**Form 67 (Rule 16-1(5) and Rule 25-14(2) )**

Supreme Court file no. KEL-S-S-136195
Kelowna Registry

In the name of Yahveh (God)

# In the Supreme Court of British Columbia

Between:

City of Kelowna,

Petitioner,

-v-

Unknown Persons Operating as "Common Law Education and Rights", David Lindsay, John Doe, Jane Doe, and Persons Unknown,

Respondents.

# Response to Petition of David Lindsay, CLEAR

Filed by: David Lindsay (Petition Respondent)

**THIS IS A RESPONSE TO the Petition filed January 16, 2023.**

**Part 1: Orders Consented to:**

The Petition Respondent (Respondent) consents to the granting of the orders set out in the following paragraphs of **Part 1** of the Petition: **None**

**Part 2: Orders Opposed**

The Respondent opposes the granting of the orders set out in paragraphs **1(a)-(d), 2, 3, 4, 5 (a)-(d), 6 (a)-(b), 7 (a)-(h), 8, 9** of **Part 1** of the Petition.

The Respondent opposes the use of the label, "*Unlawful Events*" at **Part 2, para. 4** of the Petition, as being not a fact, but a conclusion of law or mixed fact and law, and usurps the functions and duties of the trial judge. In fact and law, they are all Lawful Protests and Marches.

**Part 3: Orders on which no position is taken: None**

# Part 4: *Factual Basis*

1. The Respondents, herein rely upon and adopt the facts as set out in their Constitutional legal position and response, set out further below, on page 31-38

2. The terms, Lawful Protests, Lawful Marches, Lawful Street Protests and collectively as Lawful Activities, are defined in the Facts section of the Constitutional Challenge, at para. 23.

3. The use of the term "*Respondents*" includes the Respondent Common Law Education and Rights.

4. The words, "*Petitioner*" and "*City*" are used interchangeably here to refer to as the Petitioner.

# Part 5: *Legal Basis*

## *Overview*

5. The Petition is an attempt to deny the Respondents their common law and s. 2 Charter freedoms for no valid reason or grounds, nor express wording to permit this, for improper purposes and to give injustice the colour of justice.

6. Communities must provide public space for the Respondents to use for their freedom of expression, or there would be nowhere to exercise their freedoms, and without the fiat of the very Governments they are protesting against. The Petitioner would be a judge in its own cause and biased in its decision making. The right to freedom of expression must not be relegated to times and places where it is of the least possible relevance or effectiveness, or upon the fiat of the State being opposed.

7. Having city property open for municipal purposes are not restricted to only those that the City approves of with respect to date, time, location and/or content. Nor that the City imposes so many restrictions and/or conditions upon, as to render the Respondent's freedoms ineffective, or of no use.

8. Parks and streets are, inherently and by their very nature, significant community gathering places for purposes of communications, or alternatively, incident or necessarily incident to their use. If there is a conflict between the use of Stuart Park and public streets in the exercise of the Constitutional freedoms of the Respondents and the Bylaws, which is denied, the former govern. The nature of the Lawful Protests is not incompatible with the use of any street or park, including Stuart Park.

9. The sound equipment, CLEAR Canopy and signage are necessarily incidental to, and/or part of and/or mode of the Respondents' common law, s. 2 Charter freedoms and manner of communication.

10. Any alleged Respondent's interference with the use of the Park or streets by others, is, without prejudice, temporally and factually *di minimus*, insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

11. Bylaw Officer Short admits the factors the Petitioner considers to constitute an "*event*" in s. 3.8 of the *Parks Bylaw* and thus requirable for a permit, were malleable, assumed and agreed upon between himself and his secretive superior(s) in a covert, closed door, back room, secret meeting. Neither the public nor the Respondents were ever notified of this secret meeting and arbitrary definition and factors, nor any test to be met to constitute an event ("*Arbitrary Definition*").

12. As will be seen throughout this Response and in the Constitutional Challenge, the Petitioner is playing

a word game, ignoring Bylaw definitions and principles of statutory interpretation, because it has admitted that the Respondents cannot be required to obtain a permit for the Lawful Protests. So, it is trying to arbitrarily define terms in an attempt to "*pigeon hole*" the Respondents' Lawful Protests and support its relief. The Court should not and legally cannot, fall for these misrepresentations.

13. The Petitioner's underlying reasons for this Petition are arbitrary, improper, an abuse of process, in bad faith and punitive in support of its relief for political reasons. The Petitioner's literal interpretation of every Bylaw in support of same, is contrary to various maxims and principles of statutory interpretation, the modern principle and is being used in an improper attempt to defeat the Respondents' Constitutional freedoms and give the appearance of justice to their unjust activities. It is unreasonable, frivolous and vexatious.

14. The Affidavits in support of this Petition contain argument, conclusions of both fact and law, unsupported general comments, assumptions, and important portions of the evidence should not be given much weight, if any.

***Dolosus versatur generalibus* - A deceiver deals in generals 2 Co. 34**
***Fraus latet in generalibu* - Fraud lies hid in general expressions**
**Broom's Maxims of Law 1856**

15. The Respondent Lindsay's Constitutional Challenges to the Bylaws and the *RCMP Act* in his defence and response to the Petition, are set out further below.

## A. *Petitioner's Declaratory Relief Should not be Granted – para. 1-4 Petition*

16. Fairness requires that persons affected by the relief sought, be given a right of audience in the Court.

***Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* 2020 SCC 4 CanLII para. 42**

17. The Supreme Court of Canada (SCC) has held that declaratory relief can only be granted where the Court has jurisdiction to hear the issue, the question is real and not theoretical, and the party has a genuine interest in its resolution. It must have practical utility and settle a live controversy.

***Canada (P.M.) v Khadr* 2010 1 SCR 44**
***Operation Dismantle Inc. v. Canada* 1985 CanLII 74 SCC para. 33**

18. Though the Petitioner does have the power under the *Community Charter* to seek declaratory relief, the Respondents submit that there is no real issue to decide. The SCC has repeatedly recognized the Constitutional freedom to protest in parks and on streets. The City has conceded this fact and admits that it will not issue permits to the Respondents on this basis.

19. The evidence of the Respondents' Affiants on the nature of, and reliance upon their common law and s. 2 Charter freedoms, there is no real issue to decide, the Bylaws must conform to the Respondents' common law and Constitutional freedoms, leaving the Petitioner with no relief to obtain, where McLachlin J. held: "*It is important that municipalities not assume power which have not been conferred on them, that they not violate civil liberties... and that abuses of power are checked.*"

***Sunshine Coast (Regional Disctrict) v Sheppard and Delaney***

**2007 BCSC 1754 CanLII para. 28-30, quoting,**
***Shell Canada Products ltd. v Vancouver (City)***
**1994 CanLII 115 SCC "Proper scope of judicial review"**
**. *City of Prince George v Payne* 1977 CanLII 161 SCC 458, 463**
***Cessante causa, cessat effectus* - The cause ceasing, the effect must cease**
***Frustr probatur quod probatum non relevat* –**
**It is vain to prove that which if proved would not aid the matter in question**
**Broom's Maxims of Law 1856**

20. As for the Respondents' RCMP declaratory relief, delineating and assigning or recognizing Constitutional authority between the Provinces and the Federal Government, will have enormous practical utility for the issue of policing, *a fortiori* now where many locations are struggling to decide whether to maintain the RCMP as a Provincial police force. *Inter parties*, this will directly prohibit the enforcement relief being sought in the Petition.

***Daniels v. Canada (Indian Affairs and Northern Development)* 2016 SCC 12 para. 12**

21. As for the declaratory relief against the impugned Bylaws, this relief, will strip the Petitioner of its relief sought which is based entirely upon the validity of these Bylaws. No Bylaws equal no claim for relief. With the exception of the relief sought to declare the Bylaw tickets and convictions of no force and effect pursuant to s. 24(1), all remaining relief to declare unconstitutional the applicable Bylaws is pursuant to s. 52 of the *Constitution Act*.

***Transportation Authority v Canadian Federal of Students***
**2009 SCC 31 CanLii para. 83, 84, 87**

## B. *Petitioner's Injunctive Relief Should not be Granted*

22. The Petitioner is seeking a permanent, statutory injunction. This requires a final disposition of the case and is more in line with a summary determination of its relief, after which all proceedings end.

***Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)***
**2010 BCCA 396 CanLII para. 30**

23. Permanent injunctive relief is discretionary and must not be granted *ex debito justitiae*. The Court must proceed cautiously, implying further herein, the importance of proceeding by way of an Action.

***Qureshi v. Gooch* 2005 BCSC 1584 CanLII para. 28**
***Vancouver Coastal Health Authority v. Adamson* 2020 BCCA 145 CanLII para. 36**

24. Permanent injunctive relief is further an extraordinary remedy and should be granted rarely, and certainly not where there are ongoing claims between the parties, as herein.

***Tomm v. Weibe* 2014 BCSC 2079 CanLII para. 69**
***Grosz v Guo* 2020 BCSC 997 CanLII para. 73**

25. This is supported by this Court's findings in *Grosz*, that, "*...permanent injunctions are remedies granted after a final adjudication on the substantive claim.*" (my emphasis)

***Grosz v Guo* 2020 BCSC 997 CanLII para. 47**
***Nunatu Kavut Community Council Inc. v. Nalcor Energy* 2014 NLCA 46 at para. 72(i)**

26. The usual tri-partite test set out in *RJR-MacDonald v Canada (A.G.)* 1994 CanLII 117 SCC, is inapplicable to a permanent injunction.

***Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*** **2010 BCCA 396 CanLII para. 27**

27. The Petitioner must first establish its legal rights to permit determination if the relief is the appropriate remedy. The Respondents have the correlative right to fully defend the case on its merits, as herein.

28. For permanent injunctive relief, the Court is required to, "*...fully evaluate the legal rights of the parties.*" This is prohibitive of proceeding in a summary manner. Natural justice and procedural fairness require a full trial and consideration of the position of both Parties.

***Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*** **2010 BCCA 396 CanLII para. 27**

29. Such broad permanent injunctive relief should not be acknowledged nor countenanced, where the relief sought by the Petitioner is so broad and all-encompassing, as to completely deny to the Respondents their Constitutional freedom of effective assembly and express themselves.

***Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*** **2010 BCCA 396 CanLII para. 39**
***Vancouver (City) v. Zhang*****, 2010 BCCA 450 CanLII para. 69**

30. Whether a permanent injunction is to be granted may be resolved by answering six questions set out by the NLCA. Consideration of same confirms the Petitioner's interpretation of the Bylaws is inconsistent with our Constitution and the freedoms of the Respondents. Equity will not permit the Petitioner to use these Bylaws for fraudulent purposes of arbitrarily denying these freedoms.

***NunatuKavut Community Council Inc. v. Nalcor Energy*** **2014 NLCA 46 at para. 72**

31. Granting permanent injunctive relief in the absence of a full trial (Action), without adjudication upon the defences and Constitutional Challenges, is not the correct starting procedure, and would be in error. "*Injunctions should be used where necessary to supplement, not to substitute for, due process.*"

***Interior Health Authority v. Statham*** **2005 BCSC 1243 CanLII para. 70**

32. In *Capital Regional District*, a municipality had restricted density on lands. The land in question, with many cabins thereon was non-conforming. Thereafter, one cabin burned. The municipality refused a building permit. The owner began construction of a new cabin, stopping midway pending the outcome of a statutory injunction hearing.

***Capital Regional District v. Smith*** **1998 CanLII 6490 BCCA para. 5, 6, 22-24**

33. The BCCA held that there was no difference with the new cabin and number of cabins than before. The Court found it to be highly inequitable to grant the municipality's relief and refused to so do. In deciding this case, the BCCA held that principles of equity will apply to statutory injunctions.

***Capital Regional District v. Smith*** **1998 CanLII 6490 BCCA para. 22-24**

34. Granting the injunctive relief would have no effect other than to move the Respondents to another and ineffective part of the City with no basis for so doing, denying them their Constitutional freedom to choose their location, clearly exposing underlying improper purposes of the City.

35. Alternatively, if this be an interlocutory statutory injunction, *Thornhill* would apply. Only upon a "*clear breach*" of a Bylaw being established will such injunctive relief issue, save under exceptional circumstances. A clear breach is made out only if the Respondents herein, were to fail to advance an arguable or reasonable defence, as in *Saanich.*

***Maple Ridge (District) v. Thornhill Aggregates Ltd.* 1998 CanLII 6446 BCCA para. 9, 11**
***Saanich (District) v. Island Berry Company Ltd.* 2008 BCSC 614 (CanLII) para. 12-14, 16, 30, 48**
***British Columbia (Min. of Environment, Lands and Parks) v. Alpha Manufacturing Inc.* 1997 CanLII 4598 BCCA para. 32, 33**

36. Such examples of an exceptional circumstance include: where there was a right that pre-existed the enactment allegedly convened, or where the actions do not give rise to the mischief the enactment was intended to preclude. Freedom of expression long predates the Charter and the Bylaws.

37. The Respondents' common law and s. 2 Charter freedoms existed far prior to our Constitution. The Bylaws were not intended to apply to the circumstances of this case, where, for example, if there was any interference with the Park or streets, it was temporally and factually insignificant, minimal, trifling and/or inconvenient and is inherent to all protests. The impugned Bylaws were not intended to deny the Respondents' Constitutional freedoms, nor to permit the Petitioner to shuffle them off from one end of the City to the other. That the City is claiming to be able to so do, demonstrates improper purposes. If there was a breach downtown, it would be a breach everywhere, so why just a downtown restriction?

38. The Respondents have clearly met this test, and the positions put forth, including the Constitutional Challenges, are very much arguable and/or reasonable, and require discoveries, witnesses and cross-examinations. The City, meanwhile, is playing nothing more than a frivolous or vexatious play on words in the Bylaws that cannot be sustained.

39. On the basis of the above and the position below, the permanent injunctive relief should be denied at this time, until after a full trial.

## C. *Hearing of Petition be held in Abeyance until Hearing of Constitutional Challenges and SLAPP. The Petition should be Converted into an Action*

40. The Petitioner has made no claim to urgency, or even a remote possibility of any past, ongoing or future harm, as to justify the immediate granting of this specific type of relief in a summary manner.

41. The Supreme Court's emphasis on the importance of s. 2 Charter freedoms cannot be understated, para. 99-105 below. It transcends the parties and is of interest to everyone in the public wishing to partake in the democratic discourse, truth finding, and/or fulfill their personal ambitions. This case raises Charter infringements as well as a Constitutional Challenge to the applicable Bylaws and *RCMP Act.*

***Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 SCC para. 91, 95**

42. Hearing the Petition first would deny the Respondents' Constitutional freedoms for a long period of time. They could never regain the significant, irreparable harm of lost opportunities of interacting with the public and the resulting loss of credibility and visibility. Every day missed, is a day that the Respondents are denied their Constitutional freedoms, especially in relation to new issues.

43. The declaratory relief requested at para. 1-4 of the Petition is moot after a positive judgment to the Constitutional Challenges or other defences, and does not have a real prospect of success. Such a positive judgment will result in the elimination of any live controversy with no utility to the relief sought. S. 274 of the *Community Charter* is not applicable.

***Solosky v The Queen*** **1980 1 SCR 821**
***York University v Canadian Copyright Licensing Agency (Access Copyright)***
**2021 SCC 32 CanLII**

44. The BCSC has recognized a strong basis for deferring hearing of the Petition until after the hearing of Constitutional Challenges, where a successful challenge will defeat the Petitioner's relief.

***Schooff v. Medical Services Commission*** **2009 BCSC 1596 CanLII para. 40**
***Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)***
**2015 BCSC 2169 CanLII para. 16 17, 125**
**overturned on other grounds, 2010 BCCA 396 CanLII**

45. Other issues such as the *Parks Bylaw*'s definition of "*event*" being void for vagueness, have been interpreted and determined prior to the Petition or any Constitutional issues, though these will require discoveries and cross-examination.

***Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City)***
**1983 CanLII 3114 ONCA para. 29**

46. The Court previously found on a noise Bylaw issue, that on the basis of conflicting affidavit evidence, the importance of the case to the business of a dog kennel and the neighbourhood, it was set for trial. This case herein exponentially succeeds the importance in *Crawford*.

***Coquitlam (City) v. Crawford et al*** **2007 BCSC 146 CanLII para. 24**

47. The Constitutional Challenge to the *RCMP Act*, is a meritorious challenge in response to the relief sought by the Petitioner at para. 7 of its Petition. The Constitutional Challenge to the Bylaws, is a meritorious challenge in response to the relief sought by the Petitioner at para. 1-6 of its Petition.

