



Docket No. A70807866R

IN THE PROVINCIAL COURT OF ALBERTA
Sitting at Edmonton

BETWEEN:

HER MAJESTY THE QUEEN

(The Crown)

- and -

DALE MALAYKO

(The Accused)

WRITTEN SUBMISSIONS OF THE ACCUSED

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PART 1: OVERVIEW

1. This case concerns state censorship of peaceful expression on a busy street corner within Old Strathcona, Edmonton.
2. On June 28, 2019, Mr. Dale Malayko and a colleague, Nehemia Smeding were on a busy street corner peacefully expressing their religious message when Constables Strutynski and Blackwood of the Edmonton Police Service (the “EPS”) issued Mr. Malayko a ticket for violating section 14(1) of the Community Standards Bylaw 14600 (the “Bylaw”). The Constables communicated to Mr. Malayko that the ticket was in response to a complaint and for allegedly “causing or permitting a noise that disturbs the peace of another individual” (the “Ticket”).
3. The purpose and effect of the Ticket is to penalize Mr. Malayko and his colleague for expressing themselves as they did, in breach of free expression and freedom of religion rights as protected by the *Canadian Charter of Rights and Freedoms* (the “Charter”). The Ticket is therefore constitutionally invalid and ought to be thrown out.
4. Mr. Malayko pleads not guilty as he did not in fact breach the Bylaw. In the alternative, if this Court finds that Mr. Malayko did, beyond a reasonable doubt, violate the Bylaw, Mr. Malayko relies on the defense of justification as his street preaching is a protected activity under sections 2(a) and 2(b) of the *Charter* and the City of Edmonton (the “City”) is unable to justify the violation of his *Charter* rights under section 1 of the *Charter*.

PART 2: BACKGROUND

HISTORY OF STREET PREACHING

5. Open-air, public preaching, referred to as street preaching, is a method of informing the public about religious ideas and beliefs and attempting to persuade members of the public about the truth of those ideas and beliefs. Typically, the preaching is done at open, highly trafficked public spaces, such as broad street corners, parks and the yards in front of important civic buildings.

6. While street preaching is not common in 21st Century Canada, “it is a practice which can claim a long history, supported by biblical antecedents and historical examples.”¹ Street preaching’s roots stretch back into antiquity, including “Hebrew prophecy, ancient oratory, and the proclamation of the gospel by Jesus and the apostles.”²
7. Street preaching is a type of “soapbox oratory”, which can be defined as outdoor impromptu speaking that involves the speaker standing atop a small box or makeshift platform so as to make the speaker more visible.³ “By World War 1, ‘soapbox’ had become a metaphor for impassioned, impromptu, unofficial public speaking.”⁴
8. During the early 20th Century, soapbox orators became a dynamic element of cities’ cultural environment and “provided political education and entertainment for people of limited means, recruited members for labor, suffrage, antiracist, and other movements, and attempted religious conversions.”⁵ This type of public discourse “transformed urban locales into vibrant, dynamic, and contested spaces.”⁶ The intention of these soapbox orators, much like Mr. Malayko, was to engage the audience. As Mary Anne Trasciatti describes it, and Mr. Malayko will testify, “speakers tell stories, make arguments, and appeal to the intellect, emotions, and values of their listeners”.⁷

PART 3: APPLICABLE LAW

9. The fundamental Canadian right of freedom of religion and freedom of expression are celebrated and constitutionally protected in sections 2(a) and 2(b) of the *Charter*, which states:

Everyone has the following fundamental freedoms:

¹ Stuart Blythe, “Open-Air Preaching: A Long And Diverse Tradition” (2018) *Perichoresis*, Vol 16, Issue 1, 61-80 at 76. **(TAB 33)**

² Blythe, at 64. **(TAB 33)**

³ Mary Anne Trasciatti, “Athens or Anarchy? Soapbox Oratory and the Early Twentieth-Century American City.” (2013) *Buildings & Landscapes: Journal of the Vernacular Architecture Forum*, Vol 20, No. 1, 43–68 at 43. **(TAB 32)**

⁴ Mary Anne Trasciatti at 44. **(TAB 32)**

⁵ Mary Anne Trasciatti at 43. **(TAB 32)**

⁶ Mary Anne Trasciatti at 52. **(TAB 32)**

⁷ Mary Anne Trasciatti at 50. **(TAB 32)**

freedom of conscience and religion

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

10. Section 1 of the *Charter* states:

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.

