

# Court of Queen's Bench of Alberta

**Citation: R. v. Pawlowski, 2011 ABQB 93**

**Date:**20110217  
**Docket:** 100010008S1  
**Registry:** Calgary

Between:

**Her Majesty the Queen**

Appellant

- and -

**Artur Pawlowski**

Respondent

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**Reasons for Judgment  
of the  
Honourable Mr. Justice R. J. Hall**

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Appeal from the Judgment by Judge A. A. Fradsham  
The Honourable Judge A. A. Fradsham  
Dated the 7<sup>th</sup> day of December, 2009  
Filed on the 7<sup>th</sup> day of December, 2009  
(2009 ABPC 362, Dockets: A08139530E, A06303706K, A06303754K, A06300394K,  
A08546123E, A08652604E, A06322702K )

## **Introduction**

[1] The Respondent, Artur Pawlowski, works with Street Church Ministries (“Street Church”), a multi-denominational Christian organization. He undertook certain actions to attempt to address certain important social issues by ministering to homeless and financially impoverished individuals who may be abusing drugs or may be involved in criminal misconduct. He placed tables, signs, a large wooden cross, banners, boxes with food, drinks and DVDs on the sidewalk in front of City Hall. Sound speakers were also placed on the sidewalk. Mr. Pawlowski

used a sound amplification system to amplify his voice during activities. Neither Mr. Pawlowski nor anyone affiliated with Street Church had a permit to place materials on a street or to use an amplification system in a park.

[2] Between April 13, 2007 and June 18, 2007, Mr. Pawlowski was charged with five violations of the City of Calgary bylaws and two violations of Province of Alberta traffic safety legislation. The charges relate to the placing of material on a street and for the use of amplification in a public park. Mr. Pawlowski was also charged with stunting contrary to the *Traffic Safety Act*, R.S.A. 2000, c. T-6 because of the amplification of his voice through a portable speaker (“a boom box”). He was also charged with causing unnecessary noise from a motor vehicle contrary to s. 82 the *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002 because he used a speaker on the roof of a pickup truck to carry his voice, which was parked at Simmons Park, a park essentially adjacent to Triangle Park, the park in or close to which the Street Church activities occurred.

[3] The Appellant, The City of Calgary (“City”), appeals from the judgment of Judge Fradsham, who found that s. 21(e) of the *Parks and Pathways Bylaw*, Bylaw No. 20M2003 and s. 17(1)(a) of the *Street Bylaw*, Bylaw No. 20M88 violated Mr. Pawlowski’s rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (“the Charter”). The trial judge also found that the accused was not guilty of stunting and that s. 82 of the *Use of Highway and Rules of the Road Regulation*, violated Mr. Pawlowski’s Charter rights. Finally, he concluded that the conduct by the City did not fall in the clearest of cases of abusive conduct. The City only appeals the trial judge’s conclusions regarding the City bylaws and does not appeal the provincial charges.

[4] Section 21(e) of the *Parks and Pathways Bylaw* states as follows:

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

[5] Sections 2(16), 2 (21) and 17(1)(a) of the *Street Bylaw* as it read at the pertinent time stated as follows:

### **Definitions**

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, trestle way, 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.

(a) and includes:

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

[...]

### **Use of Streets**

#### **General – Material on Streets**

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;

[...]

[6] Mr. Pawlowski does not dispute the fact that he operated an amplification system in a City park and that he placed material on a City street without a City permit to do so.

[7] At trial the parties agreed on the following facts by way of the 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.

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. 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.
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.

## **Trial Judgment**

[8] At trial, Mr. Pawlowski did not dispute that he engaged in most of the impugned behaviour which formed the subject matter of the charges. However, he argued that the prohibitions of those behaviours resulted in infringements of freedom of religion and freedom of expression; that the bylaws were vague or over broad; and that there was abuse of process contrary to the *Charter*.

## **Evidence Before Trial Judge**

[9] Mr. Pawlowski testified in a *voir dire* during trial. The trial judge wrote that the hearsay evidence contained in his testimony was not offered as proof of the truth of its contents, but was provided as part of the narrative, and as evidence of what Mr. Pawlowski understood the facts to be.

[10] Mr. Pawlowski said he started Street Church in 2005. The activities of Street Church was the continuation of the work that he had been doing as a volunteer with Centre Street Church since 2002, which included distributing food in the park of 17<sup>th</sup> Avenue and 8<sup>th</sup> Street, distributing literature, praying for people and preaching the gospel. He said that they would interfere with drug dealers. Initially, Mr. Pawlowski was involved in one-on-one interventions. An amplification system was used later on commencing around 2003 or 2004 to address the people.

[11] Mr. Pawlowski testified that Centre Street Church attempted to help the homeless off the streets by bringing them to the church facility itself, but he decided to join a group that would literally go to the people who needed help and bring the church to them.

[12] At trial, Mr. Pawlowski explained that when he worked with Centre Street Church in the park at 17<sup>th</sup> Avenue and 8<sup>th</sup> Street the use of sound amplification made a big difference because they were able to impact 50 or 100 people instead of one at a time. With the sound amplification system everyone could hear. Mr. Pawlowski explained that the sound amplification system was also used at "Crack-cul-de-sac", an area east of City Hall which was targeted by Mr. Pawlowski and other volunteers to impact the drug trafficking business. They would interfere with the drug activities by going in the middle of what was going on and speaking to the clients telling them that "drugs will kill you". He said that the drug dealers did not appreciate it, but also that they found out that slowly their lives had been changed. Some clients were scared of being caught on tape or that people would witness them buying or selling.