48. The BCAG and AG of Canada will likely both become involved as the Challenges involve Provincial and Federal legislation and the results of which will have effects provincially and nationally.

***Constitutional Question Act*** **RSBC 1996 CHAPTER 68 s. 8(2)**

49. All Constitutional Challenges must have a detailed, supporting factual matrix presented to the Court, as they will have a, "*...profound impact on the lives of Canadians...*" This cannot be done by Petition in this summary manner. "*Charter decisions should not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably produce poorly reasoned opinions. The presentation of the facts is not...a mere formality; on the contrary, it is essential to a proper consideration of Charter issues.*"

*Danson v. Ontario (Attorney General)* **1990 CanLII 93 SCC**
*MacKay v. Manitoba* **1989 CanLII 26 SCC**
*Thomson Newspapers Co. v Canada (A.G.)* **1998 CanLII 829 SCC para. 87**

50. The relief sought by the Petitioner based on strict liability Bylaw offences, does not allow for the establishment of a factual context for the Constitutional issues below, nor defences to the Petition.

51. Summary Petition proceedings are not well suited to factually complex, extensive or detailed cases, only to cases that are "*...straightforward on their facts... The difficulty, of course, is all the greater where not all parties are competently represented....*"

*Simon Fraser Student Society v Canadian Federation of Students*
**2009 BCSC 1081 CanLII para. 34[53], quoting,**
*Cannaday v McPherson* **1998 CanLII 6529 BCCA**
*Schooff v. Medical Services Commission* **2009 BCSC 1596 CanLII para. 28-30, 37**
*Nanaimo (City) v Courtoreille*, **2018 BCSC 1629 CanLII para. 55-59**
*B.C. (Min. of Forest) v. Westbank First Nations*
**2000 BCCA 316 CanLII para. 1(a-d), 2 (a)-(c), 8, 9**

52. There is an unacceptable risk in hearing the Petition first and/or not converting it to an Action. Not all information that could affect the decision will be before the Judge. "*There is nothing much more important than the right and opportunity to cross-examine.*"

*Re Roensich and Alberta Veterinary Medical Association*
**1968 CanLII 641 66 D.L.R. (2d) 358 at p. 364 Alta. S.C.**

53. Many of the facts existing for the impugned *Bylaws*, overlap with the Respondents' Constitutional freedoms. Forcing a form of summary trial on untested Affidavits, where many witnesses will be adversarial, is unfair to the Respondents who are denied natural justice, procedural fairness, the right to test adversarial evidence and credibility, and denied proper delineation.

*Solmaz v. Canada (Public Safety and Emergency Preparedness)*
**2006 FC 951 CanLII para. 13**
*Trinh v. Acadie-Bathurst Health Authority* **2005 NBQB 103 CanLII**

54. There are inherent difficulties in demonstrating breaches of public duty such as bad faith, fraud, improper decisions and motives etc., which all go to intention and are difficult if not impossible to show only on untested Affidavits.

*Roncarelli v. Duplessis* **1959 CanLII 50 SCC 121, 140-141**

55. Multiple Government witnesses will be involved, such as those persons who signed the RCMP Agreement between BC and Canada and participated in drafting it, and various City officials. Discoveries and cross-examinations will be required.

56. The Constitutional issues raised of vagueness, overbreadth and arbitrariness, further require examinations of the Petitioner's Affiants, and other City officials, demonstrating just how the City arbitrarily interpreted and applied these Bylaws to the Respondents.

57. The Respondents will be tendering significant video evidence in support of their position and

Challenges, requiring examinations or cross examinations, which will prohibit determination on affidavits only.

58. There will be a significant amount of material, authorities and evidence required in support of the complex issues being raised. Volume of materials alone is sufficient to convert to an Action.

***Simon Fraser Student Society v Canadian Federation of Students***
**2009 BCSC 1081 CanLII para. 26**

59. A triable issue to convert this Petition into an Action can be by way of fact or law. The issues of law raised by the Respondent Lindsay are complex and require a supporting factual matrix that goes back three years, including credibility of the Petitioner.

***2158872 Ontario Ltd. v. The Owners, Strata Plan BCS2647***
**2016 BCSC 946 CanLII para. 91-95**

60. Triable issues in this case include but are not restricted to the following:

A. All issues, including the Constitutional Challenges, are inter-related and cannot or alternatively, should not be divorced from each other;

B. Credibility of Bylaw officers and the Petitioner;

C. Improper purposes and/or motives behind the Petition, unreasonableness and bad faith, including the nature of and improper involvement, by the Province and/or due to SLAPP;

D. Proper interpretation of the impugned Bylaws, including how the City has come to interpret and apply the Bylaws, including "*event*", "*tent*", "*procession*", and other words against the Respondents, especially when critical words remain undefined;

E. What totality of factors did the City consider in its interpretation of its Bylaws to support the tickets and this Petition;

F. Why did the City do nothing for the first 17 months of the Lawful Protests – what caused them to suddenly start issuing tickets;

G. Why is the Petitioner only attacking the Respondent Lindsay, despite others being involved;

H. Why has the Petitioner made allegations of selling merchandise against the Respondent Lindsay based on evidence showing other people possibly so doing – how and why is Lindsay being held accountable including herein, for the actions of others;

I. Who was involved in making decisions to start ticketing the Respondent Lindsay and the factors that were considered in so doing, and was this unreasonable and/or in bad faith, or due to SLAPP;

J. What has been the nature and use of Stuart Park from its inception – does it include regular protests by other people/groups, and if so, when, how often, do they use sound equipment and post signs, and did any of them apply for and/or receive permits and if not, why not;

K. Why has the Petitioner so attacked the Respondents, including the Respondent Lindsay, while other people/groups are allowed to protest with sound equipment and signs even for up to half a year, not only without being ticketed, but with the consent and support of the Petitioner;

L. What were the terms and conditions of the City obtaining $500 000.00 in grants from the Province for Stuart Park and did this grant, include the use of the Park as a Town Square and for protests;

M. What happens if there is an overlap between activities by the Respondents in the exercise of their Constitutional freedoms, and words/definitions in the Bylaws and who makes Bylaw enforcement decisions and upon what considerations;

N. What level of response is required to actually constitute a nuisance in the Bylaws – is any response or interference sufficient or must it be material;

O. Did the Respondents actually cause a nuisance as alleged in the Petition;

P. What are the specific duties involved in policing that the RCMP are doing for the Province and Petitioner;

Q. Is policing exclusively a matter within the subject of the administration of justice in s. 92 of the *Constitution Act* 1867;

R. If the matter of policing does come within the matter of the administration of justice in s. 92 of the *Constitution Act* 1867, is the *RCMP Act ultra vires* Parliament;

S. Does this Petition constitute a SLAPP case;

T. Is the Petition, and/or Bylaw enforcement actions by the Petitioner, unreasonable or arbitrary;

U. Will this Petition have a broader or collateral effects on other expressions of public interest;

V. Did the Petitioner's actions constitute or arrive as a result of some form of punitive, retributory or vengeful intention or motive by the Petitioner and/or others in the background;

W. Is the Petition frivolous or vexatious.

61. This case is important to tens of thousands of people who protested in parks and streets across the Province in the exercise of their Constitutional freedoms. They too will be affected by the outcome and with no opportunity to be involved, more importance must be given to a fully considered case.

62. Consideration must be placed on the *consequences* of a lack of evidence if an Action is denied. No new evidence can be tendered on an appeal from Constitutional issues. Forcing a hearing through summarily restricts the Respondents' appeal rights and impairs the BCCA from fulfilling its duties.

***Actton Transport Ltd. v B.C. (Employment Standards)* 2010 BCCA 272**

63. Even a possibility of harm in *Thomson*, did not displace the importance of s. 2(b) of the Charter.

***Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 SCC para. 94**

64. The *Parks Bylaw* and *Traffic Bylaw* provide up to $10 000.00 in fines and jail for each offence. Contempt of court provides further fines and incarceration. These should not be permitted to be imposed on the exercise by the Respondents of their Constitutional freedoms, without a full hearing.

***Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada***
**1991 CanLII 8197 MBKB para. 24-27**

65. If there is no discretion on this permanent, injunctive relief, coupled with contempt of court penalties, this then becomes the same, unlawful situation as an absolute liability offence with imprisonment.

***R v City of Sault Ste. Marie* 1978 CanLII 11 SCC**

66. Alternatively, similar to the paramountcy principle, the Bylaws are rendered inoperative to the extent that the Respondents have their common law and/or s. 2 Charter freedoms.

***Burnaby (City) v. Trans Mountain Pipeline ULC* 2015 BCSC 2140 CanLII para. 77**
**s. 52 of the *Constitution Act***

67. The Respondents further seek an interim stay of the Petition, if required, pending the outcome of the Constitutional Challenges, to preserve their *prima facie* freedoms, and safety from the RCMP. They are not asking to be exempt, or that the Bylaws be suspended. A similar temporary stay of a Trespass Notice issued by the City of Toronto to *Occupy Park* protestors, was held in abeyance pending the outcome of the challenge to the Trespass Notice in that case.

***Batty v. City of Toronto* 2011 ONSC 6862 CanLII para. 6**

68. The *Protection of Public Participation Act* or SLAPP legislation already provides for no further actions until that issue is decided. Evidence in support of the Constitutional Challenge to the Bylaws is likely to be required to support the SLAPP case.

69. This is an appropriate case where the Petition should be converted into an Action to permit discoveries and cross examinations, and should not proceed until hearing of the Constitutional Challenges. Alternatively, that discoveries and cross examinations be ordered.

## D. *Promissory Estoppel against the Petitioner*

70. Promissory estoppel applies against the Petitioner: "*...where a representation is made by one party, and relied upon by another to that person's detriment, the party making the representation will be estopped from following a contrary course of action... One should not be able to say one thing, having it acted upon, and then behave differently than first represented.*"

***Marchischuk v. Dominion Industrial Supplies Limited***
**1991 S.C.J. No. 44**

71. This representation can be done by words or actions, and can be inferred from the circumstances.

***John Burrows Ltd. v. Subsurface Surveys Ltd. et al.***
**1968 S.C.R. 607, 68 D.L.R. (2d) 354**
***DeWolfe v. Jones* 2016 BCSC 2008 CanLII para. 21**

72. City Bylaw Officers represented to the Respondent Lindsay for 17 months that no permit was required to have their Lawful Protests, being a Constitutional freedom that the City recognized, and no action could be taken. Bylaw Officers could reasonably be expected to know the City's legal position.

***Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada***
**2021 SCC 47 CanLII para. 65, 68, 73**

73. The City knew and admits in writing, that it did not and would not issue permits to the Respondents for the Lawful Protests, even if the Respondents applied for one. This was a trap, as is the Petition.

74. Former Mayor Basran represented to the public and the Respondents, in a video news release from Stuart Park, that the Petitioner knew and recognized the Respondents had the Constitutional freedom to conduct their Lawful Protests.

75. The RCMP admitted to Respondent Lindsay that they recognized their Constitutional freedom to the Lawful Activities and would and did provide traffic control for same. The City did not object.

76. The Petitioner is estopped from bringing its Petition with respect to all relief sought, resulting from previous assurances not only that the City would not prevent their Lawful Protests, but that the City recognized that the Respondents had the Constitutional freedom to assemble and exercise them.

77. The Respondents reasonably relied on these representations for their Lawful Protests. Granting the Petitioner's relief now, after three years and the Respondent's serious and significant investment financially, and of time, effort, and resources to achieve a level of knowledge by the general public of their presence and exercise of their Constitutionally protected freedoms at that location, would be unconscionable, unfair and unjust.

## E. *Proper Bylaw Interpretation does not Permit Relief to be Granted*

### i. *s. 7.3 Kelowna Good Neighbour Bylaw #11500*

*7.3 **No person shall make, cause, or permit to be made or caused, noise or bass sound of a radio, television, player, or other sound playback device, public address system, or any other music or voice amplification equipment, musical instrument, whether live or recorded or live, whether amplified or not, in or on private property or in any public space or street in such manner that is liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals or the public.***

78. The Petitioner alleges that because the Respondents were using sound equipment in Stuart Park, that *ipso facto* this Bylaw has been infringed. Such a claim is in error.

79. S. 7.3 only applies to a "*public space or street.*" In the *Parks Bylaw*, a "*public space*" and a "*park*" are clearly differentiated, defined words. The definition of a "*public space*" in s. 2 of the *Good Neighbour Bylaw* is effectively identical to Part 2 of the *Parks Bylaw* and cannot include a park.

80. Section 7.3 does not include a park (including Stuart Park), or it would have been mentioned in this definition. The listed examples in the *Good Neighbour Bylaw*, all reference physical locations and buildings on public facilities. *Noscitur a sociis* applies to exclude Stuart Park as does the maxim:

*expressious alterius est exclusio alterius* and the modern principle of statutory interpretation.

81. The use of the words "*ordinarily invited or permitted to be in or on*", in the definition of "*public space*", excludes all parks which the Respondents are entitled to use as of right. See para. 126-150 of the Constitutional Challenge below, at p. 42

82. As for the inclusion of a "*street*", the position in relation to "*nuisance*" below at para. 96-105 and the Constitutional Challenge at para. 160-163 are a complete answer to this inclusion.

83. The word "*noise*" is undefined. Noise is defined in the dictionary as: "*A sound or sounds, especially when it is unwanted, unpleasant or loud. Grammar: Sound or noise. Sound and noise are nouns. We can use them both as countable or uncountable nouns. Both refer to something which you can hear, but when a sound is unwanted or unpleasant, we call it a noise.*" Simply making sound is not, *ipso facto* sufficient to be making "*noise*".

**https://dictionary.cambridge.org/dictionary/english/noise**
**Cambridge Dictionary**

84. Construction noise is defined in s. 2.1. The definitive characteristic of construction noise, is that it results in stress, anxiety, and associated health problems due to the nature of the noise being made.

85. Giving the word "*noise*" its general dictionary definition, there would have to be complaints about such harm to the public. In approximately 150 Lawful Protests, there have been no such noise complaints filed with the City or the Respondents'. The Lawful Activities are not liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public.

86. Alternatively, any alleged interference with the use of the Park was legally, temporally and factually *di minimus*, insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

87. The Respondents are exercising their Constitutional freedom. S. 7.3 is either unconstitutional or is to be interpreted in accordance with the Respondents' Constitutional freedoms set out in para. 165-177 in the Constitutional Challenge below.

### ii. *s. 3.1, 3.3, 3.17, 3.8, 3.41 Kelowna Parks Bylaw #10680*

***3.1 No Person shall use any land in a Park in contravention of this bylaw or in contravention to a sign which has been posted prohibiting or regulating such use.***

***3.8 No Person shall conduct any event, procession, march, drill, performance, ceremony, concert, gathering or meeting without the written permission of the City firstly being obtained.***

88. The word "*event*" is arbitrary, vague, uncertain, grossly disproportionate and/or overbroad, as set out in the Constitutional Challenge, at para. 208-277 in the Constitutional Challenge below.

89. There is no provision in s.3.8 that applies to a park, including Stuart Park. *Noscitur a sociis* applies to exclude Stuart Park as does the maxim: *expressious alterius est exclusio alterius* and the modern principle of statutory interpretation.

90. No signs are posted anywhere that Stuart Park cannot be used for the Lawful Protests, and even if

same were posted, they would amount to Constitutional infringements and found unconstitutional.

91. Insofar as this position may be, without prejudice, incorrect, the Respondents rely upon their position as set out in their Constitutional Challenge that they have the freedom to so do.

92. Alternatively, there is no provision in this Bylaw for outlining the procedure to obtain a permit, nor what conditions are required for same, nor what factors are even to be considered to obtain a permit. This leaves the City with complete and unfettered discretion to grant or refuse any such request that might have made and to determine its own temporal basis, even if it could be granted, which is denied.

> ***3.3 No Person shall sell or display for sale any refreshment, article, merchandise, product, thing, service, or conduct any business in a Park without a permit issued by the City or written permission obtained from the City.***

93. There is no evidence that the Respondent Lindsay or anyone acting for CLEAR were conducting sales or displaying for sale anything. The pictures provided by the Petitioner in its Affidavits, show people other than the Respondent Lindsay or CLEAR. The Respondents are not deputized by the Bylaw to enforce its provisions, even if applicable.

94. This provision, applying principles of statutory interpretation, clearly applies only to business transactions. It has no applicability to gifts, donations, or charitable offerings.

