within the protected scope of freedom of expression as it did not interfere with the primary function of this public place (at para. 262). If Judge Fradsham had applied the *Montreal (City)* test, this finding might have gone the other way, as it is difficult to see a sidewalk as a place where one would expect protection for this kind of expression. Lastly, although the purpose of the *Street Bylaw* is seen as controlling the physical consequences of certain activities rather restricting expression, its effect is nevertheless seen to violate the values underlying freedom of expression. Judge Fradsham characterizes Pawlowski's actions as occurring "in the context of social activism… and in the context of attempting to influence political decision making" around homelessness and drug addiction (at para. 260). The prohibition on placing materials on the street is thus seen to violate Pawlowski's freedom of expression, contrary to section 2(b) of the *Charter*. Further, because the *Street Bylaw* amounts to an absolute ban on placing material on the street, it fails the minimal impairment test once again.

Similar conclusions are reached with respect to the prohibition concerning the use of amplified sound. Judge Fradsham finds that this activity conveys meaning, and is not incompatible with the function of the public place in question. Interestingly, Judge Fradsham notes that "certain downtown parks … had drifted far away from being places of rest or activity for the general public… [and] had become … a gathering place for the homeless, for those buying and selling drugs, and for others who may have been engaged in criminal activity" (at para. 265).

Pawlowski's use of amplified sound was aimed at returning the parks to their original conditions, and is thus seen as within the protected scope of section 2(b). Judge Fradsham holds that the *Parks and Pathways Bylaw* has the effect of violating Pawlowski's expression, and it can not be saved under section 1 of the *Charter*. While there was a permit system in place, the City's application of that system to Pawlowski "is no longer minimal" (at para. 272).

As for the *Use of Highway and Rules of the Road Regulation* and its prohibition of loud and unnecessary noise from a motor vehicle, there is no separate analysis of this provision under section 2(b) of the *Charter*. Judge Fradsham finds that it cannot be justified under section 1 of the *Charter*, as the word "unnecessary" is too broad and thus not minimally impairing of Pawlowski's freedom of expression (at para. 276).

Only the stunting provision under the *Traffic Safety Act* survives *Charter* scrutiny. Because the law had been read down in the *Jones* case, Judge Fradsham holds that "the law, properly interpreted, does not affect [Pawlowski's] right of freedom of expression" (at para. 280).

Abuse of Power

Judge Fradsham summarizes the relevant case law on abuse of power as follows:

> Abuse of process can be said … 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 … 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" (at para. 193).

Applying this test, Judge Fradsham refers to the various incidents in which Pawlowski was ticketed by bylaw and police officers between April 13 and June 18, 2007. He notes that "the conflict between [Pawlowski] and the City was escalating" (at para. 290), and that "[i]ntransigence 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" (at para. 292). Judge Fradsham concludes that:

> 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 (at para. 292).

Once again, the City is being held to a very high standard of conduct, and its role in the protection of the public interest is absent from this part of the judgment.

Remedies

Judge Fradsham finds the challenged provisions of the provincial *Use of Highway and Rules of the Road Regulation*, and of the City's *Street Bylaw* and *Parks and Pathways Bylaw* "to be of no force or effect with respect to this accused in these circumstances" (at para. 298). He is therefore found not guilty of the charges laid under these laws. As for the stunting law (section 115 of the *Traffic Safety Act*), the actions of Pawlowski are seen to fall outside the scope of this section, properly interpreted, and so he is also found not guilty of this charge (at paras. 301-304).

Conclusion

The fact that Judge Fradsham found the City's actions so close to the line of abuse of process, in combination with his findings under the *Charter*, leave very little room for the City to respond to the persistent actions of Pawlowski. Pawlowski's actions were called "unrepentant" and "obstreperous" in a previous ruling in which he was found to be in contempt of court for failing to abide by an injunction (see 2008 ABQB 267 at paras. 32 and 52). There is very little reference in Judge Fradsham's *Charter* analysis to the hundreds of noise complaints that gave rise to the City's actions, and to the City's earlier efforts to reach a compromise with Pawlowski. The City is held to a very high standard -- arguably too high – in relation to the wording, application and enforcement of the law.

I question whether this judgment is in keeping with previous *Charter* case law that provides a much wider scope for governments to constrain behaviours that are contrary to public peace and security (see for example *Hutterian Brethren* and *Montreal (City)*), and would be surprised if the City does not appeal the judgment. While one would hope that the City could reach an agreement with Pawlowski that strikes a balance between his religious expression and the public interest, there is no incentive for Pawlowski to negotiate unless the judgment is appealed.