[13] Mr. Pawlowski testified that the first church service organized by Street Church occurred in May 2005 at Triangle Park. After receiving many requests for food, Mr. Pawlowski and other volunteers started distributing food and drinks along with preaching the word of God. He said that the basis of Street Church's activities is Christianity as they are followers of Christ. Mr. Pawlowski said the following with respect to the need for amplified sound in Christianity:

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 could 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. [...]

[14] Mr. Pawlowski and other Street Church volunteers did not use sound amplification in all locations. For instance, he explained that they did not use it for Olympic Plaza because the amount of alleged drug trafficking involved only a few drug dealers and clients and thus “the amplification was absolutely not needed.” Mr. Pawlowski said that he would only use amplified sound when it was absolutely needed and essential to deliver the message.

[15] Mr. Pawlowski testified at trial that the church’s job is to take care of the poor, the orphans, the widows and the brokenhearted. Like Jesus, they are to go to the people in need. He said that it is a commandment that he assist the poor. He said that they choose the worst possible locations in the city where the need was the greatest. He said that they were needed the most in Triangle Park. Mr. Pawlowski explained that at Triangle Park sound amplification was, for example, necessary in order to communicate to 50 people at the same time and get their attention. He added that another main reason behind the amplification was for safety purposes: “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.”

[16] At trial, Mr. Pawlowski testified that in late 2005 or early 2006, he and other leaders of Street Church met with City of Calgary officials. He said that the officials expressed appreciation for their activities and offered to provide assistance with garbage removal and with supplying water, and spoke of permits.

[17] Following complaints about the Street Church activities regarding the level of sound, Mr. Pawlowski was asked to take his two speakers down. He took a series of measures to try to rectify the problems by aiming the speakers at a different direction, but further complaints were received.

[18] A subsequent meeting with City officials was held. Mr. Pawlowski testified at trial that he was told that because of the numerous complaints he would not be allowed to amplify sound whatsoever.

[19] Some witnesses gave evidence that Street Church activities have had a life-altering effect on them.

[20] In 2006, Mr. Kenny, Parks Operations Manager for the City, who testified for the Crown, interacted with Street Church in response to a number of complaints regarding the level of sound from Triangle Park. He said that a meeting was convened in November of 2006 where Street Church was told that sound amplification would not be permitted in 2006. Other site options were discussed. A permit without amplification was issued for Simmons Park. However, Mr. Kenny was told by Street Church that without amplification, their operation was basically shut down by the City. Generally, the trial judge gave little weight to his testimony because he was concerned by its reliability. The trial judge found that Mr. Kenny had significantly altered his testimony during cross-examination.

[21] In the winter of 2006, Street Church met with the Mayor of Calgary. Mr. Pawlowski testified that despite the fact that he thought the meeting went well, he received a letter advising him that he was not allowed to use amplified sound.

[22] Despite the clear refusals from the City of Calgary, Mr. Pawlowski continued to use amplified sound. He said at trial that he thought that the bylaws were unconstitutional and that there was confusion regarding their interpretation from one officer to the other.

[23] Mr. Pawlowski said that after permits previously issued to Street Church were revoked on April 24, 2007, no further applications for permits were made because “we were told that the permit will not be given to us.” The trial judge noted that there was evidence that Mr. Pawlowski and Mr. Stoviecki had in fact attempted to submit applications for the use of space at Olympic Plaza, but these applications were rejected at the customer service counter at the City and were not forwarded to Mr. Kenny, which was in violation of the City’s procedures.

[24] At trial, Mr. Pawlowski testified that since June 2007, he attempted to submit applications to the City for permits but was told that his applications would not be accepted.

[25] In an order dated May 1, 2007 and entered on December 5, 2007, Justice Rawlins ordered:

3. If any Plaintiff uses amplified sound in any City of Calgary Park before the trial of this matter, the Plaintiffs are to pay the costs of \$7,089.25 forthwith to The City of Calgary and The City of Calgary can bring an application for contempt against the person or persons that used the amplified sound.

[26] Further, in April of 2008 an injunction was placed against Street Church and Mr. Pawlowski personally, prohibiting the use of sound amplification except if the City and Street Church Ministries could agree on a venue where amplified sound could be used .

### **Trial Judge’s Conclusions**

[27] The trial judge reviewed the law regarding constitutional issues such as vagueness and over breadth, freedom of religion, freedom of expression, s. 1 of the *Charter*, the doctrine of abuse of process under s.7 of the *Charter* and with respect to remedies that may be granted by the Provincial Court of Alberta in cases of *Charter* challenges.

### **Material on a Street**

[28] On April 15, 2007, May 23, 2007 and June 18, 2007 three tickets were issued to Mr. Pawlowski under s. 17(1) of the *Street Bylaw*, for placing material on a street. The “material” included boxes of food which were temporarily placed on the sidewalk or on a table, tables, a cross, a speaker and banners.

[29] The trial judge found that the scope of the term “material” could include “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 [...]”. He concluded that the term “material” was both vague and, because it could refer to so many objects or articles, he found that it was also overly broad. He held that by failing to provide notice to individuals regarding whether a behaviour was acceptable under s. 17(1) of the *Street Bylaw*, the term “material” was so vague as to constitute a breach of fundamental justice which could not be saved under s. 1 of the *Charter*.

[30] The trial judge wrote that out of an abundance of caution he would nonetheless address the s. 1 issue. He found that while there is a pressing and substantial concern regarding litter and other items that may interfere with the use of city streets or aesthetics of those streets, there was no proportionality between the breadth of the term “material” and the purpose of the *Street Bylaw*. He found that there was no rational connection between such a broad term and the aims of the bylaw. He further added that, as seen in the case before him, the breadth of the term meant that the potential for abuse of the law outweighs the possible benefits. He held that the violation created by the vague and overly broad law could not be saved under s.1.