> ***3.17 No Person shall erect, construct or build any tent, building, shelter, pavilion or other construction whatsoever, or penetrate the ground with any object including stakes or posts, without prior written approval of the City.***

95. The Respondents' CLEAR Canopy is not a tent, nor a "Gazebo tent" as Mr. Short plays on words to it at para. 9 of his Affidavit #1. A tent is part of the definition of "*camping equipment*" in s. 1.1 of the *Parks Bylaw*. The CLEAR Canopy is not a piece of camping equipment. Applying principles of statutory interpretation, such as *noscitur a sociis*, the maxim: *expressious alterius est exclusio alterius* and the modern principle of statutory interpretation, this Bylaw definition clearly is referencing permanent structures and/or designed for camping and overnight/long term stays. To state otherwise, would result in absurdities. This interpretation is more in agreement with preventing "*Occupy*" activities and people sleeping overnight in parks, as occurred elsewhere.

***Parks Bylaw* s. 1.1 Def. "*camping equipment*"**

96. This fits perfectly with the use of the word "*tent*" in s. 3.8 of the *Parks Bylaw*, which generally all items listed there refer to things that people use for shelter or to live in.

97. A gazebo is not a tent nor a canopy, which as can be seen from this website from Costco, where all such gazebos have a permanent structure associated with them, similar to a tent, but with no walls. They are designed to remain for long periods of time.

**https://www.costco.com/gazebos.html**
**https://www.linkedin.com/pulse/canopy-vs-gazebo-whats-difference-khuram-shehzad/**

98. The CLEAR Canopy is designed to be and is temporary, and is removed after each Lawful Protest. One cannot sleep in the Canopy.

https://www.quora.com/Whats-the-difference-between-a-canopy-and-a-tent
https://mastercanopies.com/canopy-vs-gazebo
https://patioline.ca/gazebo-vs-canopy-whats-the-difference/#:~:text=The%20main%20difference%20between%20a,is%20an%20entire%20freestanding%20design.

99. Insofar as this position may be, without prejudice, incorrect, the Respondents rely upon their position as set out in their Constitutional Challenge below at para. 99-109, 112, 124, 126, 127, 131, 132, 134.

***3.41 No Person shall engage in any activity that creates a nuisance or that interferes with the use and enjoyment of the park by other persons.***

100. The Respondents were never charged with this on the days at issue. They were not interfering with the use etc. of the Park as defined in the definition of "*nuisance*" in the *Parks Bylaw*.

101. The Petitioner has provided no evidence that the Respondents were causing a nuisance (Petition, para. 10, 11). Alternatively, protests, by their nature, are inherently disruptive to some degree and to this extent, should not be "*repressed or controlled.*"

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 163-165**

102. Inconvenience to the public for which there will always be some, where public property is being used, is not an acceptable basis to deny the Respondents their reasonable use of their freedoms. "*Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society.*"

***Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 77**
***NunatuKavut Community Council Inc. v. Nalcor Energy* 2014 NLCA 46 CanLII para. 98**
***Ramsden v Peterborough (City)* 1993 CanLII 60 SCC Iacobucci J. Part V**
***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 165**

103. The fundamental importance of permitting freedom of expression, of necessity, permits some interference with the activities of others. There is a degree of interference with the activities of others that we are required to tolerate to allow important values such as freedom of expression, to flourish in our society.

***Toromont Cat v. International Union of Operating Engineers, Local 904* 2008 NLTD 22 CanLII para. 38, 39**

104. The Petitioner's reliance upon the defined word "*nuisance*" in the *Parks Bylaw*, is overly and unreasonably restrictive. In *Toromonnt*, the Court found that there is room within the tort of nuisance to allow for a degree of interference with the use of an employer's land by picketers so long as that interference is necessarily incidental to the exercise of s. 2(b) and not for some ulterior purpose. *Mutadis mutandis* with the Respondents' Lawful Activities. Every protest in Canadian history affects to some degree, the rights or freedoms of others on a temporary basis.

***Toromont Cat v. International Union of Operating Engineers, Local 904* 2008 NLTD 22 CanLII para. 45**

105. Determination of whether or not a nuisance exists, involves the reconciliation of conflicting claims: "*the claim to undisturbed use and the enjoyment of land on the one hand with the claim to freedom of action on the other.*" To constitute a legal nuisance, the annoyance or discomfort must be substantial and unreasonable given that all human activity in an urban environment impinges on others to a lesser or greater degree. This high test has not been evidenced by the Petitioner. The use of the public highways involves give and take, where everyone using them must expect a certain degree of inconvenience.

***Ontario (Attorney-General) v. Dieleman*, 1994 CanLII 7509 ONSC para. 571**
**Pure Economic Loss and the Modern Tort of Public Nuisance**
**2016 Tate & Lyle CanLII Docs 98, 1043-1044**
***Crandell v Mooney* 1873 23 UCCP 212, 221**
***Harper v GN Haden & Sons Ltd.* 1933 Ch. 298, 320 CA**
***Vancouver v Burchill* 1932 SCR 620 Rinfret J.**
***Ramsden v Peterborough (City)* 1993 CanLII 60 SCC Iacobucci J. Part V**

106. The Lawful Protests have social utility. It cannot be said, simply because one of its incidental effects may be to temporarily inconvenience or minimally interfere with others, to be *ipso facto* illegal and subject to injunctive relief.

***Toromont Cat v. International Union of Operating Engineers, Local 904***
**2008 NLTD 22 CanLII para. 49**
***Ramsden v Peterborough (City)* 1993 CanLII 60 SCC Iacobucci J. Part V**

107. Alternatively, any alleged interference with the use of the Park was legally, temporally and factually *di minimus*, insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

108. The Respondents have not used Stuart Park in contravention to this *Parks Bylaw*. The Respondents are exercising their Constitutional freedom. Section 3.8 is either unconstitutional or is to be interpreted in accordance with the Respondents' Constitutional freedoms set out in para. 126-150 below.

### iii. *s. 8.2.2, 8.2.4 Kelowna Traffic Bylaw # 8120*

***8.2.2 Walk on sidewalk. Pedestrians shall not walk on the roadway where there is a sidewalk that is reasonably passable on either or both sides of the roadway.***

***8.2.4 Obstructing traffic. No person shall stand or loiter in such a manner as to obstruct or impede or interfere with traffic on a roadway.***

109. 8.2.2. The Lawful Protests regularly had hundreds of protestors and on rare occasions, over 1000. It was not reasonable to use sidewalks. Sidewalks were not designed for this quantity of people. In the summer sidewalks are blocked on Bernard Ave. by business tables and chairs, and closed to traffic.

110. Using sidewalks would defeat the purpose of the Bylaw under these conditions, where so many people would be moving on the sidewalk that it would interfere with traffic for hours instead of minutes. Under these conditions, a large number of protestors would be unable to exercise their freedoms.

111. Section 8.2.2 is inapplicable to this number of protestors. The use of the word "*pedestrians*" implies

a much smaller number of people that sidewalks can reasonably accommodate and its purpose was not to prevent the Lawful Marches nor force thousands of people onto sidewalks.

112. Using sidewalks is an unreasonable restriction on the common law and s. 2(b)(c) Constitutional freedoms of the Respondents, and the attention obtained is much less due to less visibility.

113. Insofar as this position may be, without prejudice, incorrect, the Respondents are exercising their Constitutional freedom to so do. This provision is either unconstitutional or is to be interpreted in accordance with their freedoms therein, as set out in para. 151-164 of the Constitutional Challenge below.

***Vancouver v Burchill* 1932 SCR 620 Rinfret J.**

114. Section 8.2.4. The term "*loiter*" is defined as: "*to move slowly around or stand in a public place without an obvious reason.*" Used in combination with the word "*stand*", this clearly is inapplicable to the Lawful Protests, Street Protests and Lawful Marches in fact do have a purpose(s), including conveying public opposition to the COVID-19 restrictions and other threats to the Respondents' rights and freedoms, and where people were constantly moving about or walking.

**https://dictionary.cambridge.org/dictionary/english/loiter**
**Cambridge Dictionary**

115. The Respondents, *ipso facto* by their presence when standing and/or moving on sidewalks and/or in parking lanes of streets as part of the Lawful Street Protests, with or without placards and other visible signs, for the aforesaid purposes are not obstructing, impeding or interfering with traffic on the roadway.

116. Alternatively, any alleged interference was temporally and factually *di minimus*, insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

117. Insofar as this position may be, without prejudice, incorrect, the Respondents are exercising their Constitutional freedom to so do. This provision is either unconstitutional or is to be interpreted in accordance with their freedoms therein, as set out in para. 132, 156-158 of the Constitutional Challenge below.

### iv. *s. 1.2.1, 2.1.2 Outdoor Events Bylaw #8358*

***"Outdoor Event" means: (i) any public or private exhibition, parade, procession, carnival, athletic event, commercial performance or show, held outdoors on public property, including any street, road, lane, bridge, park or other public right of way or place***

118. The Respondents' Lawful Marches are also identified as a "*protest march*" which in turn is defined as: *an occasion when people show that they disagree with something by walking somewhere, often shouting and carrying signs, examples: A protest march through the streets was held; Following the protest march, the government quickly agreed to the protesters demands; Despite the suspension of the project the protest march continued in order to see the project canceled.*

**https://dictionary.cambridge.org/dictionary/english/protest-march**
**Cambridge Dictionary**

119. A "*procession*" in turn is defined as: a line of people who are all walking or travelling in the same direction, especially in a formal way as part of a religious ceremony or public celebration, examples: *a wedding/funeral procession; The festival will open with a procession led by mayor; My day has just been a never-ending procession of visitors.* None of the Lawful Activities are encompassed within the definition of an "*outdoor event.*"

**https://dictionary.cambridge.org/dictionary/english/procession**
**Cambridge Dictionary**

120. Insofar as this position may be, without prejudice, incorrect, the Protestors participating in the Lawful Marches, are exercising their Constitutional freedom to so do. This provision is either unconstitutional or is to be interpreted in accordance with their freedoms therein, as set out in para. 132, 156-159 of the Constitutional Challenge below.

## F. *SLAPP – Protection of Public Participation Act* SBC 2019 CHAPTER 3

121. Section 4(1)(a)(b) of the *Protection of Public Participation Act* (*PPPA*), provides that the Respondents may seek to have the Petition dismissed on the basis that:

> ***a. the proceeding arises from expressions from the Respondents, and***
> ***b. the expression relates to a matter of public interest.***

122. If the Respondents meet this test, then the obligation falls upon the Petitioner to avoid having the Petition dismissed as of right, unless the Petitioner can satisfy the Court that, pursuant to s. 4(2):

> ***(a) there are grounds to believe that***
>
> ***(i) the proceeding has substantial merit, and***
>
> ***(ii) the applicant has no valid defence in the proceeding, and***
>
> ***(b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.***

***Hansman v. Neufeld* 2023 SCC 14 CanLII para. 53**

123. If the Petitioner fails to meet their burden with respect to any of these last three steps its case will fail.

***Todsen v Morse* 2022 BCSC 1341 CanLII para. 30**

124. If the Petitioner fails to establish either s. 4(2)(a)(i) or (ii), there is no requirement to discuss s. 4(2)(b).

***Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 61-63**
**Quoting, *Lang v Neufeld* 2022 BCSC 130**
***Durkin v Marlan* 2022 BCSC 193**

125. Procedurally, hearings under s. 4 cannot be bi-furcated between s. 4(1) and 4(2).

***Reynolds v Deep Water Recovery Ltd.* 2023 BCSC 600 CanLII para. 63**

126. Part 4(a)(i)(ii) are discretionarily determined on a "*grounds to believe*" standard.

***Cheema v Young* 2021 BCSC 461 CanLII para. 15**

127. Insofar as the impugned Bylaws are contrary to the *PPPA*, they are of no force and effect for Provincial legislation overrides these Bylaws, and cannot support the relief sought in the Petition. By complying with the impugned Bylaws, individually and/or collectively, the Petitioner has contravened the *PPPA*, and infringed upon the Respondents' 2(b)(c) freedoms in the Charter.

**s. 3(a), 10(1)(2) *Community Charter***

128. As described by the A.G. at the time, the *Act* was "*intended to protect an essential value of our democracy, which is public participation* [Lawful Protests] *in the debates of the issues of the day.*"

***Galloway v. Rooney* 2022 BCCA 243 CanLII para. 8**

129. A further category of SLAPP suits involves public officials using the legal system to stifle expression critical of Government officials, just as herein.

**Anti-SLAPP Legislation and Non-Justiciable Issues: A Consideration of *Hansman v Neufeld* and *Todsen v Morse* Charlotte Dalwood 2022 p. 2**
**https://canliiconnects.org/en/commentaries/89682**

### i. *s. 4(1)(a)(b) Expression in Relation to a Matter of Public Interest*

***a. the proceeding arises from expressions from the Respondents, and***
***b. said expression relates to a matter of public interest.***

130. The term, "*expression*", "*means any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity*".

***Protection of Public Participation Act* s. 1 Definitions**

131. "*Public Interest*" is to be given a "*broad and liberal interpretation.*"

***Bent v. Platnick*, 2020 SCC 23 CanLII SCC para. 81**

132. To be in the public interest, it is sufficient if, "*...some segment of the community would have a genuine interest in receiving information on the subject.*" An extremely broad interpretation is recognized where the expression need only be in relation to a matter of public interest.

**Canadian Anti-SLAPP Laws in Action Hilary Young 2022 CanLII Docs 3386 p. 198**
***Grant v Torstar Corp.* 2009 SCC 61 CanLII para. 102-106**
***1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 26-29**

133. The expressions and information from the Respondents at their Lawful Activities for purposes of advocating political change, relate to, *inter alia* their concerns regarding the accuracy and truthfulness of comments and representations from public servants in relation to COVID-19, the Constitutionality of Public Health Orders and mandates, whether these officials have committed criminal offences, the dangers of the COVID-19 vaccines and speaking for vaccine injured people, statistical accuracy from

inaccurate models and PCR tests, falsified claims of COVID-19 caused hospital backlogs and shortages, jurisdiction in relation to the COVID-19 situation, mainstream media (MSM) cover-ups, political participation in elections, issues such as digital ID and currencies and 15 minute prison cities.

134. Whether or not the allegations or concerns are valid is irrelevant, because "*...there is no qualitative assessment of the expression at this stage.*"

***Bent v. Platnick*, 2020 SCC 23 CanLII SCC para. 84**

135. There has been significant MSM attention on TV, radio, print and local media outlets in B.C. in relation to the Lawful Protests and the Respondent Lindsay, including interviews. Up to 1500-2000 people have attended the Lawful Protests, confirming a large segment of community interest.

136. The COVID-19 issue mobilized the Trucker's Convoy, invoking the *Emergencies Act*, nationwide street and park protests, occupied significant MSM and alternative attention, and raised awareness of COVID-19 issues to the local public, resulting in thousands of people attending the Lawful Protests.

137. The expressions of the Respondents clearly are of public interest, in part simply due to the nature of the expressions, the effect on all Canadians, and because the Government and MSM have refused to give the Respondents a platform for their COVID-19 opposition. Having the Government instruct the MSM to withhold opposing COVID-19 information, facts and studies, is another matter of public interest. The Respondent Lindsay has clearly met his obligation under s. 4(1)(a)(b) of the *PPPA*.

### ii. *s. 4(2)(a)(i) Whether the Proceedings have Substantial Merit*

138. Substantial merit, combined with "*grounds to believe*", mean that there must be a basis in the evidence and the law to satisfy the judge. This is a more onerous standard than a motion to strike or a reasonable prospect of success. Having "*some chance of success*" is not sufficient, nor is merely having an "*arguable case.*" The Petitioner must have a real prospect of success to have substantial merit.

***Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 25 [49, 50]**
**Quoting, *1704604 Ontario Ltd. v Pointes Protection Ass'n* 2020 SCC 22**
***Cheema v Young* 2021 BCSC 461 CanLII para. 16**

139. There are at least five SCC cases recognizing policing is an exclusive Provincial jurisdiction; and a sixth that delegation is not permitted. Once the *RCMP Act* is struck, the Petitioner is likely to fail in its enforcement relief for want of jurisdiction. See para. 411 of the Constitutional Challenge below.

140. S. 3.1, 3.8, 6.1, 6.2 of the *Parks Bylaw*, if they were to apply to the Lawful Protests and Marches, which is denied, actually prohibit all of the protests throughout the entire City by way of a complete ban on s. 2 freedoms under punitive sanctions. Complete bans on s. 2 Charter freedoms, have already been held to be unconstitutional, and violate the minimal impairment requirement in the s. 1 analysis. The likelihood of the Petitioner surviving the Bylaw Challenge and the Court granting the relief sought, is highly unlikely.