11. Section 24(1) of the *Charter* states:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

12. City of Edmonton Bylaw 14600: Community Standards Bylaw⁸ states:

DEFINITIONS 13(a) “noise” means any sound that is reasonably likely to disturb the the peace of others

PROHIBITED 14(1) A person shall not cause or permit any noise that disturbs the peace of another individual.

NOISE

14(3) A person may be found guilty of a contravention of this section whether or not the decibel level:
(a) is measured

CRITERIA 15 In determining if a sound is reasonably likely to disturb the peace of others the following criteria may be considered:
(a) type, volume, and duration of the sound;
(b) time of day and day of week;
(c) nature and use of the surrounding area;
(d) decibel level, if measured; and
(e) any other relevant factor.

⁸ *Community Standards Bylaw 14600* [“The Bylaw”]. (TAB 30)

PART 4: ARGUMENT

THE BYLAW

13. Mr. Malayko is not challenging the constitutionality of the Bylaw. He accepts that the City has a legitimate interest in managing noise.⁹ Rather, Mr. Malayko contends that he did not violate the Bylaw. Further, the Ticket is a result of the misuse or misapplication of the Bylaw in response to an expressive activity that some residents of Edmonton are bothered by and is an “unconstitutional curtailment of freedom of expression in an open public venue”.¹⁰ The mere fact the Bylaw is valid and tickets may be issued pursuant to it “says nothing about whether the exercise of that power in this particular case was lawful or constituted a violation of a Charter right”.¹¹
14. The street preaching for which Mr. Malayko was ticketed is not “noise” as defined in section 13(a) of the Bylaw. It is the spoken word, spoken in a conversational tone through moderate amplification. The spoken word, including when amplified, is not a “sound that is reasonably likely to disturb the peace of others”.
15. Nothing in the Bylaw indicates it was intended to prohibit the spoken word, regardless of amplification, or anything other than actual “noise”. Common sense indicates “noise” is not something intelligible, such as the spoken word or live music, but rather unnecessary and irritating sounds that have no intrinsic value, such as obnoxious backyard parties at three o'clock in the morning or loud and sustained machinery noises in close proximity to a dwelling from equipment such as a chainsaw. These are the types of “sounds” that are “reasonably likely to disturb the peace of others”.¹² The spoken word could only become “reasonably likely to disturb the peace of others” if it rose to such an objectively loud level that it drowned out all other sounds in the area and made conversation without yelling impossible. That is not what occurred on the evening of June 28, 2019.

⁹ *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 99. (TAB 11)

¹⁰ *Bracken v Niagara Parks Police*, 2018 ONCA 261 at para 92 [*Bracken*]. (TAB 2)

¹¹ *Bracken* at para 90. (TAB 2)

¹² The Bylaw, section 13(a). (TAB 30)

16. Unless this Court accepts that the street preaching that occurred on the evening of June 28, 2019 is, beyond a reasonable doubt, “noise” as defined in the Bylaw, Mr. Malayko must be acquitted.
17. Further, whether this Court finds that the street preaching is a “noise” pursuant to sections 13 and 14 of the Bylaw, Mr. Malayko submits that it is not objectively a noise that disturbs the peace of another individual. What constitutes “disturbing the peace of another individual” is not defined in the Bylaw. A purely subjective interpretation cannot be used.¹³ The Supreme Court of Canada provides guidance on what an objective definition of “disturbing the peace of another” is in *R v Lohnes*, where the Court rhetorically asked, “does mere annoyance or emotional disturbance of the complainant suffice? Or is something more required?”.¹⁴