[31] With respect to Mr. Pawlowski’s freedom of religion, the trial judge found that the efforts of Mr. Pawlowski to bring food to the homeless and other congregants was a function of his religious beliefs. He did not find that the bylaw was drafted for the purpose of violating freedom of religion, but found that interference did in fact occur as an effect of the attempted enforcement of the legislation. He wrote that the enforcement affected Mr. Pawlowski’s ability to act in accordance with his religious beliefs in a significant manner. Reiterating that there is a pressing and substantial concern regarding litter and other items that may interfere with the use or the aesthetics of the City streets, and acknowledging that the City was entitled to address that concern, he found that the bylaw had a rational connection to the objective. However, the impairment was not within the range of what would comprise “minimal”. His interpretation of the bylaw was that without a permit from the City, any preacher on the sidewalk could not have a conversation with a colleague or could not pause to chat with a group of people sitting on a park bench because the physical presence would be “material” on the street. The trial judge concluded that the negative effect of the bylaw outweighed the objective of the *Street Bylaw*.

[32] The trial judge also held that there was a violation of Mr. Pawlowski’s freedom of expression.

[33] He found that Mr. Pawlowski’s activities deserved *Charter* protection because the materials conveyed meaning:

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

[34] The trial judge wrote that the provisions at issue did not have the purpose of limiting expression nor of controlling access to content, but to control physical consequences of human behaviour. However, he concluded that the effect of the bylaw was to restrict Mr. Pawlowski's freedom of expression. The trial judge stated that Mr. Pawlowski's expression occurred in the context of social activism and found that there was a significant nexus between Mr. Pawlowski's activity and participation in social and political decision-making, one of the three values identified by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (A. G.)*, [1989] 1 S.C.R. 927 as underlying freedom of expression.

[35] Referring to *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the trial judge determined that Mr. Pawlowski's activities were compatible with the principal function or intended function of the government property. He identified the primary purpose of a sidewalk as being to allow for the flow of pedestrian traffic. The trial judge noted that the City had not convinced him that the material placed on the sidewalk by Mr. Pawlowski caused the pedestrians to step into the street or prevented or unduly hindered nor significantly impeded the pedestrians in their use of the sidewalk.

[36] The trial judge did not find that the violation of the freedom of expression could be saved under s.1 of the *Charter*. He accepted that the concern of the City for maintaining safe and efficient access to and use of streets and sidewalks was pressing and substantial. He also accepted that prohibiting the placement of materials on a street was rationally connected to that objective. The trial judge noted that the permit process which may allow for placing materials on a street may in some circumstances override the objective of safe and efficient access. He referred to his conclusions regarding vagueness and over breadth of the bylaw provision at issue and concluded that the minimal impairment test was not met.

[37] The trial judge declared s. 17 (1)(a) of the *Street Bylaw* of no force or effect under s.52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c.11. Further, he concluded that "[t]o 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": para. 305.

### **Amplification System in a Park**

[38] On April 13, 2007 and April 27, 2007, tickets were issued to Mr. Pawlowski because he used sound amplification in a park without a permit in violation of s.21 of the *Parks and Pathways Bylaw*. On both occasions, Mr. Pawlowski used a microphone and sound speakers to amplify his voice.

[39] The trial judge found that the term “amplification system” in the *Parks and Pathways Bylaw*, although not defined, was not vague nor overly broad. He found that reasonable parties would have sufficient notice that, without a permit, the use of a sound amplification system in a city park could result in an infraction.

[40] At trial, Mr. Pawlowski’s evidence was that he believed in the need for and the benefit of a street church ministering to the homeless and impoverished and attempting to disrupt the particular scourge of drug abuse. He said that he believed that engaging in such conduct was a religious imperative that stemmed from his personal interpretation of the Bible. He referred to Jesus Christ who would go to the top of the mountain so that he could reach more people, as well as other methods that Jesus Christ used to communicate his teachings. In the trial judge’s opinion, the choice of Mr. Pawlowski to use amplified sound, while having additional purposes including enhancing his personal safety, was a behaviour undertaken as a function of his spiritual faith. He also noted that the Bylaw Officer who dealt with the matter testified that Mr. Pawlowski was saying grace using the sound amplification system. The trial judge concluded that clearly, this was an activity that had a nexus with religious belief.

[41] The trial judge stated that each of the charges relates either to the use of sound speakers or amplification in a religious activity or to boxes of food placed on a sidewalk. He did not find that the *Parks and Pathways Bylaw* was drafted for the purpose of violating freedom of religion, but found that interference did in fact occur as an effect of the attempted enforcement of the legislation. He found that the enforcement affected Mr. Pawlowski’s ability to act in accordance with his religious beliefs in a significant manner as opposed to trivial or insubstantial. He concluded that in the result, Mr. Pawlowski’s freedom of religion was infringed.