***Vancouver (City) v. Zhang* 2010 BCCA 450 CanLII para. 69**

141. Freedom to choose the time, date and location of their Protests is encompassed in the Respondents' s. 2(b)(c) Charter freedoms; not if, when, how and where it is agreeable to, or on consent of the Petitioner. The Court is unable to grant this relief as a result.

***Garbeau v. Montreal (City of)* 2015 QCCS 5246 CanLII para. 466**
***Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC *A. Government Property* L'Heureux-Dubé J.**
**a. Interest of the Individual Wishing to Express Himself Lamer J.**
***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 43, 47, 67-75, 127, 158**

142. Not only is the relief sought Constitutionally repugnant, there is no factual justification. The Respondents have peacefully exercised their common law and Constitutional freedoms each week.

143. The Petitioner's only factual basis for its relief is that the Respondents failed to obtain a permit or caused a nuisance. Yet the City admits no permit was available to be given or obtained, nor would be given to the Respondents for their Lawful Protests as the City recognizes their Constitutional freedom for same. The Petition is a frivolous and vexatious sham. *Lex non cogit ad impossibilia* – The law never urges to impossibilities; *Quod vanum et inutile est, lex non requirit* – The law does not require what is vain and useless; or compel a person to do what which he cannot possibly perform.

***Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Iron Workers Local 721* 1969 CanLII 222 ONSC**
***Canadian Pacific Ltd. v. The Queen* 1988 CanLII 10062 ON SCDC 431, 438**
***Garbeau v. Montreal (City of),* 2015 QCCS 5246 CanLII para. 466, quoting:**
**Montreal (City) v. 2952-1366 Quebec Inc. 2005 SCC 62 CanLII para. 171**
**S. 4.2 *Parks Bylaw* #10680 - Events are not listed as basis for granting of permits**

144. Banning the Lawful Activities is unlikely to succeed on the claim of nuisance as there is no evidence of same. Alternatively, by their very nature, protests cannot occur without some inconveniences and disruptions. These are necessarily incidental to or a result of the Lawful Protests, are *di minimus*, or reasonable and/or trifling in nature, or inherently disruptive to some degree and the Lawful Activities must not be "*repressed or controlled.*" (Petition, para. 10, 11).

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 163-165**
**See para. 96-104, 160, 161, herein**

145. The relief sought is premised upon seriously flawed and misleading interpretation of the impugned Bylaws. The Petitioner is attempting, in futility, to try and frivolously "*pigeon hole*" the Lawful Activities into Bylaw definitions that do not, were never designed nor intended to include same.

146. The Respondents were not doing a "*procession*" but were involved in their Constitutional Lawful Marches as part of their Lawful Protests. (Petition, para. 16-18) The Lawful Marches are not contrary to, nor encompassed within the *Outdoor Events Bylaw* nor *Traffic Bylaw*. (Petition, para. 20-22)

147. The Respondents did not have a "*tent*" but a canopy, the CLEAR Canopy, where the difference lies in the fact that tents are designed to be lived or slept in, canopies such as the CLEAR Canopy, are not. This complies with the definitions in the *Parks Bylaw*.

**Canopy v Tent - Canopy Tent Advisor**
**https://canopytentadvisor.com**
**/whats-difference-canopy-tent/**

148. The Respondent Lindsay is not selling merchandise at the Lawful Protests. He is not responsible for

the actions of any other group, person or organization who may so do, nor has he been deputized to enforce these Bylaws. (Petition, para. 6, 7). All evidence by the Petitioner is against other people.

149. The Petitioner's relief violates its contractual obligations to the Province, where it has contractually agreed as a condition of Provincial funding, that it would build Stuart Park in trust as a Town or Public Square, encompassing the public's (and thus the Respondents') freedom for its Lawful Protests. Granting the relief sought would put the City in a breach of contract situation.

150. The Respondents have a right or freedom as beneficiaries of that trust or duty, to their Lawful Protests. The terms of the trust are also set out in statute, for enjoyment and community uses, and in the Constitution. Community uses are not restricted to only viewpoints or activities approved by the City.

151. The Petitioner cannot escape the only conclusion that it is obtaining this relief against the Respondents, while permitting every other protestor to have political protests and even events take place in the same parks, with sound equipment and signs in the ground, and using the same sidewalks and streets, during this same time frame and without any permit, for improper and/or malicious purposes not sanctioned by law. This raises further s. 15 Charter violations.

152. The duty or power for the City to regulate its property for the public benefit is not unlimited nor to be used for its improper purposes. Any Bylaw and policies implemented pursuant thereto that are inconsistent with the Constitution are of no force and effect, including the Respondents s. 2 Charter freedoms. The declaratory relief at para. 1-4 of the Petition is moot. Alone or with lack of factual justification, there is no real prospect of success by the Petitioner to obtain their permanent injunctive relief, even if just restricted to Stuart Park, much less the entire downtown area and against the entire public.

**s. 52 *Constitution Act* 1982**
**Sullivan on the Construction of Statutes 6th Sullivan p. 497 §15.37**
**The Interpretation of Legislation in Canada Cote 4th p. 494-498**

### iii. *s. 4(2)(a)(ii) Whether the Moving Parties (Respondents) have no Valid Defence in the Proceeding*

153. The Respondents incorporate the submissions from the previous section herein as well.

154. Once the Respondents have illustrated their defences, the onus shifts to the Petitioner. Grounds to believe implies more than mere suspicion, but less than a balance of probabilities, requiring the Plaintiff to then show that these defences "*...are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success.*"

***Hansman v. Neufeld* 2023 SCC 14 CanLII para. 94**

155. The Bylaw Constitutional Challenge is a complete answer to the Petition and forms a valid defence unto itself. A large volume of cases has recognized the freedom of people to protest on streets and in parks. The authorities set out below in the Constitutional Challenge, applicable here, are a complete answer to the Petition coming up to a brick wall of defences called the Constitution.

***Beaudoin v British Columbia* 2021 BCSC 512 CanLII**

156. Freedom to choose location has been recognized as an integral component of freedom of expression. See para. 117-150.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47**
***Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC La Forest J., L'Heureux-Dubé J. 77 DLR (4th) 385, p. 393, 426, 449**
***Saumur v City of Quebec (City)* 1953 CanLII 3 SCC Rand J.**
***Garbeau v. Montreal (City of)*, 2015 QCCS 5246 CanLII para. 120-127, 136, 140, 150, 151, 166**
**Street Legal: Constitutional Protection of Public Demonstration in Canada Stoykewych 1985 43 UTL Rev. 43**
***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 41, 43**
***Bracken v. Fort Erie (Town)*, 2017 ONCA 668 CanLII para. 33**
***Ontario (A.G.) v Dieleman* 1994 CanLII 7509 ONSC para. 612**

157. Either the impugned Bylaws will be declared unconstitutional and not saved by s. 1, or interpreted in a manner so as to not infringe or interfere with the common law and s. 2, 7 Charter freedoms of the Respondents. Either way, the Petitioner cannot rely upon them as a basis for the injunctive relief.

158. See para. 208-277, as the impugned Bylaws and Arbitrary Decision, are overbroad, vague, grossly disproportionate, unreasonable, and arbitrary; to this extent the relief sought is unlikely to be granted.

159. As with the temporary erection of the CLEAR Canopy and the Lawful Marches, the Respondents have all reasonable methods and forms of expression or as are necessarily incidental to utilizing said freedoms, including signs and the sound amplification system (Petition para. 8, 9). Upon recognition that the Respondents were exercising their s. 2 freedoms, the Petitioner again, is highly unlikely to be successful. "*In my view, to limit a mode or means of expression is to limit freedom or expression as guaranteed by s. 2(b).*"

***R v Richards* 1992 CanLII 141 BCSC**

"*quando lex aliquid alicui concedit, monia incidentia tacite conceduntur* - When the law gives anything to anyone, all incidents are tacitly given. **2 Inst. 326**

*quando lex aliguid alicui concedit, concedere videtur id sine quo res ipsa esse non potest* – when the law gives a man anything, it gives that also without which the thing itself cannot exist; When the law gives anything, it gives tacitly what is incident to it. **5 Coke 47**

**Broom's Maxims of Law 1856**

160. The Respondents further have defences with a real prospect of success, including *inter alia*, estoppel, want of jurisdiction to grant permanent injunctive relief, unreasonableness and SLAPP, and the RCMP Challenge to Petition para. 7(a)-(i), with significant SCC supporting case law and *BNA* 1867.

### iv. *s. 4(2)(b) The harm likely to have been or to be suffered by the* [Petitioner] *as a result of the* [Respondents'] *expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression*

161. The specific harm contemplated by this section, includes both monetary and non-monetary harm.

Harm pleaded by the Petitioner should not be taken at face value and bald assertions are insufficient.

***Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 64**

162. The Respondents are not required to prove that harm was incurred to them, only that it is likely to be. This weighing exercise requires that the factors being considered in favour of one party outweigh the other factors for the other party by at least 51/49.

***1704604 Ontario Ltd. v. Pointes Protection Association***
**2020 SCC 22 CanLII para. 65, 66, 71**

163. The Petitioner must show the existence of harm that was caused by the Respondents' expressions.

***1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 68**

164. The weighing exercise is informed by s. 2(b)(c) of the Charter. The Lawful Protests are solidly grounded in political expression which is the highest of the core values in s. 2, where the Respondents are searching for the truth of the issues, participating in political decision making, and self-fulfillment. The Lawful Protests do not need to meet all three, just one of these factors.

***1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 77**

165. Even if the Petitioner had a valid cause of action, which is denied, this can be struck if the public interest in protecting the Respondents' expression outweighs the public interest in allowing the Petitioner to proceed; and it does, reinforced by the Province's instructions to the MSM to silence the Respondents, and the Arbitrary Decision and its enforcement and false Gov't COVID-19 information.

***Todsen v Morse* 2022 BCSC 1341 CanLII para. 33**

166. The quality of the political expressions by the Respondents is high, consisting of the Respondent Lindsay's own research, as well as that provided by researchers, doctors, nurses, vaccine injured people, professional modelers, court accepted experts on mask usage, religious leaders and others.

167. The Petitioner is required to satisfy this test on a balance of probabilities standard.

***Platnick v. Bent* 2018 ONCA 687 426 D.L.R. (4th) 60 para. 141, 174**
***1704604 Ontario Ltd. v. Pointes Protection Association***
**2020 SCC 22 CanLII para. 82, 103, 126**

168. This is the core of this analysis and the Court can examine the core values underlying freedom of expression as were documented herein at para. 99-109 of the Constitutional Challenge, and to determine what is really going on.

***Cheema v Young* 2021 BCSC 461 CanLII para. 18, 143**

169. The effects of the Petition would be a catastrophic infringement and complete denial of effective common law and Charter freedoms. The Respondents would be forced into remote, difficult to reach, outlying areas with little strategic value and benefits, if such places even exist, only to be attacked again in the future by the City from resulting from residential complaints. It would effectively turn public displays and expression, into private meetings.

170. This Court has recognized 10 non-exhaustive factors for consideration:

i. the importance of the expression and its proximity to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfillment and human flourishing;

ii. the history of litigation between the parties, including the plaintiff's use of litigation or the threat of litigation to silence critics;

iii. a financial or power imbalance that strongly favours the plaintiff;

iv. a punitive or retributory purpose animating the plaintiff's bringing of the claim;

v. minimal or nominal damages suffered by the plaintiff;

vi. broader or collateral effects on other expressions on matters of public interest;

vii. the potential chilling effect on future expression either by a party or by others;

viii. the defendant's history of activism or advocacy in the public interest;

ix. any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award; and

x. the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation.

**_Todsen v Morse_ 2022 BCSC 1341 CanLII para. 40, upholding, _1704604 Ontario Ltd. v. Pointes Protection Association_ 2020 SCC 22 CanLII para. 80**

171. Not just one, but all of these factors weigh, in varying degrees, in favour of the Respondents:

i. The political expressions of the Respondents are Charter protected and to be accorded the highest amount of protection. They were the only organized group in Kelowna opposing the Government's COVID-19 lockdowns and restrictions and sharing their information.

The B.C. Government has ordered local MSM not to give the Respondents a platform in the media, where these Lawful Protests were the only and/or most effective way to express themselves and share information with the public that the MSM would not publish.

The issues involved were the most important issues of this time period. The freedom of expression further was in relation to one of the largest rights and freedoms deprivations in Canadian history, notwithstanding whether it was justified or not, and the lack of justification is exactly what the Respondents were trying to communicate.

ii. The Petitioner has levied over 200 tickets and $50 000.00 in fines against the Respondent Lindsay in its sole intended attempt, as it admits in its Petition, to stop him from the Lawful Protests and Lawful Marches and the exercise of his common law and s. 2 freedoms.

iii. The Petitioner is in a much more powerful situation than any or all of the Respondents.

iv. That the Respondent Lindsay would be denied a permit even if requested, along with the Arbitrary Decision indicates that this is punitive action being taken to stop the Lawful Protests.

v. The Petitioner has suffered no damages at all from the Lawful Protests and Lawful Marches.

Alternatively, and without prejudice, any harm is *di minimus* and is more akin to a temporary inconvenience.

vi. This relief sought by the Petitioner, will prohibit everyone and anyone from holding protests in the City at all major, strategic locations, including libraries, RCMP, MSM, IH and City Hall.

vii. Same as # vi above.

viii. The Respondent Lindsay has been actively involved in freedom activism for 30 years.

ix. The involvement of the Provincial Government pressuring the City to act and all their resources, the huge amount of money paid to Bylaw Officers since June 2021, and for this case in relation to the fact that there have been no damages to the City, no formal complaints and all peaceful Lawful Protests.

x. Either not applicable, or no possibility at all, as the topics are politically driven towards Government's COVID-19 decisions, policies and orders.

172. The ONCA recognized four indicia of a SLAPP case which are redundant to points ii., iii., iv., and v.

A. a history of the plaintiff using litigation or the threat of litigation to silence critics
B. a financial or power imbalance that strongly favours the plaintiff
C. a punitive or retributory purpose animating the plaintiff's bringing of the claim, and
D. minimal or nominal damages suffered by the plaintiff

***Platnick v. Bent* 2018 ONCA 687 426 D.L.R. (4th) 60 para. 99**

173. The Supreme Court however, qualified these considerations in that they, "*...may bear on the analysis only to the extent that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature.*"

***1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 79**

174. The Respondents are the first, only and last persons to be publicly exercising their freedoms in this area of expression. The public interest in protecting the Respondents' freedoms in this context, is significantly higher than the public interest, if any, in granting the Petitioner's relief, especially in consideration of the actions by the B.C. Government and Petitioner and *inter alia*:

i. the public has a strong interest in relation to COVID-19, all rights, freedoms and privacy related issues, making informed choices and not being compelled to hear just the Government narrative especially where the Government has repeated it will again invoke these restrictions if required;

ii. this relief will prohibit the Respondents from exercising their common law and s. 2 Charter freedoms in all the most strategic locations, especially should the Government bring in further restrictions or rights and freedoms deprivations in the future;

iii. the strong potential for similar actions in other municipalities, which reasonably could shut down all protests in B.C. opposing Government actions and decisions;

iv. the Respondent's form of protesting is compatible with the use of all parks and streets, and the public has an interest in ensuring that their Constitutional freedoms are not denied to them, *a*

*fortiori* where the State does not approve of the content;

v. the Respondents are the only organized group in Kelowna publicly opposing the Government narrative. There are thousands more immediate supporters who would lose their freedoms as well as the Respondents, and where this will further affect millions of other people's Constitutional freedoms;

vi. the Respondents were encouraging and promoting people to run in elections and many people did, and relied upon these Lawful Protests to recruit people to help them and promote themselves. This would be denied in next year's Provincial elections;

vii. the involvement of the B.C. Government in the background, by ordering the MSM not to publish any activities or comments contrary to the Government's COVID-19 narrative, pressuring the City to issue tickets to shut the Lawful Protests down, and their pressure on the Petitioner to cut off funding or approvals for certain projects if the City did not take this action;

viii. this is exactly the situation s. 4 of the PPPA was intended to protect for the Respondents. The Respondent Lindsay, and indeed all Respondents, must be able to exercise their Constitutional freedoms without fear of legal retaliation or being straight-jacketed for so doing;

ix. this Petition is an abuse of the court process and supported by improper purposes.