18. Regarding the word “disturbance”, the Supreme Court found it:

encompasses a broad range of meanings. At one extreme, it may be something as innocuous as a false note or a jarring colour; something which disturbs in the sense of annoyance or disruption. At the other end of the spectrum are incidents of violence, inducing disquiet, fear and apprehension for physical safety.¹⁵

19. The Court was aware of the root issue, which it articulated as:

The individual right of expression must at some point give way to the collective interest in peace and tranquillity, and **the collective right in peace and tranquillity must be based on recognition that in a society where people live together some degree of disruption must be tolerated.**¹⁶

20. This collective right to peace, which does not benefit from the constitutional protection afforded the right to freedom of expression, is qualified by the fact that what is “disturbing” in a suburb at night is not the same as in Old Strathcona on a Friday evening in summer. As the Supreme Court noted:

¹³ *R v Lohnes*, [1992] 1 SCR 167, [1992] 1 RCS 167 at para 15 [*Lohnes*]. (TAB 22)

¹⁴ *Lohnes* at para 1. (TAB 22)

¹⁵ *Lohnes* at para 7. (TAB 22)

¹⁶ *Lohnes* at para 9 [emphasis added]. (TAB 22)

...the context in which the activity takes place must be considered so that the countervailing interests can be duly weighed. The lawful jangling of the street musician at an urban intersection at noon may become criminal if conducted outside a citizen's bedroom window at three o'clock in the morning.”¹⁷

21. Mr. Malayko submits that the Bylaw, based on a plain reading, is similar to section 175(1)(a) of the *Criminal Code* in so far as its purpose is “not to limit expression but rather to prevent the disruption of the public's normal activity and use of a public place by externally manifested disorder.”¹⁸ As such, Mr. Malayko does not challenge the Bylaw and submits that he did not “disturb the peace of another”. He therefore did not violate the Bylaw, and ought to be acquitted. The Bylaw is being misapplied by EPS to silence Mr. Malayko’s street preaching in response to a complaint from someone who does not like the sound of street preaching. Mr. Malayko’s street preaching is no more objectively loud or “noisy” than city buses, loud traffic noises, and many other city buskers, all of whom use city streets in the ordinary course of the day without being ticketed by EPS.
22. The spoken word, when in the form of moderately amplified street preaching, may annoy some individuals, but that is hardly surprising, and it does not mean it rises to the level of “disturbing the peace”. A free society tolerates modes of expression that some people would prefer not to encounter, be it commercial billboard advertising, music on the street they do not like, artwork they consider distasteful, or street preaching. Government and law enforcement ought not to cater to the complaints of such individuals by restricting modes of expression some find undesirable.
23. Mr. Malayko submits that if Constable Strutynski had properly considered the criteria in section 15 of the Bylaw, instead of reflexively issuing a ticket because a shop owner complained, the Ticket would not have been issued. Of particular relevance is the type of sound (moderately amplified spoken word), the time of day (early in the evening on a sunny day in June), day of the week (a lively Friday evening), nature and use of the surrounding area (a broad, busy commercial street corner in Old Strathcona that is regularly visited by buskers

¹⁷ Lohnes at para 15. (TAB 22)

¹⁸ *R v Lawrence (Alta QB)*, [1992] AJ No 610, [1992] 5 WWR 659 at para 18 [Lawrence]. (TAB 21)

and street performers) and the relevant factor of the constitutionally-protected right to freedom of expression.

FREEDOM OF EXPRESSION

24. Mr. Malayko was ticketed for peacefully expressing his personal and religious beliefs in a suitable public place during daylight hours, in breach of his free expression rights. Even if he did violate the Bylaw, his conduct is justified by section 2(b) of the *Charter*.
25. Freedom of expression “has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years.”¹⁹ As the Supreme Court has found, “[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.”²⁰ Indeed, “[f]reedom in thought and speech... are the essence of our life.”²¹ Due to its importance as a fundamental value in our society, any attempt by government “to restrict the right must be subjected to the most careful scrutiny”²² and “calls for vigilance.”²³ To summarize the jurisprudence, “[t]he vital importance of freedom of expression cannot be overemphasized.”²⁴
26. Indeed, “freedom of expression was entrenched in our Constitution...to ensure that everyone is able to manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, regardless of how unpopular, distasteful or contrary to the mainstream.”²⁵ The *Charter* describes this protection of speech as “fundamental” “because in a free, pluralistic and