[42] Under his s.1 of the *Charter* analysis, the trial judge accepted 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. He agreed that eliminating noise that could detract from a park user’s experience in that public facility is an important concern. He found at para. 250 that, “[t]enuously, the bylaw has a rational connection to that objective.” He explained that he used the term tenuously because the bylaw does not prohibit the use of speakers, or devices used to broadcast sound, but it prohibits the use of amplification system, which could refer to sound and light. If according to *R. v. Oakes*, [1986] 1 S.C.R. 103, the measures adopted must be carefully designed to achieve the objective in question, the trial judge concluded that this bylaw lacked that careful design. The trial judge was of the opinion that in the case before him, the permit process did not have clear rules and policies and could become arbitrary. He noted that individuals making sounds significantly louder than those alleged to have been made by Mr. Pawlowski were granted permits, because the duration of their respective event was limited. He also took into consideration the evidence before him that the City had begun to refuse to even consider applications for permits that Mr. Pawlowski was attempting to make. The trial judge concluded that the permit regime failed and could no longer be qualified as a minimal impairment. He found that the evidence before him showed that Triangle Park was no longer a

forum available for the use of the general public. He added that if rehabilitation of Triangle Park may have been a goal of sufficient importance, it was not the intent of the *Parks and Pathways Bylaw*. He concluded that the effect of the *Parks and Pathways 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.

[43] With respect to Mr. Pawlowski's freedom of expression, the trial judge also concluded that the *Parks and Pathways Bylaw* had the effect of infringing Mr. Pawlowski's right and that it could not be saved under s.1.

[44] It was clear to the trial judge that the activities for which amplified sound was used conveyed meaning and that the purpose of the *Parks and Pathways Bylaw* provision was not to limit expression or control access to content. He accepted that Calgary parks are intended to be places available for the use of all people and 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. However, he found that the purpose of certain downtown parks including Triangle Park has drifted away from being places of rest or activity for the general public. In fact, he found that the principal function of Triangle Park had become that of a gathering place for the homeless, for those buying and selling drugs and for people engaged in other criminal activities. He concluded that those activities shared a general characteristic of disrupting the usual function of the park and that Mr. Pawlowski's use of sound amplification was not incompatible with that corrupted usage. The trial judge added that, in other words, Mr. Pawlowski's intent with the use of sound amplification was to restore the park to its original condition and purpose.

[45] The trial judge accepted that the purpose of the bylaw, to ensure that City parks and pathways remain safe and accessible for enjoyment of all Calgarians, is pressing and substantial. Further he accepted that there is a rational connection between the bylaw and the objective. Referring to his analysis with respect to freedom of religion, he found that by failing to establish known standards for granting permits, and, later, by refusing to accept applications from Mr. Pawlowski for the use of an amplification system in a park, the impairment was not minimal. He concluded that the negative effect of the provision on the right of freedom of expression outweighed the salutary effect of the bylaw. The trial judge added that the City bylaw provision had the effect of controlling the volume of Mr. Pawlowski's message and of depriving some potential listeners of the true meaning of his message. He concluded that the violation could not be saved under s. 1 of the *Charter*. The trial judge held at para. 305 that "[t]o the extent of the inconsistency with these *Charter* values, and pursuant to s. 24(1) of the *Charter*", s. 21(e) of the *Parks and Pathways Bylaw* was of no force or effect in the case at bar.

### **Abuse of power**

[46] At trial, Mr. Pawlowski argued that there had been abuse of power. The trial judge acknowledged that during the time period over which the tickets were issued the conflict between Mr. Pawlowski and the City was escalating. He also found at para. 292 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". He noted that even if these matters began as a result of complaints over noise, Mr. Pawlowski was not before the Court on any noise violations. The trial judge concluded that although the evidence supported that there was abusive conduct by bylaw officers and police officers, the conduct did not fall within the category of the clearest of cases. He stated that the City's attempts, through bylaw officers, to limit the scope of efforts of Mr. Pawlowski to minister to his congregants fell precariously close to being excessive and an abuse of power, but was not in the clearest of cases.

### **Positions of the Parties**

[47] The City argues that the trial judge's decision is wrong in law and must be set aside in its entirety. The City submits that the *Street Bylaw* does not violate Mr. Pawlowski's freedom of religion or freedom of expression. If it does, they submit that the infringement is saved under s. 1 of the *Charter*. The City concedes that the *Parks and Pathways Bylaw* violates Mr. Pawlowski's freedom of expression, but argues that it is saved under s. 1. However, the City does not concede that the *Parks and Pathways Bylaw* violates Mr. Pawlowski's freedom of religion.

[48] The City submits that the trial judge's decision has the effect of granting Mr. Pawlowski an absolute right to engage in activities which are important to him, irrespective of the detrimental impact which those activities have on the lives of other Calgarians. It adds that the effect of the decision is to create an "all or nothing" approach to Mr. Pawlowski's rights which is precisely what should be avoided under the *Charter*. The City also submits that the trial judge's virtually strips away the City's powers to regulate activities within its jurisdiction. It raises that it has offered other options to Mr. Pawlowski and submits that he has refused to compromise.

[49] Furthermore, the City argues that it did not act in an abuse of process and that its actions cannot be qualified as excessive especially considering that the charges were laid following Justice Rawlins's decision. The City adds that it essentially acted under the shadow of a Court of Queen's Bench Order.

[50] Mr. Pawlowski is not a cross-appellant. Mr. Pawlowski does not assert that the City does not have jurisdiction to regulate the use of City streets and parks nor does he dispute that he operated an amplification system in a park or placed material on a City street without a permit.

[51] Mr. Pawlowski submits that the only issues before the Provincial Court and now in this appeal are whether s.21(e) of the *Parks and Pathways Bylaw* and 17(1)(a) of the *Street Bylaw* are unconstitutionally vague or over broad and whether they violate Mr. Pawlowski's freedom of religion, freedom of expression or right to life, liberty and security of the person (abuse of process). He submits that the trial judgement should be upheld in its entirety. Mr. Pawlowski submits that s.21(e) of the *Parks and Pathways Bylaw* violates his freedom of religion and freedom of expression and that those violations cannot be saved under s.1 of the *Charter*. Regarding s. 17(1)(a) of the *Street Bylaw*, Mr. Pawlowski argues that this section is

unconstitutionally over broad and vague and that no rules of interpretation can clarify the term “material”.

