

**IN THE PROVINCIAL COURT OF ALBERTA**  
*Sitting at Edmonton*

BETWEEN:

**HER MAJESTY THE QUEEN**

- and -

**DALE MALAYKO**

(Accused/Applicant)

**NOTICE OF INTENTION TO RAISE CONSTITUTIONAL ARGUMENT**  
Pursuant to *Constitutional Notice Regulation, Alta Reg 102/1999*

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RE: *R v Malayko;*  
*Community Standards Bylaw 14600, s.14(1);*  
Pre-trial conference: January 23, 2020  
Trial: April 1-3, 2020; Courtroom # \_\_; Edmonton, Alberta

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**WHEREAS THE ACCUSED STANDS CHARGED THAT:**

COUNT #1: On or about the 28th day of June, 2019, at or near Edmonton, Alberta, he did unlawfully cause or permit any noise that disturbs the peace of another individual, to wit: Prohibited Noise, contrary to section 14(1) of the *Community Standards Bylaw 14600* (the "*Bylaw*") (the "Charge").

**TAKE NOTICE THAT counsel for the Accused will apply to the Court for the following orders:**

[1] A declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") that the constitutional rights of the Accused guaranteed by sections 2(a) and 2(b) of the *Charter* are infringed by the Charge;

- [2] An order that Mr. Malayko was engaged in lawful activity protected by section 2(a) and 2(b) of the *Charter*, that the Charge is not a justifiable infringement of his rights as aforesaid, and that he is therefore not guilty;
- [3] In the alternative, a stay of proceedings pursuant to section 24(1) of the *Charter*; and
- [4] In the alternative, a dismissal of the charge against Mr. Malayko because he did not breach the Bylaw.

**AND FURTHER TAKE NOTICE THAT the grounds for the application are as follows:**

- [5] Early on the evening of June 28, 2019, Mr. Malayko began communicating with passersby a religious message, herein referred to as “street preaching”, on a busy street corner in Edmonton. He used, as he always uses, a small amplification system that marginally amplifies his voice.
- [6] After street preaching for a few minutes, Mr. Malayko’s colleague, Nehemia Smeding arrived. Mr. Malayko then ceased street preaching and Mr. Smeding commenced street preaching.
- [7] At some point thereafter, two Edmonton Police Service (“EPS”) officers, Constable Blackwood and Constable Strutynski, arrived. EPS has a well-documented history of harassing Mr. Malayko and Mr. Smeding for their peaceful and lawful exercise of their constitutional rights.
- [8] The officers approached with a pre-filled violation ticket. They approached Mr. Smeding and asked for his identification. Mr. Smeding did not have any identification with him. The officers then turned to Mr. Malayko, whom the officers knew from previous interactions, and communicated that a ticket would be issued to him as he was “the leader”. The officers wrote Mr. Malayko’s name on the violation ticket and handed it to him.
- [9] Mr. Malayko has plead “not guilty” to the ticket. He contends that both the ticket itself and the act of issuing the ticket are in breach of his rights to freedom of expression and freedom of religion as protected by sections 2(b) and 2(a) of the *Charter* and he therefore ought to be

acquitted of the charge, or, in the alternative, be granted a stay of proceedings pursuant to section 24(1) of the *Charter*.

## **SECTION 2(B) – FREEDOM OF EXPRESSION**

[10] This Court must answer three questions in determining whether an expressive activity is protected by section 2(b) of the *Charter*:

- 1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of section 2(b) protection?
- 2) Is the activity excluded from that protection as a result of either the location or the method of expression?
- 3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?<sup>1</sup>

[11] Mr. Malayko contends that the first and third requirement of this test are answered in the affirmative, while the second requirement is answered in the negative.

[12] The activity for which Mr. Malayko received a ticket, street preaching, is an act of expression, and which contains expressive content. Further, the effect of the ticket, if not the very purpose of *issuing* the ticket, is to limit or prevent Mr. Malayko's expression. Mr. Malayko will submit the purpose of issuing the ticket was to limit the content of his expression. The effect of issuing the ticket, and the ticket itself, is to limit his street preaching. Mr. Malayko states, and the fact is, that he was not in breach of the *Bylaw* in any event.

*IS THE ACTIVITY EXCLUDED FROM THAT PROTECTION AS A RESULT OF EITHER THE LOCATION OR THE METHOD OF EXPRESSION?*

[13] The location of an expressive activity can only remove it from the protection of section 2(b) of the *Charter* if permitting expressive activity in that location conflicts with or undermines

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<sup>1</sup> *Canadian Broadcasting Corp v Canada (Attorney General)* [*Canadian Broadcasting*], 2011 SCC 2, 1 SCR 19 at para 38.

the values protected by freedom of expression.<sup>2</sup> Permitting expression on the corner of streets does not undermine the values underlying freedom of expression. On the contrary, it furthers those values by allowing individuals to communicate openly and effectively with fellow citizens in a place.

[14] There are three core values that underly freedom of expression: self-fulfillment, truth-seeking, and democratic discourse.<sup>3</sup> Expression on street corners undermines none of those values and in this context, furthers all three.