¹⁹ *Christian Heritage Party v City of Hamilton*, 2018 ONSC 3690, [2018] OJ No 5105 at para 39. (TAB 4)

²⁰ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, [1989] 2 RCS 1326 at para 3, [Edmonton Journal]. (TAB 7)

²¹ *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, [1991] 1 RCS 139 at para 78, quoting *Boucher v The King*, [1951] SCR 265 at page 288 [Committee for the Commonwealth] (TAB 5)

²² *R v Sharpe*, 2001 SCC 2 at para 22, [2001] 1 SCR 45 [Sharpe]. (TAB 25)

²³ *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 36. (TAB 10)

²⁴ *Committee for the Commonwealth* at para 94, quoting *R v Kopyto* (1987), 24 OAC 81 at pp 90-91, 62 OR (2d) 449. (TAB 5)

²⁵ *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, [1989] SCJ No 36 at para 41 [Irwin Toy Ltd]. (TAB 9)

democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.”²⁶

27. Not everybody will appreciate or approve of every sound or message they hear. However, those who “do not like an idea or an image ...are free to argue against it or simply turn away”.²⁷ Freedom of expression protects “not only accepted opinions but also those that are challenging and sometimes disturbing”.²⁸ In addition, freedom of expression protects not only those who are speaking, but also the rights of members of the public to receive information, ideas and opinions, including Mr. Malayko’s religious message.²⁹

28. The Supreme Court has recognized three “core values” that underlie freedom of expression:

...(1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons.³⁰

This case engages the core values of seeking the truth and the common good and promoting self-fulfillment. Mr. Malayko’s message epitomizes the type of personal expression that engages the values of truth-seeking and self-fulfillment and the closer speech is to one of the core values, the higher the degree of protection afforded it.³¹

Test for Infringement of Freedom of Expression

29. To determine whether the Ticket infringes section 2(b) of the *Charter*, “three questions must be asked”:

- 1) Does Mr. Malayko’s street preaching have expressive content, thereby bringing it, *prima facie*, within the scope of section 2(b) protection?

²⁶ *Irwin Toy Ltd* at para 41. (TAB 9)

²⁷ *Sharpe* at para 21. (TAB 25)

²⁸ *R v Guignard*, 2002 SCC 14 at para 19 citing *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2, at para 21. (TAB 18)

²⁹ *Edmonton Journal* at para 10. (TAB 7)

³⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 75 [*Sierra Club*]. (TAB 29)

³¹ *Sierra Club* at para 75. (TAB 29)

- 2) If so, does the method or location of the expression remove that protection?
- 3) If the activity is protected by section 2(b), does the EPS' ticket infringe that protection, in either purpose or effect?³²

The answer to the first and third requirements are answered in the affirmative, while the second requirement is answered in the negative.

30. The first branch of the test is met. Mr. Malayko's message has expressive content which conveys meaning. Indeed, the spoken word is one of the most natural and sacrosanct forms of expression. The "unpopularity of the views espoused" is not a consideration in determining whether expressive content is protected by section 2(b) of the *Charter*.³³
31. The second branch of the test is also met as Mr. Malayko's expression is not disqualified from protection by virtue of either his location or method of expression. In order to determine whether the method or location of the conveyance of a message should be excluded from *Charter* protection, this Court must consider:
 - i. the historical or actual function of the location of the activity or the method of expression; and
 - ii. whether other aspects of the location of the activity or the method of expression suggest that expression at that location or using that method would undermine the values underlying free expression.³⁴
32. 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 the values protected by freedom of expression.³⁵ Further, the method by which Mr. Malayko expressed himself does not remove his expression from *Charter* protection. Mr. Malayko's religious-based message did not constitute criminal hate speech, did not advocate violence

³² *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 at para 37 [Greater Vancouver] **(TAB 8)**; *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 at para 38 [Canadian Broadcasting Corporation]. **(TAB 3)**

