



Justice Centre

for Constitutional Freedoms

November 28, 2019

Via email and ordinary mail

Dale McFee
Chief of Police
Edmonton Police Service
9620 103A Avenue
Edmonton, AB, T5H 0H7

Dear Chief McFee,

RE: Maylako, Schacher, and Smeding; Tickets #A39182916R, #A52061914R, #A69593355R, #A52374663R, #A27034781R, #A38483281R, and #A70807866R

Congratulations on your recent swearing-in as Edmonton's new Chief of Police. The Justice Centre for Constitutional Freedoms holds the duty of law enforcement in great regard, and hopes that both the Police Service and the citizens of Edmonton will flourish under your care.

We contact you regarding an ongoing concern, which arose previous to your leadership. The matter involves street preachers who exercise their constitutional freedom, protected by section 2(a) of the *Canadian Charter of Rights and Freedoms*, to preach their message peacefully in public areas.

Unfortunately, EPS Officers are repeatedly issuing tickets for alleged bylaw violations that are subsequently withdrawn by the Crown because the tickets have been issued without a valid legal basis.

This pattern continues to repeat itself, thereby violating the *Charter* freedoms of our clients and also causing them great inconvenience.

We represent a number of these preachers regarding their interactions with your officers.

Excepting the most recent ticket, regarding which it is unknown if the Crown will prosecute or drop, in every case below where a ticket was issued by the Edmonton Police Service, the charge was withdrawn by the Crown.

July 17, 2015

On July 17, 2015, Warren Schacher (hereafter "Warren"), age 53, was peacefully expressing his views on the corner of Whyte Avenue and 105th Street when a Constable Jamieson, No. 3149, stopped him and issued him a ticket under Bylaw 14600 s 14(1) for "disturb[ing] the peace of another individual" (#A27034781R).

A woman had filed a complaint against the expression, claiming it was loud and specifically complaining about its religious contents. She stated that other people had complained to her that the expression was “hate speech.” In the police report, Constable Jamieson claims that police had been previously warned Warren that his speech was “offending” others. Warren refused to plead guilty and pay a fine for peacefully sharing his religious beliefs in public, and faced a trial set for February 26, 2016.

In January 2016, the Justice Centre was made aware of the charge against Warren and immediately set about to defend him and the right of all Canadians to freely and publicly express their beliefs and opinions, even when those beliefs and opinions offend others. By initiating disclosure requests, the Justice Centre confirmed that the charge had been made against Warren on the basis that others had found the speech “offensive”. The government, including police, have a legal obligation to protect the peaceful expression of offensive and unpopular speech. Neither government nor police have any right to suppress speech on grounds of some finding it to be “offensive.” Following the disclosure of the additional information, on February 12, 2016, the City of Edmonton agreed to withdraw the charge against Warren.

May 20, 2016

On May 20, 2016, Nehemia Smeding was sharing the gospel on the sidewalk at the same intersection at Whyte Avenue and 105th Street, with the assistance of a small amplifier. While Mr. Smeding was preaching, EPS Constable Jack Yee, No. 3328, and Sergeant Elliot, No. 2564, issued him a ticket under Bylaw 14600, 14(1) for “noise that disturbs the peace of another” (#A38483281R).

Both Constable Yee and Sergeant Elliot explained to Mr. Smeding that the ticket was being issued simply on the basis of an individual’s complaint, without any independent assessment by them, and without any effort made by them to ascertain whether there were actually sufficient grounds to justify the issue of a ticket. In fact, Constable Yee stated that he did not believe Mr. Smeding’s preaching was above the traffic noise, and Constable Yee stated that an amplified guitar player across the street was at least as loud. In short, the officers informed Mr. Smeding the summons was issued only because they had received a complaint, and not because of any objective analysis of the facts by EPS.

The Justice Centre represented Mr. Smeding in respect of this baseless ticket, and the charge was stayed as of January 9, 2017.

June 3, 2016

Constable Yee (who ticketed Nehemia Smeding) was also involved in the ticketing of Dale Malayko on June 3, 2016 under Bylaw 14600 14(1), ticket #A39182916R issued by Constable Jeffrey Strickland, No. 3031. The circumstances of this ticket are very similar to the ticket given to Mr. Smeding on May 20, as described above. Constable Yee again decried any responsibility for the ticket that he issued to Mr. Malayko because, according to Constables Yee and Strickland, the officers had no choice but to issue a ticket simply because EPS had received a complaint against Mr. Malayko. Obviously, that’s not how the law works.