[15] Mr. Malayko was ticketed in response to preaching on the corner of 104 Street and 82 Avenue. The corner is part of a busy intersection and is in the midst of shops, pubs, and restaurants, all of which provide a lively atmosphere for discourse and self-fulfillment. Additionally, it is frequented by numerous buskers who express themselves through various methods. It is a not a quiet residential street; it is a popular urban street where the public gathers to shop and socialize. Further, Mr. Malayko was issued the ticket for allegedly disturbing the peace of another at 6:40 pm a busy, sunny Friday evening in June. It is trite law that a street corner such as this is a location that receives the highest degree of constitutional protection.

[16] As for the method of expression, Mr. Malayko's religious-based message did not constitute criminal hate speech, it did not advocate violence and it was not obscene or indecent as to cause harm incompatible with society's proper functioning.<sup>4</sup> The expressive activity in question is not excluded from section 2(b) protection as a result of either the location or method of expression.

## **SECTION 2(A) – FREEDOM OF RELIGION**

[17] An infringement of section 2(a) of the *Charter* will be made out where a claimant has a sincerely-held religious belief that has a nexus with religion and where the impugned

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<sup>2</sup> *Canadian Broadcasting* at para 37.

<sup>3</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

<sup>4</sup> *R v Labaye*, 2005 SCC 80 (CanLII), [2005] 3 SCR 728 at paras 21-23.

government action 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.<sup>5</sup>

[18] Mr. Malayko is a Protestant Christian who believes in and attempts to act in all his ways in accordance with the tenets of the Bible. He manifests his religious beliefs in various ways, including, but not limited to, praying, refraining from behaviour and activities he regards as sinful, engaging in worship, and communicating to others about his beliefs through conversation, teaching and preaching, including publicly in public spaces.

[19] Mr. Malayko sincerely believes in the need for and benefit of sharing his religious message, the Gospel or "good news" of Jesus Christ, to all those he can. He believes that engaging in such conduct is required of him by the Bible, which calls followers of Jesus to, out of love for others, tell everyone of the salvation found in Christ. Mr. Malayko believes that when he preaches about the Gospel, he is answering a call by Christ to do so.

[20] According to the Supreme Court of Canada:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, **the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.**<sup>6</sup>

[21] The ticket and the issuing of the ticket are, on its face, an interference with Mr. Malayko's right to act in accordance with his religious beliefs in a manner that is more than trivial or insubstantial and therefore an unjustified infringement of section 2(a) of the *Charter*.

## **REMEDY ANALYSIS AND CONCLUSION**

[22] Mr. Malayko seeks a declaration pursuant to section 24(1) that his *Charter* section 2(b) and 2(a) rights were unjustifiably breached.

[23] He further seeks an order that he is justified by sections 2(b) and 2(a) of the *Charter* and is therefore not guilty of the Charge.<sup>7</sup>

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<sup>5</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 at para 32.

<sup>6</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94.

<sup>7</sup> *R v Whatcott*, 2014 SKPC 215 at para 85.

[24] In the alternative, he seeks a dismissal of the Charge resulting from a finding that he did not breach the *Bylaw*.

[25] In the alternative, Mr. Malayko also seeks a remedy pursuant to section 24(1) of the *Charter* in the way of a stay of proceedings, or an absolute discharge, according to the Court's discretion.

[26] Where a *Charter* violation occurs as a result of government action, section 24(1) of the *Charter* permits this Court to provide an appropriate and just remedy.<sup>8</sup> The Supreme Court of Canada has stated:

Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. ... A superior court may craft any remedy that it considers appropriate and just in the circumstances.<sup>9</sup>

[27] This Court has stated, "by application of s. 24(1), a court of competent jurisdiction may issue a judicial stay (or other *Charter* remedies) in respect of the criminal proceedings."<sup>10</sup> More specifically, this Court has unequivocally stated, "The Provincial Court of Alberta is a court of competent jurisdiction to grant a judicial stay where a breach of s. 9 of the *Charter* or where a breach of other *Charter* rights has been established and the presiding judge determines that a judicial stay is the appropriate and just remedy under s. 24 (1) of the *Charter*."<sup>11</sup>

[28] In *R v Elliot*, this Court found that a just and appropriate remedy under s 24(1) of the *Charter* was to grant the accused an absolute discharge, due to a violation of the accused's right not to be arbitrarily detained, despite the fact that the Accused was found guilty of the charge.<sup>12</sup> In addition, the Ontario Court of Appeal restored a trial judge's decision to dismiss charges against the accused because of an unlawful strip and search which violated the accused's

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<sup>8</sup> *R v 974649 Ontario Inc*, 2001 SCC 81, 3 SCR 575 at para 14.

<sup>9</sup> *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87.

<sup>10</sup> *R v Pringle*, 2003 ABPC 7 at para 95.

<sup>11</sup> *R v Pringle*, 2003 ABPC 7 at para 94.

<sup>12</sup> *R v Elliott*, [1984] AJ No 940, 57 AR 49 at paras 13-14.