³³ *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 62 [Ross]. **(TAB 28)**

³⁴ *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2 at para 37. **(TAB 3)**

³⁵ *Canadian Broadcasting* at para 37. **(TAB 3)**

and was not obscene or indecent as to cause harm incompatible with society's proper functioning.³⁶

33. The fact that Mr. Malayko's expression is sometimes moderately amplified does not, in and of itself, remove his street preaching from the protection of section 2(b) of the *Charter*.
34. As is discussed below and will be demonstrated at trial, the street corner where Mr. Malayko was ticketed is a busy, lively and loud area. City buses regularly stop and accelerate loudly near the street corner. Whyte Avenue and 104th Street are multi-lane roads with constant heavy vehicle traffic. The corner is regularly home to musical street performers. A street corner like the corner of Whyte Avenue and 104th Street is "a public space where individuals can openly interact with each other and their surroundings."³⁷
35. Freedom of expression is more than a right to yell in an uninhabited forest or whisper on the sidewalk. A generous and purposive approach to freedom of expression recognizes it is, among other things, a right to *effectively* communicate with members of the public, which in certain contexts, includes a right to moderately amplify one's voice. The reality is, if Mr. Malayko and his colleagues did not use some form of amplification, they would not be heard over the substantial background noise of the area except by those immediately in front of them. As the Ontario Court of Appeal recently noted, "[a]n aspect of freedom of expression is the ability to address people in places where crowds are known to congregate."³⁸

Historical Function as a Location for Free Expression

36. Speaking on street corners is a centuries old tradition. Town criers utilized these public locations in ancient Rome and medieval England to spread their messages. Throughout the 19th Century and into the 20th Century, news hawkers, commonly referred to as newsboys, utilized busy street corners to gain customers and soapbox orators capitalized on these prime locations. More closely related to Mr. Malayko's present situation, there have been examples

³⁶ *R v Labaye*, 2005 SCC 80 (CanLII), [2005] 3 SCR 728 at paras 21-23. (TAB 20)

³⁷ *Greater Vancouver* at para 43. (TAB 8)

³⁸ *Bracken v Niagara Parks Police et al*, 2018 ONCA 261 at para 44 [Bracken]. (TAB 2)

of street preachers sharing religious message throughout history, going as far back as antiquity.³⁹

37. Mr. Malayko is part of this centuries-old tradition of soapbox oratory and street preaching. Street preachers, along with the town crier, are perhaps the most iconic examples of this method of expression. While both these methods have become increasingly uncommon with modern technology and online resources, the importance of protecting these methods of expression remains the same.

38. As the Supreme Court of Canada has found:

Unquestionably, the dissemination of an idea is most effective when there are a large number of listeners; the economic and social structure of our society is such that the largest number of individuals, or potential listeners, is often to be found in places that are state property. **One thinks immediately of parks or public roads which, by their very nature, are suitable locations for a person wishing to communicate an idea.**⁴⁰

39. Indeed “streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted.”⁴¹ The Supreme court has further importantly found:

Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, **emitting noise produced by sound equipment onto public streets seems not in itself to interfere with it.**⁴²

Actual Function

40. Mr. Malayko was ticketed in response to speaking on the corner of Whyte Avenue and 104th Street, with its extra wide brick sidewalks, in the heart of Old Strathcona. Old Strathcona is described on a City of Edmonton website as:

³⁹ Stuart Blythe, “Open-Air Preaching: A Long And Diverse Tradition” (2018) *Perichoresis*, Vol 16, Issue 1, pp. 61-80 at p 64. (TAB 33)

⁴⁰ *Committee for the Commonwealth* at para 11. [Emphasis added] (TAB 5)

⁴¹ *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 81 [Montréal (City)]. (TAB 11)

⁴² *Montréal (City)* at para 67. [Emphasis added] (TAB 11)

Anchored by the funky, bohemian spirit of Whyte Avenue... [t]he city's celebrated arts and cultural community makes its home here, as does a plethora of unique local boutiques, one-of-a-kind art galleries and music shops, and trendy restaurants and cafés. ...socialize on a summer patio and enjoy world-class festivals, entertainment, and live music.⁴³