Constable Yee on this occasion also opined that he did not think that Mr. Malayko was being too loud, especially as compared with the again-present guitar player and the traffic noise. We have video-tape footage (complete with audio) which shows very clearly how loud the guitar-playing was, and that it was completely ignored by Constable Yee and Constable Strickland. The guitar was played on the other side of the street and was so loud that the conversation between EPS Constables and Mr. Smeding was difficult to hear. The EPS ignored the loud guitar playing, which was far louder than the preaching of Mr. Malayko, yet issued a ticket to Mr. Malayko.

The Justice Centre represented Mr. Malayko in respect of this ticket, and this ticket was also stayed by the Crown.

February 21, 2017

The trend of issuing tickets against street preachers continued. On February 21, 2017 our client, Dale Malayko was on 106th Street, under a pedway that connects two sides of the NAIT campus. After air preaching for approximately 1.5 hrs, Mr. Malayko was approached by EPS Sergeant Klassen. Sergeant Klassen requested that Mr. Malayko move a sign that he had with him, which Mr. Malayko immediately did. Within five minutes of the arrival of Sergeant Klassen, and while Sergeant Klassen and Mr. Malayko were still conversing, EPS Constable Margarita Dolganova, No. 3879, arrived. Constable Dolganova immediately stated to Mr. Malayko that he would “have to shut this thing down” in reference to his preaching. Constable Dolganova then proceeded to issue Mr. Malayko a ticket under Bylaw 14600, 14(1) for allegedly making “noise that disturbs the peace of another.” Without citing any relevant provision or referring to any misconduct on the part of Mr. Malayko, Constable Dolganova told Mr. Malayko that he was prohibited from ever preaching in that location again. No statute or authority was cited for this decree. Constable Dolganova provided Mr. Malayko no reason for issuing the ticket.

The Justice Centre represented Mr. Malayko in regard to this ticket (#A52061914R), upon which the Crown stayed this ticket on October 31, 2017, presumably because it both infringed Mr. Malayko's *Charter* rights, and was unlikely to be successful. We are aware that the Crown also stays charges that are not in the public interest and/or that have no likelihood of a conviction.

July 3, 2017

On July 3, 2017, Mr. Malayko was preaching at the corner of 109th Street NW and Jasper Avenue. EPS Constable Benjamin Turner, No. 3657 arrived and requested Mr. Malayko to move a few feet from his current location, which Mr. Malayko immediately did. Constable Turner then left. Approximately 15 minutes later, Constable Turner returned. He asked for Mr. Malayko's ID and then proceeded to issue a ticket under Bylaw 14600, 14(1) for allegedly making “noise that disturbs the peace of another.” The complaint received by EPS, while characterized as a complaint about noise, was almost certainly motivated by dislike for content as opposed to the volume of the expression.

The Justice Centre again represented Mr. Malayko, and on September 8, 2017, City prosecutors again withdrew the charge, this time regarding ticket #A52374663R.

February 23, 2018

On February 23, 2018, Mr. Malayko was peacefully preaching on Whyte Avenue and 105th Street NW with two signs out while distributing pamphlets to interested parties. Despite having obtained permission to display signs, Mr. Malayko was again ticketed, this time by Sergeant David Green, No. 2313, under Bylaw 5590 section 65(1) (#A69593355R). Disclosure indicates that Sergeant Green responded to complaints of “harassment”. Our client was merely expressing his deeply held beliefs in the public square. His actions do not constitute “harassment” against parties offended by a religious message. As with all of the other charges referred to above, it appears that the tickets were issued to make our clients desist and move away from the location, not for any legitimate legal reason.

The Justice Centre represented Mr. Malayko again. On June 11, 2018, this charge, like all the previous charges, was withdrawn.

June 28, 2019

On June 28, 2019, Mr. Malayko was preaching on the southeast corner of Whyte Ave and 104 Street with a sign and case of bibles. Mr. Malayko only spoke for five minutes before a fellow preacher took over. EPS Constable Blackwood, No. 3763, and Constable Strutynski, No. 3417, initially approached Mr. Malayko’s fellow pastor, however since he had no proof of identification, the two constables turned to Mr. Malayko and provided him with a ticket, as “leader” of the group, under Bylaw 14600 section 14(1) (#A70807866R). Disclosure indicates that Constable Strutynski and Blackwood responded to a noise complaint. Constable Strutynski told our client that he could hear Mr. Malayko half a block away which indicated an “excessive volume”, despite other buskers amplifying their music louder than Mr. Malayko and his fellow preacher. This ticket, like the others, appears to have been issued to make our client cease expressing himself on the street, and not for any legitimate legal reason.