### **Issues and Analysis**

[52] The standard of review on a question of law is correctness. A trial judge’s application of a legal standard to the facts of a case is a question of law. The standard of review with respect to questions of fact or factual inferences is palpable and overriding error: see for example *R. v. Loewen*, 2010 ABCA 255 at para. 5.

[53] The Appeal issues are issues of law, fact or issues of mixed fact and law. The main thrust of the Appeal is that the trial judge erred in finding that the provisions of each bylaw infringed s.2 *Charter* rights and were not saved by s.1 of the *Charter*.

[54] Mr. Pawlowski argues that the trial judge is correct in his analysis and his findings should not be disturbed. He maintains all of his defences that he presented at trial, including, presumably the defence of abuse of power (which was narrowly rejected by the trial judge).

[55] My analysis will proceed by first examining the bylaw provisions in issue to determine their validity in regard to whether they are vague or over broad to such an extent as to be invalid. In the event they survive this scrutiny, then I will determine whether they violate s.2(a) or 2(b) of the *Charter*, and if so whether they, or either of them, are saved by s.1 of the *Charter*.

[56] In the event that either of the bylaws survive *Charter* rights analysis under ss.2 and 1, Mr. Pawlowski relied upon a defence of abuse of power at trial. I will therefore consider this defence in these reasons.

### **Vagueness and Over Breadth**

#### **Vagueness and Over Breadth Relating to the *Street Bylaw***

[57] The recent decision of *Vancouver (City) v. Zhang*, 2010 BCCA 450 was rendered after this appeal was argued. In that case, the British Columbia Court of Appeal reviewed s.71(1) of the *Street and Traffic Bylaw* (Revised By-Law No. 2849) in place in Vancouver. That section provided:

71.(1) No person shall build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied (except in accordance with any by-law of the City, or except with the approval of and subject to such conditions as shall be determined by the Council) in any street, any structure, object, substance or thing which is an obstruction to the free use of such street, or which may encroach thereon, or lay or construct, or reconstruct any sidewalk on any

street, without first obtaining therefore the written permission of the City Engineer.

[58] One can find in that section what amounts to a similar prohibition as is in the *Street Bylaw* under consideration here. Section 71 of the Vancouver bylaw could be read that “[n]o person shall ... place ... in any street, any ... object, substance or thing [...]” However, s. 71 of the Vancouver bylaw goes on to say “which is an obstruction to the free use of such street, or which may encroach thereon ...”

[59] While *Zhang* had not been decided at the time of the hearing, Counsel for the City urges that s.17(1) of the *Street Bylaw* should be interpreted as if it included some similar wording. The City argues that the term “material” in s. 2(16) constitutes an identifiable class comprised of objects that do not have any place or purpose on a public street and have in common that they frustrate the purpose of a municipal street, which is to provide free and navigable passage for pedestrians and other users of that street.

[60] The City further urges that such an interpretation can be obtained by applying the principle of *ejusdem generis*.

[61] *Ejusdem generis* is not helpful here. La Forest, J. described that interpretative rule in *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029 at 1040, as follows:

Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words 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.

[62] However, in the definition of “material” in the *Street Bylaw*, the general precedes the specific; Counsel have not provided me with any jurisprudence that has applied *ejusdem generis* to limit the general to the specific where the general *precedes* the specific. I do not find *ejusdem generis* to assist me here.

[63] The interpretation that the City urges could easily have been expressed in the bylaw; it was not. I am not prepared to make such an extensive “reading in” to the provision as is urged by the City.

[64] Nor am I prepared to simply “read out” the words “any object or article” from the definition of “material”.

[65] Were I to read out, or ignore the general terms “any object or article” contained in the definition of “material”, then I would be left with a definition that details various forms of trash, and includes sand, gravel, earth and building products.

[66] If that is the limit of the definition of “material”, then I am satisfied that Mr. Pawlowski had no such materials on the streets at the relevant times. Sound speakers, signs, tables, a large wooden cross, banners and boxes with food drinks and DVDs are not items of trash or building products or materials.

[67] The provision in s.17(1) of the *Street Bylaw* prohibits the placement of any object or article on the streets or sidewalks of the City of Calgary. The over breadth of such a prohibition is alarming. The sole of one’s shoe, a baby carriage, a briefcase, even, arguably, a vehicle, is, by this prohibition, prohibited from being on a street or sidewalk. These “are easily imaginable circumstances which commonly arise in day-to-day life” *R. v. Goltz*, [1991] 3 S.C.R. 485 at 516) and may therefore be used legitimately to test the validity of the City’s enactment.

[68] The trial judge has extensively reviewed the law regarding vagueness and over breadth in his decision at paras. 147 to 163. I accept the analysis of the trial judge at paras. 221 to 223 of the trial judgment as follows:

[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*.

[69] For the above reasons, with respect to the alleged violations of s.17(1)(a) of the *Street Bylaw* by Mr. Pawlowski, I dismiss the appeal.

### **Vagueness and Uncertainty Relating to the *Parks and Pathways Bylaw***

[70] Section 21(e) of the *Parks and Pathways Bylaw* states:

No person, while in a Park, shall

(e) operate an amplification system;

[...]

[71] It is to be noted that the *Parks and Pathways Bylaw* is not a noise control bylaw as was the case in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. Further, “amplification system” is not defined anywhere in the bylaw.