*Charter* section 8 rights, even though it had no bearing on the driving offence for which the accused was charged.<sup>13</sup>

[29] As for a stay of proceedings, the Supreme Court of Canada has stated:

It must always be remembered that a stay of proceedings is only appropriate “in the clearest of cases”, where the prejudice to the accused’s right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.<sup>14</sup>

[30] It has also been adopted by the Supreme Court of Canada that a stay of proceedings would be appropriate when two criteria are fulfilled:

- 1) The prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- 2) No other remedy is reasonably capable of removing that prejudice.

These guidelines were to apply equally with respect to prejudice to the accused or to the integrity of the judicial system.<sup>15</sup> The presence of either one of the criteria justifies the exercise of discretion in favour of a stay.<sup>16</sup>

[31] In *R v Pringle*, this Court held that an appropriate remedy for a *Charter* section 9 violation includes a stay even if there is no nexus or temporal connection between the breach and the evidence that ultimately would lead to conviction.<sup>17</sup>

[32] In *R v Herter*, this Court stayed the proceedings of an accused based on his *Charter* section 9 rights having been breached.<sup>18</sup> Likewise, the Supreme Court of Canada has stayed proceedings against an accused due to a breach of their *Charter* section 7 and 11 rights.<sup>19</sup>

[33] In *R v Weaver*<sup>20</sup>, the Alberta Court of Appeal reiterated that a stay of proceedings, which is tantamount to a dismissal of the charge, should only be granted in the “clearest of cases”. In

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<sup>13</sup> *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305

<sup>14</sup> *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82.

<sup>15</sup> *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 75.

<sup>16</sup> *R v Carosella*, [1997] 1 SCR 80 at para 56.

<sup>17</sup> *R v Pringle*, 2003 ABPC 7 at para 95.

<sup>18</sup> *R v Herter*, [2006] AJ No 1058, 2006 ABPC 221 at para 45.

<sup>19</sup> See *R v Demers*, [2004] 2 SCR 489, 2004 SCC 46 and *R v Carosella*, [1997] 1 SCR 80.

<sup>20</sup> *R v Weaver*, (2005) 2005 ABCA 105, 27 CR (6<sup>th</sup>) 397.

effect, a stay of proceedings should be granted as a last resort to be taken when other acceptable avenues protecting the accused's rights to full answer and defence have been exhausted or irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were to continue, or if the circumstances of a prosecution were such as to connote unfairness or vexatious to such a degree that it would contravene fundamental notions of justice held by the community and thus undermine the integrity of the judicial process.<sup>21</sup>

[34] Mr. Malayko's *Charter* section 2(b) and 2(a) rights were violated without justification. It is respectfully submitted that a stay of proceedings is appropriate in this case and therefore the charges should be dismissed and the proceedings stayed.<sup>22</sup>

**AND FURTHER TAKE NOTICE THAT in support of this application the Accused may rely on the following cases and such other authority as counsel may advise:**

- *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 at para 32;
- *Baars v Children's Aid Society of Hamilton*, 2018 ONSC 1487 at paras 200-202;
- *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, 1 SCR 19 at para 38;
- *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87;
- *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295;
- *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, 3 SCR 141 at para 74;
- *R v 974649 Ontario Inc*, 2001 SCC 81, 3 SCR 575 at para 14;
- *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295;
- *R v Carosella*, [1997] 1 SCR 80 at para 56;
- *R v Dearing*, 2004 SKPC 116;
- *R v Demers*, [2004] 2 SCR 489, 2004 SCC 46;
- *R v Elliott*, [1984] AJ No 940, 57 AR 49 at paras 13-14;
- *R v Ferguson*, 2008 SCC 6 ("Ferguson") at para 61;

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<sup>21</sup> *R v Herter*, 2006 ABPC 221 at para 44.

<sup>22</sup> *R v Whatcott*, 2011 ABPC 336.



- *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305;
- *R v Herter*, 2006 ABPC 221 at para 44;
- *R v Labaye*, 2005 SCC 80 (CanLII), [2005] 3 SCR 728 at paras 21-23;
- *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82;
- *R v Pawlowski*, 2011 ABQB 93;
- *R v Pringle*, 2003 ABPC 7 at para 95;
- *R v Weaver*, (2005) 2005 ABCA 105, 27 C.R. (6<sup>th</sup>) 397;
- *Ross v West Vancouver (District of)*, 1991 CanLII 516 (BC CA);
- *R v Whatcott*, 2011 ABPC 336;
- *R v Whatcott*, 2014 SKPC 215 at para 85; and
- *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

**AND FURTHER TAKE NOTICE THAT the Accused expressly reserves the right to raise additional constitutional arguments that are disclosed by the evidence and that are not the subject of this notice.**

**AND FURTHER TAKE NOTICE THAT any statements of fact contained in this notice should not be interpreted as admissions of fact, but rather, merely as anticipated evidence based on disclosure provided by the Crown.**

DATED at the City of Calgary in the Province of Alberta this 15<sup>th</sup> day of January 2020.

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