175. Strengthening the integrity of our democratic system depends upon freedom of expression to criticize and oppose Governments and to share with others the reasons for same, not denying it, especially in the most effective forms and locations.

176. Examining what is really going on, the relief sought, in consideration of the intimidating 200+ tickets issued to the Respondent Lindsay and other factors mentioned above, is intended to discourage (effective) public participation in matters of public interest at strategic locations. (Petition, Part 2, para. 8) The Petition affects all members of the public and effectively bans all protests at the most effective locations in the Kelowna downtown area, colourably on the backs of the Respondents.

177. It is not in the public interest to permit this to continue, *a fortiori* where the Petitioner has admitted that the Respondents would never get a permit even if they requested one. Based on # i. – vii., ix. above, the Bylaw Tickets and Petition are merely harassment, intimidation and punitive in nature by the Petitioner (with Provincial backing). It is self-evident that the Petitioner is, "*...attempting to vindictively or strategically silence...*" the Respondents.

***Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation***
**2021 ONCA 26 CanLII para. 102**

178. Where, as herein, the freedom of speech and the harm likely to be suffered by the Respondents lie at the highest end of the spectrum, it is in the public interest in not permitting the Petition to proceed.

***Platnick v. Bent*** **2018 ONCA 687 426 D.L.R. (4th) 60 para. 162**

179. One of the most important factors to consider here, is the chilling effect. Once the Petitioner obtains an order banning the Respondents from where the most relevant political, media and other Government offices and authorities are located, every municipality will follow suit. It would be naïve and irresponsible to think otherwise.

*1704604 Ontario Ltd. v. Pointes Protection Association* **2020 SCC 22 CanLII para. 80**

180. With contempt of court proceedings lurking in the background, no one will be exercising their common law and s. 2 Charter freedoms except, possibly, in areas where there will be little or no visibility or effect, no strategic value, and where many people will not be able nor willing to come to. Downtown Kelowna will either be a Western-style ghost town, or only open for those not publicly criticizing the Government.

181. The Petitioner, Provincial and Federal Governments, while publicly claiming to recognize the Respondents' Constitutional freedoms, have continually harassed them in the exercise of their freedoms in a self-admitted attempt to shut down their Lawful Activities.

182. The Petitioner's claim is based upon the allegations that the Respondents failed to obtain a permit, but that is just a colourable assertion to obfuscate the fact that all three levels of Government do not want the Respondents at this location because it is effective for their common law and s. 2 Charter rights and freedoms, not as a result of anything done by the Respondents. It is merely to give injustice the colour of justice.

***Praetextu liciti non debet admitti illicitum* - Under pretext of legality, what is illegal ought not to be admitted 10 Co. 88.**

183. The Petitioner has discriminatorily weaponized the impugned Bylaws and/or used them arbitrarily against the Respondents, while sanctioning all other protests these Bylaws also allegedly apply to, and acknowledging these other Protest Groups and individuals have the Constitutional freedom to so do in these downtown parks.

184. The importance of the ability to assemble and have public protests and demonstrations, a collective form of individual expression, derives from absence in many cases of an effective means of making oneself heard. Expression is collectively more effective, and thus the true basis for the Petition.

*Garbeau v. Montreal (City of),* **2015 QCCS 5246 para.110, 112**

185. The Petition should not be heard until after the Constitutional Challenges and SLAPP issues, and even then, should be denied on the aforementioned basis.

Supreme Court file no. KEL-S-S-136195
Kelowna Registry

In the name of Yahveh (God)

# In the Supreme Court of British Columbia

Between:

City of Kelowna,

Petitioner, Respondent

-v-

Unknown Persons Operating as "Common Law Education and Rights", David Lindsay, John Doe, Jane Doe, and Persons Unknown,

Respondent, Applicant.

# Notice of Challenge Pursuant to s. 8 (2) *Constitutional Question Act*, of Respondent David Lindsay

Take notice that, in defence and response to the Petition filed by the Petitioner, Respondent (Petitioner) in this case, a Constitutional Challenge will be made, and Charter of Rights and Freedoms relief sought, by the Respondent, Applicant David Lindsay and possibly other Respondents, in defence to the Petition brought against him by Petitioner and upon public interest standing, on a time and date to be set by this Honourable Court, requesting the following Orders:

1. a declaration, order or finding that s. 7.3, 12.2 of Kelowna Bylaw #11500 (*Good Neighbour Bylaw*), is contrary to the common law, infringes s. 2(b)(c), s. 7 of the Charter of Rights and Freedoms, is inoperative or of no force and effect pursuant to **s. 52** of the *Constitution Act* 1982, and is not saved by s. 1 of the said Charter;

2. a declaration that s. 3.1, 3.8, 4.2, 6.1, 6.2 of Kelowna Bylaw #10680 (*Parks Bylaw*), individually or collectively, are contrary to the common law, s 2(b)(c), s. 7 of the Charter of Rights and Freedoms, are inoperative or of no force and effect pursuant to **s. 52** of the *Constitution Act* 1982 and is not saved by s. 1 of the said Charter;

3. a declaration that s. 8.2.2, 8.2.4, 10.1.1 of Kelowna *Traffic Bylaw* #8120 (*Traffic Bylaw*), individually or collectively, are contrary to the common law, s 2(b)(c)(d), s. 7 of the Charter of Rights and Freedoms, are inoperative or of no force and effect pursuant to **s. 52** of the *Constitution Act* 1982 and is not saved by s. 1 of the said Charter;

4. a declaration that s. 1.2.1(f), 2.1.2 of Kelowna *Outdoor Event Bylaw* #8358 individually or

collectively, are contrary to the common law, s 2(b)(c)(d), s. 7 of the Charter of Rights and Freedoms, are inoperative or of no force and effect pursuant to **s. 52** of the *Constitution Act* 1982 and is not saved by s. 1 of the said Charter;

5. a declaration that s. 8(1), 64, 274(1), of the *Community Charter*, insofar as it is claimed to permit the Petitioner to pass Bylaws that licence the Constitutional rights and/or freedoms of the Respondents to protest in the area described at **Part 1, para. 1-6** of the Petition and/or to permit the injunctive relief sought, are a violation of the common law, s. 2(a)-(c), s. 7 of the Charter of Rights and Freedoms, and to that extent are of no force and effect pursuant to **s. 52** of the *Constitution Act* 1982, and is not saved by s. 1 of the Charter;

6. Is the *Royal Canadian Mounted Police Act*, R.S. c. R-9, s.1, in pith and substance, legislation in relation to policing, a matter coming within the class of subjects encompassed by s. 92 (14) of the *Constitution Act* 1867, aka the *British North America Act* 1867, ie: the administration of justice in the province, and thus unconstitutional and/or *ultra vires* Parliament, as the case may be? **Yes**

7. Are sections 18 (a), (b), (c), (d), and 20 (1), (2), (3), (4), (5), of the *Royal Canadian Mounted Police Act*, R.S. c. R-9, s.1, in pith and substance, legislation in relation to policing, a matter coming within the class of subjects encompassed by s. 92 (14) of the *Constitution Act* 1867, aka the *British North America Act* 1867, ie: the administration of justice in the province and thus unconstitutional and/or *ultra vires* Parliament, as the case may be? **Yes**

8. Are s. 3, 14 (1), (2) (a), (b), (c), (d), and (3) of the British Columbia *Provincial Police Act*, R.S.B.C.1996, ch. 367, insofar as they purport to authorize the Minister, with the approval of the Lieutenant Governor to enter into and carry out agreements with Canada authorizing the Royal Canadian Mounted Police to carry out the powers and duties of the provincial police force, and *inter alia,* deem the Royal Canadian Mounted Police to be a provincial police force, unconstitutional and/or *ultra vires* the Legislature of British Columbia as the case may be, as being or amounting to a delegation, and/or an improper or unlawful use of legal fictions? **Yes**

9. Is the Memorandum of Agreement between the GOVERNMENT OF CANADA and THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA, dated April 1, 2012 and Order in Council P.C. 2011-1344, November 17, 2011 Governor in Council, which purports to authorize the Minister of Public Safety and Emergency Preparedness to enter into this Agreement on behalf of the Government of Canada, and Order in Council by the Lieutenant Governor of British Columbia, insofar as they permit Canada to establish a Provincial Police Service within the Province, hereinafter identified as the Royal Canadian Mounted Police (RCMP), with the powers and duties of a provincial police force to enforce provincial and federal criminal offences, unconstitutional and/or *ultra vires* both the Lieutenant Governor, said GOVERNMENTS, as the case may be, to enter into? **Yes**

10. it is submitted that leave is not required for this relief filed in the exercise of the Respondent, Applicant Lindsay's Constitutional rights to natural justice (including but not restricted to *audi alteram partem*), procedural fairness and full answer and defence to the Petition, including Rule 16-1(4) and Form 67;

11. that all Bylaw tickets issued against the Respondent, Applicant Lindsay by the Petitioner, Respondent, be quashed, dismissed or otherwise ruled to be not valid or applicable and all

associated fines be quashed, waived or voided for want of jurisdiction, pursuant to s. 24(1) or s. 52 of the Charter as the case may be for want of jurisdiction and Charter violations;

12. costs, on a solicitor client basis, or alternatively full indemnity basis, or alternatively, costs.

This Constitutional Challenge and relief herein shall not be defeated due to any irregularities, procedural or substantive, and the Respondent, Applicant Lindsay reserves the power at all times to make any changes as may be required to ensure it is heard upon the merits.

The following are the general particulars to be argued for this challenge, pursuant to s. 8 (4) (d) of the *Constitutional Question Act*, R.S.B.C. 1996 CHAPTER 68, with respect to the City of Kelowna Bylaws, including but not restricted to:

## 1. *Factual Basis – City of Kelowna Bylaws – para. #1-5, 11*

13. The Petitioner is the City of Kelowna, a powerful corporate entity and local Government for the City, created by statute. There are eight councilors and one mayor.

14. The Respondent Common Law Education and Rights, is not a legal person.

15. The Respondent and Applicant herein, is David Lindsay. The Respondent, Applicant Lindsay has been active in freedom issues for over 30 years across Canada, and exposing corruption, criminal activity and unconstitutional activities by various levels of Governments and Attorneys General.

16. Within days of each other in March, 2020, the Provincial Government (Min. Farnsworth) and Public Health Officer Bonnie Henry (Henry), declared a COVID-19 emergency and pandemic, despite only three deaths in the Province at that time.

17. Thereafter, lockdowns, restrictions, mandatory masks and vaccines (experimental injections) became standard fare, individually or collectively until the spring/summer of 2022, and remain partially ongoing today in specific areas.

18. Min. Farnworth did not have the statutory jurisdiction to declare an emergency in relation to a viral outbreak pursuant to s. 1(1) def. "*disaster*", "*emergency*", 9(1), 12(1) of the *Emergency Program Act.*

19. Henry's Orders were also without jurisdiction especially in relation to mandatory experimental injections, and as a condition of employment.

20. All of these measures and Orders were/are intensely and persuasively opposed by the Respondents.

21. In March 2020, the Respondents, in the exercise of their common law and s. 2 Charter freedoms, began to assemble and protest against all COVID-19 lockdowns, restrictions, Orders and legislation every Saturday at Stuart Park, located on Water St. in downtown Kelowna across from City Hall. They are presently ongoing one Saturday each month, which will change if there is a reintroduction of said lockdowns or restrictions.

22. Though these assemblies were frequently called "*Freedom Rallies*", these words have been used *ab initio* interchangeably by the Respondents and those who have assembled there, as being a protest. The original term used was "*protest*", and in substance that is what these assemblies are. This was

changed to "*Freedom Rallies*" as it conferred a more positive image, (the "*Lawful Protests*".)

23. The Respondents further participated in protest street marches in downtown Kelowna (Lawful Marches) and protests on the side of various streets and Hwy 97 (Lawful Street Protests) in the City (combined with Lawful Protests, these are collectively referred to as the Lawful Activities.)

24. Stuart Park land was purchased by the Petitioner *circa* 1955. The BCSC ruled in 2008, that the caveats on the sale of the property, constituted a trust in perpetuity, requiring that the land be used exclusively for municipal purposes.

25. The land was subsequently converted into Stuart Park *circa* 2008-2010. Stuart Park is an open space park that also serves as the Petitioner's Town or Public Square.

26. Stuart Park, was funded, built and designed as a Town or Public Square for, *inter alia* outdoor meetings, protests and demonstrations.

27. The City received $500 000.00 from the Province to construct the landing, with the Bear on the top level, and stages as a Town or Public Square, as a condition of this financial subsidy.

28. Stuart Park was the location of choice recommended by the Respondent, Applicant Lindsay, and accepted by all those in attendance.

29. Stuart Park was chosen by David and others as being one of the best and most effective places in Kelowna for the Lawful Protests. It is, *inter alia* centralized and available from all areas of the City, has multiples stages, benches, grass, scenery, washrooms, people all year long with pedestrians on the boardwalk and sidewalks from April – October, excellent access to vehicular traffic and transit, strategic and perceptive locale across from City Hall, excellent public visibility for signage, is located in a non-residential area, can accommodate many protestors without using the entire Park, and provided an excellent starting/end point for the Lawful Marches and Street Protests, where protestors would congregate in the parking lane of Water St. and sidewalks, and on Harvey Ave., to express themselves with signage and obtain public support from drivers.

30. No other location in the City has so many amenities for these Lawful Activities. Many areas with lots of people are private and/or with strategic and significant restrictions. There are no other reasonable alternatives to Stuart Park for the Lawful Protests, and even if there were, this would deny the Respondents their freedom of expressive choice, and effectiveness.

31. Street corners, side streets, and even other parks, have very few people in them, are time consuming or prohibitive to get to, and/or remain prohibitively non-functional for such Lawful Activities to effectively get the Respondent's messages to the public, and/or are located in residential areas.

32. These Lawful Protests are religious, social and political in nature, including an open recitation of the Lord's Prayer and Canadian National Anthem. The Supremacy of God in our Constitution formed a fundamental basis for the Respondents' opposition to the COVID-19 lockdowns and restrictions.

33. These Lawful Protests were, on rare occasions, held at Kerry Park, adjacent to Stuart Park.

34. The intentions and objectives of the Respondents were/are and remain to assemble and express their individual and collective opposition to the COVID-19 lockdowns, restrictions and measures taken, mandatory vaccination requirements including on health care professionals, prohibitions on family

and other visitations to hospitals/care homes by non-vaccinated people, discrimination against non-vaccinated and non-mask wearing individuals, Government Ministers and Health Minister Bonnie Henry's factual, statistical and medical lies and deceptions, non-accountability for all Government officials, and other pressing rights and freedoms deprivations and threats to same by our Governments at all levels and in all manners.

35. The Respondents wanted a dialogue and a public debate with Dr. Bonnie Henry or anyone from the Government on these issues, as the Government was controlling the media and the narrative, and the media were not asking the damning questions that needed to be asked.

36. The Lawful Protests have continued in part because no one from the Government would meet or debate with the Respondents, similar to the Federal Government's refusal to meet with the Trucker's Convoy in Ottawa. The B.C. Government, Federal Government and/or Petitioner are the cause of their own misfortune for the length of these Lawful Protests.

37. The Respondents' further intentions and objectives were to convey their knowledge, facts and beliefs to the Governments and public on these aforementioned points and issues, orally and by way of written materials, brochures and signage, banners, tables, and messages on the CLEAR Canopy, in the hopes of promoting truth finding, democratic discourse with the public and each other, and self-fulfillment, and action taking by others.

38. Many protestors wore clothes with expressive messages thereon, such as *The Resistance*. Signs are a critical component of expressing the Respondents' beliefs as they are short, visual and catch people's immediate attention. The appearance to these Lawful Activities was the strongest and most effective method of expressing their opposition to Government actions and Orders. Attendance was the means.

39. These Lawful Activities are of significant importance and value to the Respondents who desire and/or need to find a way to express themselves. These Lawful Activities were one of the most effective methods for protestors, including the Respondent, Applicant Lindsay, to communicate with others and share about businesses open to non-mask wearers, to strategize for ongoing opposition to the Government, and to obtain volunteers.

40. The Lawful Activities allowed people from all Canada and all over the world to express their views, opinions, statistics, personal experiences, research results, and legal updates and beliefs in relation to the COVID-19 situation and additional threats to our rights and freedoms.