[72] Counsel for Mr. Pawlowski argues that “amplification system” reasonably can be expected to include a transistor radio or an iPod or a cellular phone. All of these devices, he argues, amplify sound. Further, he states that the provision does not even refer to sound. The use of a flashlight in a park to light one’s way would be the use of an amplification system, in this case to amplify light.

[73] As directed by *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 at para. 21, “today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.

[74] The scheme and object of the *Parks and Pathways Bylaw* includes: “providing a safe, aesthetic and comfortable environment by: (i) protecting our Parks and Natural areas; (ii) providing environmental stewardship, programs and services; and (iii) prohibiting activities that damage City assets and jeopardize public safety,” and “ensuring that they remain safe and accessible for the enjoyment of all Calgarians.” It would be unreasonable for me to conclude that the City intended to disallow the use of a flashlight in a city park, as that would be contrary to the general scheme and intention of the bylaw. While the bylaw failed to reference “sound” amplification system, I am satisfied that that is its intention.

[75] I am equally satisfied that the intention of the bylaw is not to restrict the use of such items as hearing aids, cell phones, iPods, or transistor radios within a park, none of which affect the safety, accessibility and enjoyment of the parks by the general public. The only reasonable interpretation of this section, when viewed in harmony with the scheme and object of the bylaw, is that it is intended to prohibit noise amplified to such an extent as to interfere with the enjoyment of the park by other users. In that sense, as stated in *Montréal (City)* at para. 20, “[t]he

purpose of the prohibition was to preserve the peaceful nature of public spaces”, and at para. 26 “it is clear from the legislative purpose that the scope of art. 9(1) of the By-law does not include sounds resulting solely from human activity that is peaceable and respectful of the municipal community” and at para. 14 “soft and inoffensive sounds” are not prohibited, and at para. 48 “[u]nless the standard or the medium in question shows that the power has been exercised unreasonably [by the City], the court must show deference. [...] It is up to the City to choose the means.” I find that reasoning to be persuasive here.

[76] Accordingly, I am satisfied that the enactment of s.21(e) of the *Parks and Pathways Bylaw* was *intra vires* the City, and the words when read with the scheme and intent of the bylaw in mind, prohibit the use of a sound amplification system that interferes with the public’s peaceful enjoyment of the park. As stated by the trial judge at para. 225, “[r]easonable 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”.

## **Charter Rights**

### **Freedom of Religion and *Parks and Pathways Bylaw***

[77] Sections 1 and 2 of the *Charter* provide as follows:

#### Guarantee of Rights and Freedoms

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.

#### Fundamental Freedoms

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;

[...]

[78] In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the Court had to decide whether a regulation which required that driver’s licences contained photo identification violated the freedom of religion of the Colony members. Colony members sincerely believe that the Second Commandment prohibits them from having their photograph willingly taken. The issue before the Supreme Court was whether the limit on the freedom of religion was a reasonable limit demonstrably justified in a free and democratic society under s. 1

of the *Charter*. The majority of the Court found that the universal photo requirement was justified under s. 1.

[79] Writing for the majority of the Court, McLachlin C.J.C. stated that an infringement of s. 2(a) of the *Charter* will be made out where the claimant sincerely believes in a belief or practice that has a nexus with religion and where 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: para. 32. She noted that in the case before the Court, the record did not disclose a concession on the second element of the test, but since the courts below had proceeded on that assumption, she went on to determine whether it was saved under s. 1. However, McLachlin C.J.C. added that in order to determine that the interference is more than trivial or insubstantial, claimants need to show that their religious beliefs or conduct might reasonably or actually be threatened. She added that evidence of state-imposed cost or burden does not suffice, but that there need be evidence that such a burden is capable of interfering with religious belief or practice: *Hutterian Brethren of Wilson Colony*, para. 34

[80] The trial judge accepted Mr. Pawlowski's evidence regarding his belief in the need for, and benefit of, a street church, ministering to the homeless and impoverished and attempting to disrupt and discourage drug abuse. Mr. Pawlowski 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".

[81] The trial judge held, therefore, that the necessary "nexus" between the activity and Mr. Pawlowski's religious belief had been established.

[82] The City takes the position that the sound amplification provision does not infringe upon Mr. Pawlowski's freedom of religion. It submits that the use of amplification is not a vital component and does not have a nexus with Mr. Pawlowski's religious belief. The City submits that Mr. Pawlowski's own evidence is that the only reason that he used amplification was to serve the functional purpose of communicating to a larger group of people in larger parks where there may have been greater noise, more traffic. As he himself admitted, he only used amplification where he needed to use it. The City submits that even if the sound amplification provision violates Mr. Pawlowski's freedom of religion, it is saved under s. 1 of the *Charter*.

[83] Mr. Pawlowski argues that the trial judge did not make the errors of law or fact asserted by the City. He argues that there is a nexus between the conduct of operating an amplification system in a park and his religious practice. He argues that the prohibition against amplification without permission is more than trivial or insubstantial. Mr. Pawlowski submits that the belief lies in the need to go to the most disadvantaged and needy individuals in society and bring the message to them, and, amplification is essential in Triangle Park. In other words, Mr. Pawlowski argues that, as a function of his belief, he is required to go to Triangle Park and preach to the most disadvantaged and needy members of our society. Thus, a regulation that limits his ability

to do so infringes his freedom of religion, since he cannot achieve his goal without amplification. He adds, that the trial judge's analysis is correct when he found that the violation could not be saved under s. 1.