41. This location is ideal for unofficial public speaking such as street preaching because places like Old Strathcona are especially compatible with the type of expressive activity Mr. Malayko engages in and are likely to maximize the number of people that will hear Mr. Malayko's message. The occurrence of this type of expressive activity in this type of location furthers the values underlying freedom of expression.
42. The corner of Whyte and 104th is frequented by numerous buskers who express themselves through various methods. It is not a quiet residential street; it is a popular urban street where the public gathers to shop, socialize and enjoy cultural activities. Further, Mr. Malayko was issued the ticket for allegedly disturbing the peace of another at 6:40 PM on a lively, sunny Friday evening in June.

Conclusion

43. The Supreme Court of Canada has stated that the public square and the speakers' corner have by tradition become places of protected expression.⁴⁴ It is trite law that a street corner such as the corner of Whyte Avenue and 104th Street is a location that receives the highest degree of constitutional protection. Mr. Malayko's expression is not excluded from *Charter* protection by virtue of its location or method.
44. The third and final branch of the test is to determine whether the purpose or effect of the government action is to limit freedom of expression. In this case, both the purpose and effect of the Ticket is to limit Mr. Malayko's expressive activity. As will be shown at trial, when the Constables issued the ticket to Mr. Malayko, they did so with the purpose of penalizing and deterring Mr. Malayko's street preaching. The effect of the ticket is the same: Mr. Malayko is fined for his expression and deterred from engaging in it again, knowing that he may be further

⁴³ City of Edmonton Website: *Old Strathcona & Whyte Avenue / Explore Edmonton*, <https://exploreedmonton.com/attractions-and-experiences/old-strathcona-whyte-avenue> (TAB 31)

⁴⁴ *Montréal (City)* at para 61. (TAB 11)

penalized. As in *Ross v New Brunswick*, the purpose of the Ticket is to restrict Mr. Malayko's expressive activities and therefore violates section 2(b) of the *Charter*.⁴⁵

FREEDOM OF RELIGION

45. As the Supreme Court of Canada found in the seminal case of *R v Big M Drug Mart Ltd*⁴⁶:

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.**⁴⁷

46. 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 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.⁴⁸

47. As Mr. Malayko will testify, he is a Protestant Christian who believes in and attempts to act 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 openly in public spaces.

48. Mr. Malayko sincerely believes in the general need for and benefit of sharing his religious message, the Gospel or "good news" of Jesus Christ, to all those he can.⁴⁹ He believes it is an act of love to his community to tell them about what he believes is the eternal hope that only Jesus provides and about what he believes is the truth of the reality of the afterlife. He also believes Jesus has called him to do this specifically through street preaching. There is a direct nexus between Mr. Malayko's street preaching and his religious beliefs.

⁴⁵ *Ross* at para 62. (TAB 28)

⁴⁶ [1985] 1 SCR 295. (TAB 13)

⁴⁷ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, [1985] 1 RCS 295 at para 94 [*Big M Drug Mart*]. (TAB 13) [Emphasis added]

⁴⁸ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32. (TAB 1)

⁴⁹ *The Bible*, Matthew 28:18-20 (English Standard Version). (TAB 34)

49. The Ticket interferes with Mr. Malayko's freedom of religion in a manner that is more than trivial or insubstantial because it penalizes him for manifesting his religious beliefs through preaching to residents of Edmonton about the good news of Jesus Christ. Mr. Malayko's religious expression is justified by section 2(a) of the *Charter* and he therefore ought to be acquitted.⁵⁰
50. There is then no need for this Court to address whether the Ticket is justified under section 1 of the *Charter*. However, should this Court find that a section 1 analysis is necessary, Mr. Malayko submits the City is unable to meet its burden to show that the ticket is a justified limitation of his *Charter* rights.