41. The Respondents, including Lindsay, arranged for various professional doctors, nurses, media personnel, court appointed experts, professional modelers, politicians, terminated employees, vaccine injured, opposition political party leaders and others to assemble to express their views, and provide a factual and evidentiary basis in support of their shared beliefs.

42. No complaints have been registered or written to the Respondents nor the Petitioner in relation to the Lawful Protests nor that it interfered with anyone's reasonable use of the Park. Alternatively, any complaints were fleeting, *di minimis*, trifling or minor in nature, necessarily incidental to, and do not affect, the Constitutional freedoms of the Respondents.

43. The sound equipment was initially obtained due to representations by City Bylaw Officers prohibiting the Respondents' use of the City's electrical services without a permit, but could use their own power supply.

44. During this time, the Respondent, Applicant Lindsay further received ongoing complaints by protestors that they could not hear people, including himself, speaking without sound equipment.

45. The Respondent, Applicant Lindsay subsequently brought a small hand-held amplifier.

46. Subsequently, as numbers grew, the Lawful Protests were moved to the present location on the stage facing City Hall. The Respondent, Applicant Lindsay again received complaints by protestors that they were unable to hear people speaking, and were being denied their freedom to listen. Two new speakers were obtained to replace the amplifier.

47. These proved to be ineffective. As Lawful Protest numbers grew in size, two new speakers were obtained to replace the two initial, smaller speakers.

48. These two new speakers proved to be inefficient to reach protests at the back of the crowds, so two further speakers and stands were obtained. The use of four speakers has remained to the present.

49. This sound equipment is necessary to permit the Respondents to effectively speak, listen and exercise their common law and s. 2 Charter freedoms, especially for those with low voices or health issues.

50. The sound equipment did not interfere with others using the Park. Alternatively, any interference was temporary, unintentional, *di minimis*, trifling or minor in nature.

51. No complaints have been registered or written to the Petitioner in relation to volume of sound nor that it interfered with anyone's use of the Park. Alternatively, any complaints were fleeting, *di minimis*, trifling or minor in nature, necessarily incidental to, and do not affect, the Constitutional freedoms of the Respondents.

52. Further common law and s. 2 Charter freedom activities by the Respondents included the Lawful Marches on certain downtown streets over about 18 months, Lawful Street Protests, and expressing concerns and sharing information to and with the public.

53. The Lawful Marches started at Stuart Park and were about 25-40 minutes from start to finish. Large numbers of people were involved in these marches as an exercise of their freedom of expression.

54. Due to the quantum of people for many of these Lawful Marches, the sidewalks could not be used, and so one street lane was utilized, with the approval and sanction of the RCMP, who further provided traffic control, with the approval of the City, for many of the larger Lawful Marches.

55. The Kelowna RCMP acknowledged that the Respondents had a Constitutional freedom to participate in these Lawful Marches, and were voluntarily present with traffic control officers throughout the vast majority of the Lawful Marches.

56. These Lawful Marches were an integral and much anticipated part of the Respondent's expressive activities, to obtain greater visibility and to convey their messages to the public.

57. The Lawful Street Protests include supporters lining up along City streets and the Boardwalk with their signs with the intention of expressing themselves and obtaining public support and visibility. They were not loitering as this word is commonly defined.

58. There was no interference with traffic. Alternatively, any interference was fleeting, *di minimis*,

trifling or minor in nature, and posed no threat to traffic safety.

59. The Respondents' expression took many forms, including *inter alia* signs, the CLEAR Canopy, literature and brochures, banners, stickers, vehicle advertising, individual people speaking, protest singers, sound equipment, emblazed clothing, Lawful Marches and the Lawful Activities.

60. Frequently, Protest Singers would join these Lawful Protests, accompanied by Protest Songs in support of, and to encourage and inspire the protestors who were present.

61. All of these Lawful Activities were an integral part of the Respondent's expressive intentions and activities, and to obtain greater visibility and to convey their messages to the public.

62. The Respondents have also had "*surprise*" Lawful Protests downtown at Interior Health, the RCMP, various MSM offices, and City Hall in the past. The freedom to organize same would be denied if permits were required, or the relief sought is granted, and would permit the Petitioner to determine if or when such protests could occur, or at all.

63. Protestors assembled at the Lawful Protests desired to and would show support for each other and express their viewpoints, especially those who were vaccine injured or whose employment was terminated for refusing to be vaccinated (Victims), to assist Victims, to connect like-minded people across Canada and to show their individual and collective opposition to Government COVID-19 responses.

64. People from all over Canada came to Kelowna and conveyed to the public their messages in relation to COVID-19, including local nurses and doctors, and many other professionals and lay people. The Kelowna Lawful Protests were known all across Canada for their protestors' steadfast expressions of opposition with the unconstitutional and medically unsupported statutes and Orders from the Government, and exposing those in power for breaking the law. It was and remains one of the strongest bastions of opposition to Government overreach in Canada.

65. The Lawful Protests inspired similar protests all over B.C., and were a major inspiration and driving force for COVID-19 opposition. There have been other spin-off groups inspired by, and participating in the Lawful Protests. The Unity Group and others have blossomed in large part because they were able to express themselves at our Lawful Protests to achieve credibility and publicity.

66. Castanet Reporter Rob Gibson readily conceded to the Respondent, Applicant Lindsay in 2020, that the B.C. media, including Castanet, were contacted by the B.C. Government and instructed that they were not to give anyone opposing the Government COVID-19 narrative "*a platform*" in their media, including the Respondents. Castanet could not and would not publish anything indicative of the details of the Respondent's opposition to the B.C. Government and Henry's COVID-19 narrative, including evidence discrediting Government testing procedures, statistics and models.

67. In part, as a result of these instructions to the MSM, there was no other effective method for the Respondents to get their messages across to the public and each other, save for their Lawful Activities. This remains to the present.

68. These Lawful Activities, in whole and in part, were critical for people to assemble and express their concerns in relation to all aspects of the COVID-19 situation.

69. Thousands of Canadians joined these Lawful Activities, expressing their individual and collective

concerns and objections to all COVID-19 Government responses, legislation and Orders.

70. The RCMP have publicly admitted that the Lawful Protests have been peaceful since the beginning.

71. The Respondents have dutifully cleaned up after every Lawful Protest, removing their Canopy, tables, literature, sound equipment, etc., leaving Stuart Park as it was when they arrived.

72. After many of the Lawful Protests, protestors would frequent downtown businesses who were prepared to allow them in without a mask, or if the weather was permitting, or had outdoor facilities.

73. From March 2020 to August 2021, no Bylaw tickets were served upon any of the Respondents in relation to their Lawful Activities including sound amplification.

74. During this time, the Kelowna RCMP and Bylaw officers admitted publicly, and privately to the Respondents, that they have a Constitutional freedom to utilize Stuart Park and the streets for these outdoor Lawful Activities also without any requirement for a permit.

75. Bylaw Officers informed and represented to Respondent, Applicant Lindsay that they considered these protests to be lawful and Constitutional and no permit was required, as long as they were not using any electrical or other services of the Petitioner. At no time have the Respondents used any City electrical or other supplies.

76. Bylaw Officers for the Petitioner began issuing tickets exclusively to the Respondent, Applicant Lindsay *circa* August 14, 2021, 17 months after the Lawful Protests began.

77. The Petitioner has harassed the Respondent, Applicant Lindsay with over 200 bylaw tickets amounting to over $50 000.00 in fines against him in the exercise of his common law and Constitutional freedoms.

78. No other person from any other protest has been ticketed for organizing political protests in parks, street marches, using sound equipment, or signage.

79. The Petitioner has harassed the Respondent, Applicant Lindsay by knowingly ticketing him for activities that he was not a party to, such as selling merchandise, and recklessly issued tickets on days where he was not even present. The Respondent, Applicant Lindsay is not responsible for the actions of others.

80. The City did not issue any trespass orders to the Respondents, demanding that they leave the Town or Public Square in Stuart Park. The City is aware of the Respondents' Constitutional freedom for their Lawful Protests and admit same.

81. Bylaw Officer Short admits the factors the Petitioner considers to constitute an "*event*" in s. 3.8 of the *Parks Bylaw* and thus requirable for a permit, were malleable, assumed and agreed upon between himself and his secretive superior(s) in a closed door, back room, covert and secret meeting. Neither the public nor the Respondents were ever notified of this secret meeting and arbitrary definition, nor any test to be met to constitute an event ("*Arbitrary Definition*").

82. Neither the public nor the Respondents were ever notified of this secret meeting and *Arbitrary Definition*, nor any test to be met to constitute an event.

83. The Respondent, Applicant Lindsay repeatedly noticed Bylaw Officers they were exercising their common law and **s. 2** Charter freedoms and not licensed privileges, they were not having an event, nor encompassed within any Bylaw or *Arbitrary Definition*, and if there was a conflict, their Constitutional freedoms prevailed. Officer O'Hanlon ignored and discarded the *Beaudoin* case given to him from the Respondent, Applicant Lindsay in response to O'Hanlon's questioning Lindsay if he had a permit.

84. Both Bylaw Officers Short and O'Hanlon informed the Respondent, Applicant Lindsay that while they did have Constitutional freedoms, the Bylaws governed over his Constitutional freedoms.

85. The Petitioner has admitted that it recognizes the Constitutional freedoms of the Respondents to their Lawful Protests and further admits that it has not issued, does not, cannot and will not issue permits for any political protests. Permits for non-political protests can take up to nine months, if at all.

86. A high ranking official (the Source) with the Petitioner has conceded that the primary reason for this Petition is that both the B.C. and Federal Governments are pressuring the City to stop these Lawful Protests, *inter alia* by threatening the Petitioner with denial of funding or approval of certain projects.

87. The Source, as well as various Bylaw Officers have admitted to the Respondent, Applicant Lindsay that there have been no complaints, especially of a formal nature, filed with the Petitioner in relation to these Lawful Activities and that no files for any complaints were opened by the Petitioner. Alternatively, any complaints were fleeting, *di minimis*, trifling or minor in nature, necessarily incidental to, and do not affect, the Constitutional freedoms of the Respondents.

88. People have utilized the Park and the Bear area during these Lawful Protests, including even walking behind people while they were speaking and allowing children to play on all areas of the landing. No pedestrian, or anyone from the Stuart Park concrete/skating rink area has ever complained to the Respondents or the Petitioner that the Respondents were, by way of their Lawful Protests, interfering with, or preventing them from using or enjoying the Park in any way.

89. The Respondents have not denied access to, or use of the Park facilities to anyone. Alternatively, any interference was temporary, unintentional, fleeting, *di minimis*, trifling and/or insignificant in nature.

90. There is a long history of acceptance and recognition by the Petitioner of the Constitutional freedom for all other protestors/protests/counter protestors (Protest Groups) at Stuart Park. Many of them have used, and continue to use both Stuart Park, Kerry Park, and City Hall property for political protests.

91. These other Protest Groups for years have done, in their protests and in public parks and streets, all activities that the Respondents are alleged to have done, including posting signs in the ground, using sound equipment and erection of tents, canopies and/or tables. None of these other Protest Groups or their organizers or protestors, have been charged with any offences nor issued any bylaw tickets, or demanded to have permits.

92. Counter protestors regularly assembled in front of City Hall, simultaneously with the Lawful Protests. Some of these people were screaming at the top of their lungs and causing a disturbance. The Petitioner has approved of and/or supported these other Protest Groups by allowing same to occur.

93. Virtually all remaining parks in the City are in residential or remote, outlying areas and will likely raise complaints by residents that are simply not applicable at Stuart Park. These Lawful Protests are in an area least likely to materially affect the public, while simultaneously permitting the Respondents

to exercise their common law and s. 2 Charter freedoms in an effective manner.

94. Considering that the Lawful Protests were temporary and occurred once/week, for about 60-90 minutes, are peaceful, clean, and non-materially intrusive, there is nothing more that can be done that would not otherwise deny the Respondents their Constitutional freedoms in its entirety, or to the point as to render them meaningless, ineffective or useless.

95. If this Petition is granted, the Respondents will have no effective place, or no place at all to protest in the entire City and, alone or in combination with the MSM's refusal to report on them, will effectively deny to them their common law and s. 2 Charter freedoms.

## 1. *Constitutional Basis*

96. The issues raised in this Challenge are:

A. These impugned Bylaws, individually and/or collectively, are quasi-criminal in nature and prohibit the Respondents in the exercise of their common law and s. 2 Charter freedoms, under penalty of fines and/or incarceration.

B. The Respondents have the Constitutional freedom to their Lawful Activities, and insofar as the Bylaws infringe upon same, they are unconstitutional and not supported by s. 1 of the Charter.

C. A proper interpretation of these impugned Bylaws does not permit the relief sought.

D. The Bylaw Tickets were issued from August 2021 to the present from the City to the Respondent Lindsay, absent jurisdiction to so do and should be quashed.

E. The relief sought and actions taken by the Petitioner are *inter alia* an abuse of process, and unreasonable.

F. The impugned Bylaws and relief sought are arbitrary, impermissibly vague, overbroad and/or grossly disproportionate.

G. The *RCMP Act* is *ultra vires* Parliament insofar as it permits for a Federal police force to operate in the Province of British Columbia. The enforcement relief the Petitioner seeks cannot be granted for want of jurisdiction.

97. Pursuant to s. 52 of the *Constitution Act*, any law that is inconsistent with or infringes the provisions therein, is of no force and effect. This applies to municipal Bylaws and officials as well. Any Government action or administrative practice, such as the Bylaw Tickets, invokes s. 24(1) of the Charter.

**_Slaight Communications Inc. v Davidson_ 1989 CanLII 92 SCC**
**Lamer J., quoting Prof. Hogg**
**s. 1, Def. "_Regulation_", s. 2 _Interpretation Act_ RSBC 1996 CHAPTER 238**
**_R v Ferguson_ 2008 SCC 6 CanLII para. 61**

98. The Petition is an indirect attack on the most cherished common law and s. 2(b)(c) Charter freedoms and values. The Province and Petitioner cannot do this directly so they are attempting to do this via the use of the City's Bylaws, but the negative Constitutional result is the same.

## A. *Nature and Importance of Freedom of Expression*

99. The Charter is required to be construed generously and purposively, to fulfil the purpose of the guarantees therein and securing for the Respondents the full benefit of the Charter's protection.

***Hunter v Southam*** **1984 CanLII 33 SCC**
***R v Big M Drug Mart*** **1985 CanLII 69 SCC para. 117**
***Berube v City of Quebec*** **2019 QCCA 1764 CanLII para. 47, quoting:**
***Greater Vancouver Transportation Authority v Canadian Federation of Students*** **2009 SCC 31 CanLII para. 27**

100. Freedom of expression is so significant that it has been recognized as the fundamental underpinning of all other Constitutional rights and freedoms, and as eloquently stated by Rand J., a "*...little less vital to man's mind and spirit than breathing is to his physical existence.*" It is a "*...pillar of modern democracies.*", and is an inherently fundamental, "*original*" freedom existing prior to the Charter.

***Irwin Toys Ltd.*** **v Quebec (A.G.) 1989 CanLII 87 SCC**
**p. 968-69, also McIntyre J. (dissent)**
***Ontario (A.G.) v Dieleman*** **1994 CanLII 7509 para. 6210-621**
***R v Sharpe*** **2001 SCC 2 para. 21**
***Bou Malhab v Diffusion Métromédia CMR Inc.*** **2011 SCC 9, para. 17**
***Edmonton Journal v Alberta (A.G.)*** **1989 CanLII 20 2 SCR 1326, 1336 Cory J**
***R. v. Guignard*** **2002 SCC 14 LeBel J. para. 20**
***Saumur v City of Quebec (City)*** **1953 CanLII 3 SCC p. 329**

101. The Respondents' exercise of their common law and s. 2(b)(c) Charter freedoms in this "*Public or Town Square*," cannot be denied due to hostility or disagreement to their messages being conveyed, yet that is what is happening.

***Harper v. Canada (Attorney General)*** **2004 SCC 33 CanLII para. 14, 16**

102. Freedom of expression will not always include pleasantries: "*... (d)emocracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those . . . who exercise power and authority in our society... Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy.*"

***Cusson v. Quan*** **2007 ONCA 771 para. 125 Rev'd other grounds, 2009 3 S.C.R. 712**

103. The degree of Constitutional protection varies depending on the nature of the expression. Here, where the nature of the Respondents' expression is extremely political and is at the highest core of expression guaranteed by s. 2(b), a deferential approach to the City's Bylaws is not appropriate.