[84] The Supreme Court of Canada gave guidance on this issue in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551. Iacobucci J. writing for the majority of the Court states:

“[46] 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.” [Emphasis added]

And at para. 69:

“[69] Rather, as I have stated above, regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec *Charter* or that of s. 2(a) of the Canadian *Charter*, or both, depending on the context.” [Emphasis in original]

[85] The sincerity of Mr. Pawlowski's belief that he must take religion to the streets is not in question. Mr. Pawlowski maintains that the means by which he must practise this belief is by amplification, so that his preaching may be heard outside in a public area.

[86] On the basis of Mr. Pawlowski's subjective belief, I find that there is a nexus between the activity (of using an amplification system to broadcast his religiously based message) and his religious beliefs that has been established at trial.

[87] However, establishing that nexus is not sufficient; I must also determine whether the bylaw provision interferes with Mr. Pawlowski's ability to act in accordance with that religious belief in a manner that is more than trivial or insubstantial.

[88] The majority of the Supreme Court of Canada addresses this in *Hutterian Brethren of Wilson Colony*:

[32] [...]“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 religious belief or practice.* In short, legislative or administrative action which 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.” [Emphasis added in *Hutterian Brethren of Wilson Colony*.]

Chief Justice McLachlin recognized that a degree of deference is appropriate.

[89] I consider that the prohibition against the use of an amplification system is a trivial or insubstantial burden upon Mr. Pawlowski. It does not threaten his religious beliefs. While it impairs the practice that he *wishes* to follow, it does not impair his right to conduct the practice of preaching to the homeless. Rather, amplification is a pragmatic tool used to allow his preaching to be more effective. Neither his belief, nor his practice of preaching to the homeless is threatened by the bylaw provision prohibiting the use of an amplification system without a permit.

[90] Accordingly, I find that s.21(e) of the *Parks and Pathways Bylaw* does not violate s. 2(a) of the *Charter*. No s. 1 analysis is therefore necessary.

### **Freedom of Expression and the *Parks and Pathways Bylaw***

[91] The City acknowledges that the ban against the use of an amplification system in a park violates Mr. Pawlowski’s freedom of expression under s.2(b) of the *Charter*. However, the City maintains that the infringement upon his s.2(b) *Charter* right was justified under s.1 of the *Charter*, in accordance with the finding of the Supreme Court of Canada in *Montréal (City)*.

[92] I agree with the conclusion of the trial judge on this point and this concession and I therefore conclude that s.21(e) of the *Parks and Pathways Bylaw* infringes upon Mr. Pawlowski's 2(b) *Charter* right to freedom of expression.

**Is the violation of s.21(e) of the *Parks and Pathways Bylaw* saved by s.1 of the *Charter*?**

[93] The issues to be determined are as follows:

1. Is the purpose for which the limit is imposed pressing and substantial?
2. Is the means by which the goal is furthered proportionate?
  - a) Is the limit rationally connected to the purpose?
  - b) Does the limit minimally impair the right?
  - c) Is the bylaw proportional in its effect?

[94] At trial, the City submitted that the purpose of the bylaw is to ensure that City parks and pathways remain safe and accessible for enjoyment of all Calgarians. I agree with the trial judge that the objective of the *Parks and Pathways Bylaw* is pressing and substantial.

[95] While the *Parks and Pathways Bylaw* is not a noise bylaw *per se*, s. 21(e) was clearly intended to control noise in order to achieve the objective that City parks and pathways remain safe and accessible for enjoyment of all Calgarians. Controlling noise and having peaceful use of the City parks is certainly rationally connected to the objective of accessibility for enjoyment by the public.

[96] As to the issue of minimal impairment, regard is had to the Supreme Court of Canada decision in *Montréal (City)*. At paras. 93 to 97, McLachlin C.J. and Deschamps J. state:

“[93] On appeal, only Chamberland J.A. found it necessary to consider minimal impairment. We generally endorse his comments and conclusions on this issue.

[94] First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive: *Canadian Pacific*.

[95] Second, it is far from clear that regulation by degree of loudness would effectively deal with the problem of noise pollution and the conflict between commercial concerns seeking to maximize commercial expression and citizens seeking a relatively peaceful and calm environment. Boilard J. erred in suggesting that the City could adequately deal with the problem of noise pollution by regulating the volume of noise measurable by sound level metre. Noise can be emitted randomly in unexpected places. Detecting and prosecuting violations could be difficult. Moreover, the regulation of sound levels alone would not prevent the possibility that multiple, simultaneous noises, each within the legal limit, could cumulatively exceed an acceptable sound level.

[96] Regulation by degree of loudness would not achieve the City's goal of eliminating, subject to exceptions, a certain *type* of sound -- that produced by sound equipment. Moreover, regulation by sound level metres has definite limits. While some noises may be capable of being monitored in this way, some, like intermittent noises or random noises, cannot. Moreover, the suggestion was unrealistic. As Chamberland J.A. put it: [TRANSLATION] "[I]t would take a forest of sound level metres and an army of qualified technicians lying in waiting to monitor the noise produced by sound equipment at different times of day and night, everywhere in greater Montréal" (para. 119).

[97] Rights should never be sacrificed to mere administrative convenience. Here, however, the City contends that for a variety of reasons there was really no other practical way to deal with the complex problem it was facing. Accordingly, the City's measures do not go beyond what was reasonably necessary in the circumstances and, as a result, its regulatory plan is entitled to deference."

[97] Based on that reasoning, the Supreme Court held that the impairment was minimal. I can see no basis to depart from that reasoning here. The ban on amplification systems in parks is a practical method of controlling noise in the use of public parks; it is probably the most practical and effective way of doing so. It minimally impairs freedom of expression in parks. It does not curtail public discourse. It simply limits its volume.