SECTION 1 JUSTIFICATION ANALYSIS

51. As the Saskatchewan Provincial Court stated in *R v Whatcott*, 2014 SKPC 215:

Once there is an infringement of s. 2(b), the question becomes whether the infringement is reasonable and demonstrably justified in a free and democratic society, pursuant to s. 1 of the Charter. The case *R v Oakes*, [1986] 1 SCR 103, provides the framework for this question. The first requirement is that the objective is sufficiently important to warrant a limit of a Charter right. The second requirement is that the means used to reach that objective are reasonable and demonstrably justified. This will require ensuring that the measures are rationally connected, that they are minimally impairing, and that they are proportional to the effect of the limit of the Charter right.⁵¹

52. The onus of proof rests on the party seeking to invoke section 1 of the *Charter*. Here, that is the Crown.⁵²
53. As discussed above, the purpose of the Ticket is to penalize and deter Mr. Malayko's street preaching. Mr. Malayko submits that, like in *R v Whatcott*, 2011 ABPC 336, preventing Mr. Malayko from peacefully street preaching through moderate amplification on a Friday evening

⁵⁰ *R v Whatcott*, 2014 SKPC 215 at para 85. **(TAB 27)**

⁵¹ *R v Whatcott*, 2014 SKPC 215 at para 66. **(TAB 27)** See also Canadian Broadcasting Corporation at para 64. **(TAB 3)**

⁵² *R v Whatcott*, 2011 ABPC 336 at para 26. **(TAB 26)**

in June at the corner of Whyte Avenue and 104th Street is not a pressing and substantial objective. As such, there is no need to consider whether the ticket is proportionate.⁵³

54. However, should this Court determine the objective of the Ticket is pressing and substantial, Mr. Malayko submits the Ticket is a disproportionate response. Issuing a bylaw ticket in the amount of \$250 was not required to objectively prevent people from being disturbed or to maintain the ability of residents to access and benefit from the public spaces in and around the corner of Whyte Avenue and 104th Street.⁵⁴
55. The ticketing of street preaching that is not objectively louder than musical street performers or the noise generated by vehicle traffic such as city buses is not rationally connected to the prevention of noise that reasonably disturbs the peace of others. The Ticket is also not minimally impairing, as it completely prevents Mr. Malayko, through penalization, from *effectively* communicating his message to the public at the corner of Whyte Avenue and 104th Street in the early evening hours. Finally, the deleterious impact of the Ticket is disproportionate to any benefit gained. The severe restriction of Mr. Malayko's *Charter* rights to free expression and the free exercise of his religion far outweighs any lack of mere annoyance experienced by shop owners, consumers or pedestrians in the area.
56. To summarize, Mr. Malayko submits that the Ontario Court of Appeal's findings in *Bracken*, which was a case involving a person issued a trespass notice for peacefully expressing himself in a public park, are dispositive. The Court stated that case was:

...an instance of a single person, standing on a sidewalk at the edge of a public, semi-commercial plaza within a park, holding a sign displaying a political message. Political messages are always provocative. They imply that others are wrong, perhaps through ignorance, mistake, negligence or even moral failure. They frequently risk offending those with contrary views. **But in a free society, individuals are permitted to use open public spaces to address the people assembled there -- to challenge each other** and to call government to account. The idea that the parks are somehow different -- that they are categorically a "safe space" where people are to be protected from exposure to political messages -- is antithetical to a free and democratic society and would set a dangerous precedent. Again, this does not mean that there cannot be any limitation on expression in

⁵³ *R v Whatcott*, 2011 ABPC 336 at para 28. (TAB 26)

⁵⁴ *R v Whatcott*, 2014 SKPC 215 at para 68 (TAB 27); *R v Whatcott*, 2011 ABPC 336 at para 28. (TAB 26)

the parks based on time of day, appropriate limits on noise, or the nature of any interference with the specific activities going on in the specific location within the parks. The analysis must always be contextual. But in this instance, it is conceded that there were no circumstances that would justify the removal of a single protester with a sign from a busy plaza.⁵⁵

PART 5: RELIEF SOUGHT

57. Mr. Malayko seeks the following relief:

- i. An Order from this Court that he did not violate the Bylaw and is therefore acquitted;
- ii. Further, a declaration pursuant to section 24(1) that his *Charter* section 2(b) and 2(a) rights were unjustifiably breached;
- iii. Further, or in the alternative, an Order that he can rely on the defence of legal justification as his actions were justified by section 2(b) of the *Charter* and is therefore not guilty;⁵⁶
- iv. In the alternative, pursuant to section 24(1) of the *Charter*, a stay of proceedings, or an absolute discharge, according to the Court's discretion;
- v. Such further and other relief as this Honourable Court deems just and equitable.