The Justice Centre is representing Mr. Malayko in this most recent matter. We currently await the Crown’s decision as to whether they will, once again, withdraw the ticket.

The Law

Given the above, a brief recapitulation of the law on freedom of expression in Canada is necessary.

The Supreme Court of Canada in *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, held that Section 2(b) of the *Canadian Charter of Rights and Freedoms* protects all non-violent expressive activity, without discrimination based on content, however unpopular, distasteful, or contrary to the mainstream.

The Supreme Court of Canada in *R v Zundel*, [1992] 2 SCR 731, held that the purpose of freedom of expression serves to protect minority beliefs which the majority regard as wrong or false. The view of the majority has no need of constitutional protection; it is tolerated in any event. Therefore, the role of the police is to protect all citizens from criminal behaviour, not to

protect those who adhere to majority opinion from being exposed to minority views which the majority considers offensive.

In *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139, the Supreme Court of Canada held that individuals have a *Charter* Section 2(b) right to engage in the peaceful expression of opinion at airports, and at other public places such as streets, sidewalks, and parks.

The Supreme Court in *Committee for the Commonwealth of Canada* made it abundantly clear that citizens have a right to use airports, public sidewalks, and other public locations for the peaceful expression of opinion. This is a basic right, not a privilege conferred on citizens by police or by municipalities, or by the federal or provincial government.

Supreme Court Chief Justice Antonio Lamer stated as follows in *Committee for the Commonwealth of Canada v Canada*:

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.**

Accordingly, it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say. (emphasis added)

In *R v Behrens*, [2001] O.J. No. 245 (Ont. Ct. Just.), some protestors at the Legislative Building at Queen's Park in Toronto were charged with trespassing under the Trespass Act. The primary issue before the court was whether the defendants' *Charter* rights to participate in a political demonstration on government property took precedence over the Speaker's common law right under the Trespass Act. Because the defendants' activities on that occasion were constitutionally protected, the Trespass Act had to yield to the *Charter* and, as a result, the charges against the defendants could not stand.

Police authority to remove and arrest trespassers on government property must, unless an interference with individual liberties is justified in the circumstances, yield to the *Charter* rights of protesters who are peaceably demonstrating on government property in a manner that is consistent with the ordinary use of that property.

As long as those engaged in expression do not obstruct pedestrian traffic or the orderly functioning of the venue in question, no law can prohibit the peaceful expression of opinion in public places.

Warren Schacher, Nehemia Smeding and Dale Malayko have not engaged in any conduct that justifies a ticket for "causing a disturbance." These individuals hope to continue to enjoy the full protection of the law within the City of Edmonton, free from threats as to the exercise of their right to free expression, a guaranteed "fundamental freedom" under section 2(b) of the *Charter*.

The behaviour of Constables Jamieson, Yee, Strickland, Dolganova and Turner, and of Sergeants Elliot, Klassen and Green, has caused Messrs. Schacher, Smeding and Malayko to waste many hours of time fighting tickets that should never have been issued in the first place.

I write to request that you train and educate EPS officers to understand that:

- 1) the citizens of Edmonton have a *Charter* right to speak or preach “offensive” messages in a peaceful fashion on public sidewalks and in other public places;
- 2) one or more listeners feeling “offended” by the contents of another person’s speech does not constitute “causing a disturbance”;
- 3) officers have an obligation to reflect on whether a complaint actually justifies a ticket, rather than simply following instructions from aggrieved parties; and
- 4) receiving a baseless, unjustified ticket is not a minor inconvenience, but a significant problem for the person receiving the ticket. That person must spend considerable time, effort and energy on dealing with the ticket, even if the ticket is ultimately withdrawn by the Crown as unfounded.

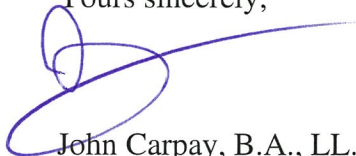
Please let me know whether you agree with these four points above.

We request that you institute training for new and existing EPS officers about the fundamental freedom of all citizens to proclaim unpopular messages on public sidewalks, without fear of being issued baseless tickets.

We request that you instruct your officers to refrain from bringing similar charges as a result of future complaints against free speech, because such enforcement activity against street preachers significantly and unjustifiably infringes upon their *Charter* rights, and is a black mark against the use of state power in Edmonton.

Please let us know what concrete steps, if any, you plan to take to address this significant problem.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'John Carpay', with a large, stylized loop at the end.

John Carpay, B.A., LL.B.

President

Justice Centre for Constitutional Freedoms