[98] As to proportionality, McLachlin C.J. and Deschamps J. continue at paras. 98 and 99:

“[98] It remains to consider whether the prejudicial effects on free expression flowing from the regulation of sound at issue are proportionate to the beneficial effects of the regulation. In our view, the test supports the conclusion that the By-law is valid.

[99] The expression limited by the By-law consists of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment. This limitation therefore goes to the permitted forms of expression

on city streets, regardless of content. Against this stand the benefits of reducing noise pollution on the street and in the neighbourhood. We acknowledge that in balancing the deleterious and positive effects of the By-law, account must be taken of the fact that the activity was taking place on a street with an active commercial nightlife in a large and sophisticated city. This does not, however, mean that its residents must necessarily be subjected to abuses of the enjoyment of their environment. As Chamberland J.A. put it, [TRANSLATION] "the citizens of a city, even a city the size of Montréal, are entitled to a healthy environment. Noise control is unquestionably part of what must be done to improve the quality of this environment" (para. 129). We conclude that the beneficial effects of the By-law outweigh its prejudicial effects."

[99] Here, the Citizens of Calgary are entitled to a healthy environment, including noise control in City parks. I conclude, as did the Supreme Court of Canada, that the beneficial effects of the bylaw outweighs its prejudicial effects.

[100] In analysing this factor, the trial judge found that the principal function of Triangle Park had become that of a gathering place for the homeless, for those buying and selling drugs, and for people engaged in criminal activities. He concluded that these activities showed a general characteristic of disrupting the usual function of the park and that Mr. Pawlowski's use of sound amplification was not incompatible with that corrupted usage.

[101] Although, I accept that fact finding and characterization of Triangle Park, it does not change my conclusions above. Complaints had been received from citizens as to the volume of amplified speech and music coming from the Park.

[102] The actions of Mr. Pawlowski were taking place in a downtown area, much as was the case in *Montréal (City)*. As stated in para. 99 of that decision: "This does not, however, mean that its residents must necessarily be subjected to abuses of the enjoyment of their environment." This is no less true in downtown Calgary than in downtown Montreal.

[103] For the reasons above, I find that the violation of s.21(e) of the *Parks and Pathways Bylaw* is saved under s.1 of the *Charter*.

### **Abuse of Power**

[104] At trial, Mr. Pawlowski sought a stay of the proceedings on the basis that there had been an abuse of power by the City's bylaw officers. In that regard, the trial judge noted that the conflict between Mr. Pawlowski and the City was escalating and that the charges here flowed from the City's considerable efforts to curtail the impugned behaviours. He then noted that this culminated in the City's refusal even to accept an application from Mr. Pawlowski for permission to use sound amplification in the park. The trial judge concluded that the City's efforts fell

precariously close to abuse of power, but as it was not the clearest of cases he declined to find abuse of power by the City.

[105] In April of 2007 the City revoked Mr. Pawlowski's permit to use Triangle Park, on the basis that Mr. Pawlowski violated the terms of that permit by using an amplification system. On May 1, 2007 Mr. Pawlowski's application for a mandatory injunction allowing him to use amplified sound in Triangle Park was rejected by the Court of Queen's Bench. In November of 2008, the City was refusing to accept, for consideration, any application by Mr. Pawlowski for a permit to preach in any Park using amplified sound. The trial judge was very critical of the City, particularly for refusing to consider Mr. Pawlowski's permit applications in 2008.

[106] I do not consider that the City has abused its powers. It was faced with balancing the concerns of the public with the wishes of Mr. Pawlowski. It had tried many times before April of 2007 to come up with solutions acceptable to both; however when no such solution could be found, the City exercised the discretion afforded to it and revoked the permit as Mr. Pawlowski was not abiding by its terms.

[107] To my mind, the City was justified in refusing to consider applications by Mr. Pawlowski in 2008 given the outcome of the Court of Queen's Bench applications. I do not see this as constituting an abuse of power by the City. Further, I am not critical of the City for trying to enforce s. 21 (e) of the *Parks and Pathways Bylaw* against Mr. Pawlowski. He was clearly violating that provision. The city laid charges in response.

[108] For these reasons I am satisfied that the abuse of power argument put forth by Mr. Pawlowski at trial is without merit.

[109] As Mr. Pawlowski has admitted to the use of a sound amplification system on April 13, 2007 and April 27, 2007; and as the use of such a sound amplification system violated s.21(e) of the *Parks and Pathways Bylaw*; the City's appeal is allowed in regard to the charges stemming from these instances, and based upon the admissions made by Mr. Pawlowski that such activities did indeed occur, the accused is convicted of the charges in relation thereto.

## **Conclusion**

[110] For all of these reasons, the Court:

Allows the appeal with respect to the charges under the *Parks and Pathways Bylaw* against Artur Pawlowski for operating an amplification system while in a Park;

Dismisses the appeal on the other grounds of appeal;

Sets aside the verdicts of acquittal entered for the violations of the *Parks and Pathways Bylaw* in respect of Artur Pawlowski;

Finds the Respondent Artur Pawlowski guilty as charged for the violation tickets issued for the violations of April 13, 2007 and April 27, 2007 for operating an amplification system while in a Park, and imposes the specified penalty prescribed by the *Parks and Pathways Bylaw*, Bylaw No. 20M2003.

Heard on the 7<sup>th</sup> day of October, 2010.

**Dated** at the City of Calgary, Alberta this 17<sup>th</sup> day of February, 2011.

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**R.J. Hall**  
**J.C.Q.B.A.**

**Appearances:**

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Michael G. Bates of Ruttan Bates  
for the Respondent