REMEDY ANALYSIS

58. 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.⁵⁷ 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

⁵⁵ *Bracken* at para 93. (TAB 2) [Emphasis added]

⁵⁶ *R v Whatcott*, 2014 SKPC 215 at para 85. (TAB 27)

⁵⁷ *R v 974649 Ontario Inc*, 2001 SCC 81, 3 SCR 575 at para 14. (TAB 12)

freedoms. ... A superior court may craft any remedy that it considers appropriate and just in the circumstances.⁵⁸

59. 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.”⁵⁹ 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*.⁶⁰

60. In *R v Elliott*⁶¹, 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.⁶² 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 *Charter* section 8 rights, even though it had no bearing on the driving offence for which the accused was charged.⁶³

61. 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.⁶⁴

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

⁵⁸ *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87. **(TAB 6)**

⁵⁹ *R v Pringle*, 2003 ABPC 7 at para 95 [*Pringle*]. **(TAB 24)**

⁶⁰ *Pringle* para 94. **(TAB 24)**

⁶¹ [1984] AJ No 940, 57 AR 49. [*Elliott*]. **(TAB 16)**

⁶² *Elliott* at paras 13-14. **(TAB 16)**

⁶³ *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305. **(TAB 17)**

⁶⁴ *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82 [*O'Conner*]. **(TAB 23)**

- 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.

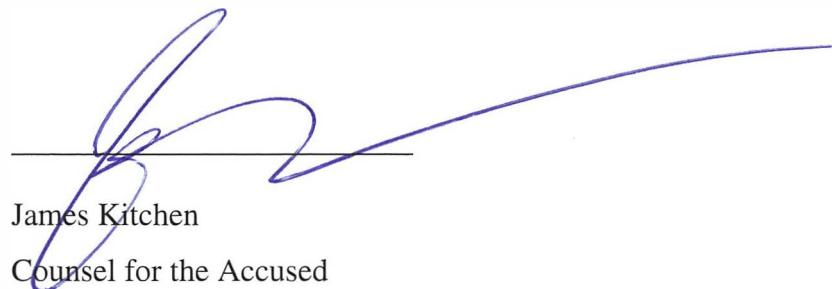
These guidelines are to apply equally with respect to prejudice to the accused or to the integrity of the judicial system.⁶⁵ The presence of either one of the criteria justifies the exercise of discretion in favour of a stay.⁶⁶

63. In *R v Pringle*⁶⁷, 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.⁶⁸

64. In *R v Herter*⁶⁹, this Court stayed the proceedings of an accused based on his *Charter* section 9 rights having been breached.⁷⁰ Likewise, the Supreme Court of Canada has stayed proceedings against an accused due to a breach of their *Charter* section 7 and 11 rights.⁷¹

65. 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 an appropriate remedy in this case.⁷²

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th day of February 2020:



James Kitchen
Counsel for the Accused

⁶⁵ *O'Connor* at para 75. (TAB 23)

⁶⁶ *R v Carosella*, [1997] 1 SCR 80 at para 56. (TAB 14)

⁶⁷ 2003 ABPC 7 [*Pringle*]. (TAB 24)

⁶⁸ *Pringle* at para 95. (TAB 24)

⁶⁹ [2006] AJ No 1058, 2006 ABPC 221 [*Herter*]. (TAB 19)

⁷⁰ *Herter* at para 45. (TAB 19)

⁷¹ See *R v Demers*, [2004] 2 SCR 489, 2004 SCC 46 at para 108 (TAB 15) and *R v Carosella*, [1997] 1 SCR 80 at para 56. (TAB 14)

⁷² *R v Whatcott*, 2011 ABPC 336. (TAB 26)