***Thomson Newspapers Co. v Canada (A.G.)*** **1998 CanLII 829 SCC para. 91, 95**
***Harper v. Canada (Attorney General)*** **2004 SCC 33 CanLII para. 11, 12, 14-18**

104. This right of expression includes, of necessity, the right to absolute dissent.

***Garbeau v. Montreal (City of),*** **2015 QCCS 5246 para. 102, 107**

105. Section 2(b) of the Charter protects freedom of expression for both the speaker and all listeners at the Lawful Protests, attending protestors and all passers-by who wish to listen.

*Harper v. Canada (Attorney General)* **2004 SCC 33 CanLII para. 15-18, 20**
***R v Quintal* 2002 ABPC 79 CanLII para. 123**
***Ruby v Canada (S.G.)* 2002 SCC 75 CanLII para. 52, 53**
***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* 1993CanLII 153 SCC Part IV**

## *B. s. 2(b) Constitutional Right to Protest – Freedom of Expression, Irwin Toy*

106. "*Communication requires a forum. Individuals speak to passers-by on street comers... If freedom of expression is to be more than an abstraction, it must encompass the circumstances of communication and ensure that those wishing to communicate are allowed access to the resources necessary for effective communication. Government entities have a duty to ensure that public spaces are open for public protests. Parks meet that duty, as the SCC has repeatedly held.*"

**Access to Public and Private Property under Freedom of expression**
**1988 CanLIIDocs 3 Richard Moon p. 339**

107. *Irwin Toys* set out the test determining if the impugned Bylaws infringe s. 2(b) of the Charter. The first two questions determine if the Respondents' expressions are encompassed within s. 2(b).

| | |
|---|---|
| First, did the sounds have *expressive content*, thereby bringing it within s. 2(b) protection? | **Yes** |
| Second, if so, does the *method or location* of this expression remove that protection? | **No** |
| Third, if the expression is protected by s. 2(b), does the Bylaw *infringe* that protection, either in purpose or effect? | **Yes** |

***Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 30**

108. Whether freedom of expression is protected in a government location, the SCC stated: "*The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:*

*(a) the historical or actual function of the place; and*

*(b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.*"

***Montréal (City) v. 2952-1366 Québec Inc.* 2005 SCC 62 CanLII para. 74**
***Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 30, 35**

109. Neither the method or location of the expression, including the Lawful Protests with sound equipment, Lawful Street Protests and Lawful Marches, conflict with the values protected by s. 2, ie: self-fulfillment, democratic discourse and truth finding; indeed, they support all of these values, and are thus not excluded from Charter protection.

*Canadian Broadcasting Corp. v. Canada (Attorney General),* **2011 SCC 2 CanLII para. 37**
***Bracken v. Fort Erie (Town),* 2017 ONCA 668 CanLII para. 33**

### i. *1st - Did the Sounds have Expressive Content bringing it within s. 2(b) Protection?* Yes

110. The Lawful Protests engage s. 2(b)(c) of the Charter, and the common law upon which these Charter freedoms were based upon. S. 2(b) has been interpreted broadly to include picketing, commercial speech and even hate speech. If the activity conveys or attempts or was performed to convey a meaning, it is encompassed within s. 2 of the Charter, content being irrelevant.

***Berube v City of Quebec* 2019 QCCA 1764 CanLII para. 80**
***RWDSU v Dolphin Delivery Ltd.* 1986 CanLII 5 SCC para. 12-20**
***Irwin Toys Ltd. v Quebec* (A.G.) 1989 CanLII 87 SCC**
***Ford v Quebec (A.G.)* 1988 CanLII 19**
***R v Keegstra* 1990 CanLII 24 SCC Part VI**

111. Expression includes tone, volume, demeanour, gestures and even facial expressions.

***R v Amsel* 2017 MBPC 52 CanLII para. 27**
***R. v Epstein* 2023 QCCQ 630 CanLII para. 168-169**
***RWDSU v Dolphin Delivery Ltd.* 1986 CanLII 5 SCC**

112. The form (method or type of expression) by the Respondents, including signs, banners, CLEAR Canopy, tables and brochures, are further protected by s. 2(b) of the Charter.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 32, 37**
***Batty v City of Toronto* 2011 ONSC 6862 para. 71**

113. The sounds and visuals made by the Respondents at their Lawful Activities and literature table, do have expressive content, thus being encapsulated in s. 2(b).

114. Political expression is the single most important and protected type of expression. Political expression "*...lies at the core of the Charter's guarantee of free expression.*"

***Harper v. Canada (A.G.)* 2004 SCC 33 CanLII para. 11**
***B.C. Freedom of Information and Privacy Association v. British Columbia (A.G.)* 2017 SCC 6 CanLII para. 16**
***Libman v Quebec (A.G.)* 1997 CanLII 326 SCC**
***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 40, 68**

115. The Respondent's Lawful Protests are primarily in relation to political issues, inclusive of COVID-19 and the underlying political, social, medical and science related issues, which are at the highest end of the core values s. 2 (b) was intended to protect.

***R v Sharpe* 2001 SCC 2 para. 23**
***Libman v. Quebec (Attorney General)* 1997 CanLII 326 SCC para. 29**

116. The only exception is if the expression advocates violence. This is clearly not applicable herein.

### ii. *2nd - If so, does the Method or Location of Expression Remove that Protection?* *No*

#### a. *Section 2(c) - Charter*

117. Freedom of expression in s. 2(b) and peaceful assembly in s. 2(c), though listed separately, can and frequently are combined in protests and demonstrations, often they are inextricably connected and inseparable. Both are exercised by the Respondents in their Lawful Activities.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 40-43, 50-55**

118. Section 2(c) of the Charter includes the freedom to participate in peaceful demonstrations, protests, meetings, picketing and other assemblies. These must be on some form of public property, for no one protests on their own land, and private property owners generally refuse to allow people to do so, in many cases, for business and commercial reasons.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 40-43**
***Roach v Canada (Min. of State for Multiculturalism and Citizenship)* 1994 CanLII 3453 FCA**

119. Freedom of assembly inherently recognizes the freedom of the individual to connect with others.

***Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC 1 CanLII para. 64**

120. The importance of assembly, public protests and demonstrations, a collective form of individual expression, derives from absence of an effective means of making oneself heard, *a fortiori* where the Government has ordered MSM not to give anyone opposing their COVID-19 narrative a platform.

***Garbeau v. Montreal (City of)*, 2015 QCCS 5246 para. 110, 112**

121. Requirements to provide advance notice to police of the time, location and route of a demonstration, failed to be upheld under the s. 1 analysis as being not minimally impairing, and their effects outweigh their adverse impact on protected freedoms.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 67-75, 127, 158**

122. The Respondents' s. 2(b)(c) freedoms include voluntarily and independently choosing the best location that will most effectively disseminate their information and beliefs to the largest amount of people. *"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. Certain places owned by the state are well suited for such purposes."*

***Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC Part 1 a. Lamer CJ**
***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 43**

123. This includes, of necessity, the Respondents' ability to attempt to persuade other citizens (pedestrians,

Park and boardwalk users, and walk throughs) of their position through debate and discussion, to advocate for changes to the political situation of the day, in this case, COVID-19 and related issues.

***Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 16**

124. Signs, even commercial signs, are part of the medium or mode of communication, which is strongly interwoven into the fabric of expression and in many cases, more effectively.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 32, 37**
***Ford v. Quebec (Attorney General)* 1988 CanLII 19 SCC para. 46**
***R. v. Glassman* 1986 CanLII 7326 ONCJ 164, 181**

125. The Respondents' freedom of expression protections are not to be removed or restricted on the basis either that someone may feel discomfort or unease from the topics of discussion.

***Bracken v. Fort Erie (Town)* 2017 ONCA 668 CanLII para. 82**

### b. *s. 2(b)(c) Location - Constitutional Right/Freedom to Protest in Stuart Park, Town Squares and Streets, including Marches*

126. Freedom of expression will be violated if the Government imposes a limitation or precondition (or prohibition) that must be complied with in order to exercise freedom of expression. Such is the case with s. 3.1, 3.8, 6.1, 6.2 of the *Parks Bylaw*, s. 8.2.2, 8.2.4, 10.1.1 of the *Traffic Bylaw*, and s. 7.3, 12.2 of the *Good Neighbour Bylaw* which purport to so do.

***Figueiras v. Toronto (Police Services Board)* 2015 ONCA 208 CanLII para. 74, quoting:**
***Canadian Broadcasting Corp. v. Canada (Attorney General)* 2011 SCC 2 CanLII para. 54**

127. Section 2(b) of the Charter protects not only the expressive activity, but also the right to so do in many public places, including streets and parks.

***Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 47, 48**
***Stewart v. Toronto (Police Services Board)* 2020 ONCA 255 CanLII para. 46**
***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47, 48, 50-52, 55**
***Edmonton (City) v Forget* 1990 CanLII 5597 ABKB para. 26, upheld in:**
***Ramsden v Peterborough (City)* 1993 CanLII 60 SCC Iacobucci J. Part V**

128. The Petitioner seeks an injunction prohibiting the Respondents from having their Lawful Activities everywhere in downtown Kelowna, implying that they can go elsewhere in the City without a permit, where their presence will not be felt or noticed. It is not a defence to claim that the Respondents can go somewhere else for their Lawful Activities, same violating freedom of expression, including locus.

***Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 27**
***Canadian Federation of Students v. Greater Vancouver Transportation Authority* 2006, 2006 BCCA 529 CanLII para. 120**

129. Freedom is characterized by the absence of coercion or constraint. Where the Respondents are compelled by the City to a course of action or inaction which they would not then have chosen, such as a different location, they are not acting of their own volition and cannot be said to be truly free.

***R v Big M Drug Mart Ltd.* 1985 CanLII 69 SCC para. 95**

130. The location of the exercise of freedom of expression can be as important as the speech itself. Section 2(b) is not dependent upon a benevolent Government's provision of time and location, particularly where the audience is minimal or otherwise to ensure no harm to itself in those locations.

***Bracken v. Niagara Parks Police* 2018 ONCA 261 CanLII para. 57**

131. This is supported by Huddart J.'s acknowledgement that, "*...The question is not whether the form of the expression is compatible with the function of the street, but whether free expression in the chosen form would undermine the values the guarantee is designed to promote (para. 77, City of Montreal).*"

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 35**
***Committee for the Commonwealth of Canada v Canada***
**1991 CanLII 119 SCC McLachlin J.**

132. Judicial notice can be taken that our public streets, sidewalks, public squares and parks are, inherently, "*...privileged, traditional and historical places of collective expression and popular assembly...*" and thus amenable for the Lawful Activities. L'Heureux-Dube J. emphasized the dangers in *Committee* of denying access to public property in that if the public had no right to express themselves on Government owned property, there would have little or nowhere else to go, as is the case herein.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47, 50, 51**
**See also:**
***Committee for the Commonwealth of Canada v Canada***
**1991 CanLII 119 SCC La Forest J., L'Heureux-Dubé J. p. 393, 426, 449**
***Saumur v City of Quebec (City)* 1953 CanLII 3 SCC Rand J.**
***Garbeau v. Montreal (City of)*, 2015 QCCS 5246 CanLII**
**para. 120-127, 136, 140, 150, 151, 166**
**Street Legal: Constitutional Protection of Public Demonstration in Canada**
**Stoykewych 1985 43 UTL Rev. 43**
***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 41, 43**
***Bracken v. Fort Erie (Town)*, 2017 ONCA 668 CanLII para. 33**
***Ontario (A.G.) v Dieleman* 1994 CanLII 7509 ONSC para. 612**

133. Courthouses and City Halls are also Constitutionally protected areas available for protests, that the Petitioner is also attempting to prohibit against the Respondents from protesting at.

***R. v. Breeden*, 2009 BCCA 463 CanLII para. 15[41], 28**

134. The method or location of Stuart Park, Kerry Park and/or City streets, do not remove that protection. The Parks and streets at issue are places where the Respondents' freedom of expression is expected, and facilitates the values of s. 2(b).

***Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 39**

135. Section 3.1, 3.8 of the *Parks Bylaw*, s. 2.1.2 of the *Outdoor Events Bylaw* and s. 8.2.2 and 8.2.4 of the *Traffic Bylaw*, if accepted as interpreted by the Petitioner, imply no other reasonable finding that these Bylaws were intended and/or are being used to restrict or deny freedom of expression, minimally on an arbitrary basis. This should then proceed to a s. 1 analysis immediately.

136. Alternatively, if the Bylaws are aimed at consequences of certain activities, which is denied, the Respondents can and do still bring themselves within the context of s. 2 of the Charter, by showing that their expressive activities relate to the underlying purposes below for the s. 2(b) guarantees.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 46, 47**

137. Those said values which the SCC recognizes as being served by s.2(b), are: democratic discourse, truth finding, and self-fulfillment.

***City of Montreal v 2952-1366 Quebec Inc.* 2005 SCC 62 CanLII para. 74**

138. These values will determine if one "*...would expect constitutional protection for free expression...*"

***R. v. Breeden*, 2009 BCCA 463 CanLII para. 15[39], quoting**
***Transportation Authority v Canadian Federation of Students***
**2009 SCC 31 CanLII para. 39**

139. As such, the Charter involves a focus on the values of s. 2(b) rather than the function of the location.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 34-37**

140. The Respondents' Affidavits supportingly evidence the expressive content of these Lawful Protests and Marches (para. 99-116 herein) that satisfy these objectives of truth finding, democratic discourse, and to the extent that many protestors had come to refer to those attending the Lawful Protests as family and their personal desires to see changes made, self-fulfillment, are met.

### c. *History, design and use of Stuart Park*

141. Even in locations where the primary function is not expression nor the communication of messages, Courts have held that they are not inconsistent with s. 2(b) Charter values. The locus of the expressive activities, even if not historically for that use, can still meet s. 2 values. Notwithstanding, Stuart Park and Kerry Park and other downtown locations meet the test for being open to the public for protests.

***Société Radio-Canada v Canada (A.G.)* 2011 SCC 2 CanLII para. 37**

142. The Petitioner holds the streets and parks as trustee for the benefit of the public (beneficiaries) and cannot be made the sole justification for infringing upon Constitutional freedoms of the Respondents. Equity regards the beneficiary as the true owner of equitable interest, which is the public.

***Vancouver v Burchill* 1932 SCR 620, p. 625 Rinfret J.**
***Committee for the Commonwealth of Canada v Canada***
**1991 CanLII 119 SCC Part 1 b. Government Interest**
***Committee for the Commonwealth of Canada v Canada* 1987 2 F.C. 68, 89**
***Kennedy-Dowell v. Dowell* 2002 CanLII 78109 NSSC para. 32**

143. Being common property, the Respondents have the freedom not to be excluded from its use, as opposed to any power by the Petitioner to exclude them, directly or indirectly, or via licensing/permits. The Petitioner has a duty to uphold the right of non-exclusion.

***Garbeau v. Montreal (City of)*, 2015 QCCS 5246 CanLII para. 122**

144. Stuart Park was designed, constructed and funded specifically for the purpose of freedom of expression as well as use of sound equipment. The City contractually agreed to design and construct this Public or Town Square for the very reasons the Respondents are using these Parks.

145. There are three stages in Stuart Park, both designed to accommodate hundreds or thousands of people depending upon which stage is being used. The City Hall facing stage is smaller but with benches designed for people to watch protests for extended periods of time, necessitating the use of sound equipment to avoid individuals going hoarse and/or limiting their expressions.

146. These three stages, similar to the podium analogy referenced by the SCC, were designed and built to promote and support the purposes of s. 2(b)(c), indicating that members of the public would expect Constitutional protection of their expression at this location.

***Transportation Authority v Canadian Federation of Students***
**2009 SCC 31 CanLII para. 41, 43**

147. The Respondents have used these Parks and streets for over three years now, and over 17 months prior to the City being pressured by the Province to issue tickets. The Respondents had full expectations of a freedom of use for their Lawful Protests.

148. The City has permitted it to be open to the public for such demonstration use from the beginning. There is a documented and ongoing history to the present of actual and current use of public streets and sidewalks, Stuart Park and Kerry Park as locations for many protests by other groups, including with sound equipment, tents, canopies and signs, for which no permits were required or enforced.

***Greater Vancouver Transportation Authority v Canadian Federation of Students***
**2009 SCC 31 CanLII para. 41, 42**

149. Once this threshold of access is recognized by the Petitioner, the property becomes a public forum. If the Petitioner permits any section of the public to communicate on its property, it cannot prevent others from so doing there due to content of their communication. By allowing access to some, the Petitioner has made its property a public forum. If the parks and streets of a town are open to some expression, they must be open to all.

**Access to Public and Private Property under Freedom of Expression**
**Richard Moon 1988 CanLII Docs 3 339, 347**

150. In certain cases, private ownership can equal public ownership to not defeat s. 2(b). "*Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. (Marsh v. Alabama, 326 U.S. 501 (1946), at p. 506).*"

***Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC**

## d. *Constitutional freedom to Lawful Marches s. 8.2.2, 8.2.4 Kelowna Traffic Bylaw #8120*

151. The aforementioned points in relation to the Respondents' Constitutional freedom for their Lawful Protests and freedom of expression, apply here.

152. These *Traffic Bylaw* provisions, insofar as they may conflict with these said Constitutional freedoms, are either of no force and effect, or simply not applicable to the Lawful Marches.

153. As part of the Lawful Protests, the Respondents further were involved in the Lawful Marches. These Marches would originate from Stuart Park and travel circularly downtown and back to Stuart Park. Time was usually about 25-40 minutes from beginning to end.

154. The RCMP contacted the Respondent, Applicant Lindsay and provided traffic control for the majority of these Lawful Marches. People in motor vehicles for this short period, would simply detour around the protestors, or would wait briefly, as a minor inconvenience.

155. These Lawful Marches consisted of protestors with various signs, and banners. Occasionally there would be lead and rear vehicles, with signage and flags.

156. The Lawful Marches have been recognized as part of our s. 2(b)(c) Charter freedoms. Free use of the public highways includes the freedom to walk/demonstrate on public streets. "*The constitutional right to demonstrate on a public road can be exercised by thousands of citizens.*" (***Garbeau* para. 482**)

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47, 50, 51**
**See also:**
***Committee for the Commonwealth of Canada v Canada***
**1991 CanLII 119 SCC La Forest J., L'Heureux-Dubé J. p. 393, 426, 449**
***Saumur v City of Quebec (City)* 1953 CanLII 3 SCC Rand J.**
***Garbeau v. Montreal (City of),* 2015 QCCS 5246 CanLII**
**para. 120-127, 136, 140, 150, 151, 166, 466, 482**
**Street Legal: Constitutional Protection of Public Demonstration in Canada**
**Stoykewych 1985 43 UTL Rev. 43**
***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 41, 43**
***Bracken v. Fort Erie (Town),* 2017 ONCA 668 CanLII para. 33**
***Ontario (A.G.) v Dieleman* 1994 CanLII 7509 ONSC para. 612**

157. Public streets, frequently identified as "*thoroughfares*" in relation to freedom of expression, are open to public concourse, incorporating and accepting of many different types of expression, on the same footing as streets and parks.

***Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC Lamer J. (d.); L'Heureux-Dubé "Balancing the Interests at Stake"; McLachlin J. "The Test Under Irwin Toy"**
***Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 CanLII para. 81**

158. Once established that the historical use of the Park and streets at issue have traditionally been used for free expression by many protest groups and others, "*...the location of the expression as it relates to public property will be protected.*"

***City of Montreal v 2952-1366 Quebec Inc.* 2005 SCC 62 CanLII para. 75, upholding *Greater Vancouver Transportation Authority v Canadian Federation of Students* 2006 BCCA 529 BCCA para. 120 Prowse J.**

159. The fundamental value of permitting freedom of expression of necessity, permits some interference with the activities of others. There is a degree of interference with the activities of others that is required to tolerate to allow important values such as freedom of expression, to flourish. The Petitioner's literal interpretation of the Bylaws is unreasonable in that regard.

***Toromont Cat v. International Union of Operating Engineers* 2008 22 CanLII para. 38, 39**

160. The Petitioner's reliance upon the defined word "*nuisance*" in the *Parks Bylaw*, is overly and unreasonably restrictive and literal. There is room within the tort of nuisance to allow for a degree of interference with the use of an employer's land so long as that interference is necessarily incidental to the legitimate exercise of the freedom of expression guaranteed by the Charter and not for some ulterior purpose. Same with the Respondents' Lawful Protests and Marches. Every protest in Canadian history affects to some degree, the rights or freedoms of others on a temporary basis.

***Toromont Cat v. Int. Union of Operating Engineers, Local 904* 2008D 22 CanLII para. 45**

161. In determining whether or not a nuisance exists, a court is involved in the reconciliation of conflicting claims, "*...the claim to undisturbed use and the enjoyment of land on the one hand with the claim to freedom of action on the other.*" To constitute a legal nuisance, the annoyance or discomfort must be substantial and unreasonable given that all human activity in an urban environment impinges on others to a lesser or greater degree.

***Ontario (Attorney-General) v. Dieleman* 1994 CanLII 7509 ONSC para. 571**

162. The Lawful Protests have much social utility. It cannot be said, simply because one of its incidental effects may be to inconvenience or minimally interfere with others, to be *ipso facto* illegal.

**Toromont Cat v. International Union of Operating Engineers, Local 904 2008 NLTD 22 CanLII para. 49**
***Ramsden v Peterborough (City)* 1993 CanLII 60 SCC Iacobucci J. Part V**

163. Even if public streets are designed for vehicles, the maxim applies: the greater includes the lesser, where the streets also include the right of travel by foot (the *original* mode of moving) and bicycle.

***Rex v Law* 1915 CanLII 656 ALKB**
***R v Wright* 2022 ONSC 2950 CanLII**
***Saumur v City of Quebec (City)* 1953 CanLII 3 SCC Rand J., quoting From the Bible to preach in the streets**
***In eo quod plus sit, semper inest et minus* - The less is included in the greater 50, 17, 110 Broom's Maxims of Law 1856**

164. Section 3.1, 3.8 of the *Parks Bylaw*, and s. 8.2.2, 8.2.4 of the *Traffic Bylaw*, insofar as they are claimed to prohibit the Lawful Protests and Marches, violate the Respondents' common law and s. 2 Charter freedoms.

## e. *Constitutional Freedom to use Sound equipment s. 7.3, 9.5 Kelowna Good Neighbour Bylaw #11500*

165. The *Good Neighbour Bylaw*, as literally interpreted and enforced by the Petitioner, infringes the common law and s. 2 Charter freedoms of the Respondents and is not saved by s. 1.

166. S. 2(b) Charter freedoms encompass both form (method) and content, of all non-violent expression.

***Canadian Broadcasting Corp. v. Canada (Attorney General),* 2011 SCC 2 CanLII para. 35, 36, quoting *R v Keegstra* 1990 CanLII 24 SCC**

167. The Respondents have all reasonable methods and forms of exercising freedom of expression, or that are necessarily incidental to same, including the sound amplification system. "*In my view, to limit a mode or means of expression is to limit freedom or expression as guaranteed by s. 2(b).*"

***R v Richards* 1992 CanLII 141 BCSC**

> "*quando lex aliquid alicui concedit, monia incidentia tacite conceduntur* - When the law gives anything to anyone, all incidents are tacitly given. **2 Inst. 326**
>
> *quando lex aliguid alicui concedit, concedere videtur id sine quo res ipsa esse non potest* – when the law gives a man anything, it gives that also without which the thing itself cannot exist. **5 Coke 47**

168. The NSCA was correct in its findings that: "*...to limit a mode of expression is to limit freedom of expression as guaranteed by s. 2(b).*"

***Donahoe v. Canadian Broadcasting Corporation* 1991 CanLII 2529 NSCA Jones J.A.**
***Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 14, 16**

169. Activities such as freedom of movement, where necessary to exercise freedom of expression, form part of that freedom and are protected. Here, use of the sound equipment is necessary to excise the Respondents' s. 2(b) freedoms, and is also subsumed within this freedom.

***International Fund for Animal Welfare, Inc. v. Canada* 1988 CanLII 9362 FCA 1989 1 FC 335, 354-355**

170. The Respondents' common law and s. 2 Charter freedoms include, of necessity, the ability for "*effective*" and "*meaningful*" exercise of those freedoms and communication of their messages. It is not enough to say that the Respondents can go to some other part of the City where, for a variety of reasons, their presence is likely to not achieve the same results.

***Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 15, 16**
***Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 27**
***Canadian Federation of Students v. Greater Vancouver Transportation Authority* 2006, 2006 A 529 CanLII para. 120**

171. Freedom of expression includes the right to effective dissemination of messages and the effective

reception of these same messages. This requires of necessity, the sound equipment. Hearing every 10th word of what is being said from the person speaking, or barely hearing at all and/or the person speaking being drowned out by cars or other noises, renders freedom of expression meaningless and almost as if speaking to no crowd at all or, quoting from the SCC: "*..speech without effective communication is not speech but an idle monologue in the wilderness.*"

***Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 18, 20**

172. Many people could not effectively or at all, hear or receive messages being conveyed by people speaking on the stage. The Respondents obtained sound equipment. Sound from these speakers is reasonably directed away from the Park to City Hall, to avoid interference as much as possible with other Park users, which is likely the reason why there have been no complaints.

173. The results of denial of sound equipment would be for people to having to yell or scream, which would be unreasonably difficult and/or impossible to be able to convey one's messages.

174. Using a megaphone is unreasonable and ineffective. Most people read from scripted information and are unable hold it, including the engagement switch in the on position and talk simultaneously for the length of one's talk, causing physical discomfort. Nor when Protest Singers are on stage singing, and playing a musical instrument. They are not made for such use. Sound quality and distance is poor.

175. All protests and accompanying sounds interfere with public property to some degree, including the protests by other Protest Groups that the City has allowed to occur, and using sound equipment. Any inconvenience caused by the Lawful Protests was temporally and factually insignificant, minimal, trifling and/or inconvenient and is inherent to all protests. See para. 96-105, 160-162 herein.

176. Section 9.5 of the *Good Neighbour Bylaw* is directed toward activities such as parties. Alternatively, restricting the Lawful Protests to 15 minutes or less, is unreasonable, especially for non-local people speaking. Every individual person speaking (2-4) is usually about 15-20 minutes. Anything shorter and would deny freedom of expression to both presenters and listeners. Constitutionally, the temporal component of the Lawful Protests cannot be determinative of the Constitutionality of the Bylaws.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 44**

177. The need for sound equipment is also necessarily incidental to the Respondents' freedom of expression and is a critical component of s. 2(b). Want of sound equipment would have defeated and will defeat the Respondents' common law and s. 2(b) Charter freedoms.

### f. *Do other Aspects of the Place suggest that Expression within it would Undermine the Values Underlying Free Expression* No

178. A review of the Respondents' evidence including videos that will be played to the Court, clearly shows significant communications and expressions in relation to all of values underlying s. 2(b)(c).

179. There are no aspects to the Lawful Protests and Marches in these Park and street locations that would undermine the significance and values that s. 2(b) was intended to protect. Of such significance that it bears repeating, the activities by the Province to secretly contact the MSM and order them not to give anyone a platform opposing their narrative, gives significant weight to the importance of protection of these s. 2(b)(c) freedoms in this case.

180. The Lawful Protests are located on property that is expected to have, and does have Constitutional protection for free expression and assembly. Its location directly across from City Hall provides additional support for this. Its grassy area allows for the CLEAR Canopy and other temporary tables, chairs and canopies.

*Vancouver (City) v. Zhang* **2010 BCCA 450 CanLII para. 32-37**

181. Such Lawful Activities actually enhance the purposes s. 2(b) was intended to serve, which the Park was funded, designed and built for, and which the Respondents are using it for, specifically:

i. Democratic discourse
ii. Truth finding, and
iii. Self-fulfillment.

### iii. *3rd - If the Expression is Protected by s. 2(b), do the Impugned By-laws Infringe that Protection, either in Purpose or Effect?* *Yes*

182. The interpretation and enforcement of s. 3.1, 3.8 of the *Parks Bylaw*, s. 8.2.4 of the *Traffic Bylaw*, s. s. 2.1.2, 1.2.1 of the *Outdoor Events Bylaw* and s. 7.3 of the *Good Neighbour Bylaw* in the manner advocated by the Petitioner to support its Petition relief, inclusive of their ongoing issuance of Bylaw tickets, constitute a limit on the Respondent's common law and s. 2 Charter freedoms, as it deprives them of expressing themselves in the substance, manner, date and location of their choice.

*Vancouver (City) v. Zhang*, **2010 BCCA 450 CanLII para. 47**

183. Upon being shown that the effects of the Bylaws infringe upon the common law or s. 2 of the Charter, the issue then proceeds to a s. 1 analysis. Such should be the procedure herein. Either the impugned Bylaws do not apply to the Lawful Activities, or alternatively if they do, they were clearly worded to infringe the Respondents' freedoms and are thus unconstitutional.

*Montréal (City) v. 2952-1366 Québec Inc.* **2005 SCC 62 CanLII para. 55-57**

184. Bylaw Officer Short has further admitted that the City intentionally and arbitrarily defined and interpreted the *Parks Bylaw* and permit requirements so as to claim prohibition against the Respondents in the exercise of their common law and s. 2 Charter freedoms.

***Actio exteriora indicant interiora secreta***
**external actions show internal secrets 8 Co. R. 146**

185. Before the state can justify the exclusion of communication on any of its properties, it must show that communication has materially interfered with its or the public's use of the property and that, in the circumstances, the restriction or denial of communicative access is less serious than the impediment communication would cause to its use of the property. Such is not to be.

**Access to Public and Private Property under Freedom of Expression**
**Richard Moon 1988 CanLII Docs 3 339, 354**

186. The Lawful Protests are being prohibited specifically to prevent the Respondents from sharing with

the public and drawing public attention to their information and knowledge on COVID-19, vaccinations and other pressing rights and freedoms issues.

### iv. *Do s. 3.1, 3.8, 6.2 Parks Bylaw, s. 8.2.2, 8.2.4, 10.1.1 Traffic Bylaw, s. 7.3, 12.2 Good Neighbour Bylaw, s. 1.2.1, 2.1.2 Outdoor Events Bylaw, infringe s. 7 of the Charter?*

187. The starting point is the BCCA's recognition that: "*The right to liberty is a right to make fundamental personal decisions without interference from the state.*"

***Cambie Surgeries Corporation v. British Columbia (A.G.)***
**2022 BCCA 245 CanLII para. 234**

188. These fundamental personal choices include, of necessity, the freedom of expression, which the SCC has held, for reemphasis, to be of a "*...little less vital to man's mind and spirit than breathing is to his physical existence.*" Rand J.

189. The impugned sections here in these *Bylaws* purport to deny to the Respondents their freedom to make personal decisions of how and when to express themselves.

190. Over 200+ tickets and $50 000.00 in fines have been issued against the Respondent, Applicant Lindsay, including for Lawful Protests where the Respondent, Applicant Lindsay was not even present. These *Bylaws* provide for possible incarceration for any conviction thereunder. About 65 tickets have been issued to the Respondent, Applicant Lindsay for the Lawful Protests alone.

191. For a s. 7 violation to be demonstrated, it must be shown that the Bylaw in question interferes with the Respondents' right, in this case, to liberty, and secondly, that this deprivation is not in accordance with the principles of fundamental justice.

192. Principles of justice are legal principles for which there exists sufficient consensus that the principle is fundamental to our societal notion of justice, and are capable of being identified with precision and applied in a manner that yields predictable results.

***Cambie Surgeries Corporation v. British Columbia (A.G.)***
**2022 BCCA 245 CanLII para. 157, 158**

193. These sections of these *Bylaws* violate the right to liberty in s. 7 of the Charter. Where the availability of imprisonment for possession of marijuana was important enough to trigger a s. 7 analysis, so too here, where incarceration is possible for the Respondents' exercising their Constitutional freedoms.

***R. v. Malmo-Levine; R. v. Caine,* 2003 SCC 74 CanLII para. 84**
**s. 6.2 *Parks Bylaw***

194. The Arbitrary Decision of Bylaw Officer Short *et al*, is also contrary to s. 7 of the Charter, where tickets that were issued to the Respondent, Applicant Lindsay were based on this policy, and for the same reasons these sections of these *Bylaws* are unconstitutional.

195. The possibility of incarceration where the Respondents are in the peaceful and lawful exercise of their Constitutional freedoms, where the word "*event*" is undefined and pursuant to the Arbitrary Decision, ie: where he has done nothing wrong, implies that these sections of these *Bylaws* violate s. 7 of the

Charter.

196. Alternatively, the relief sought is premised upon seriously flawed and misleading interpretation of the impugned Bylaws. The Petitioner is attempting, in futility, to try and "*pigeon hole*" the Lawful Activities into Bylaw definitions that do not and were never designed nor intended to include same.

197. Said liberty violation is not in accordance with principles of fundamental justice, these *Bylaw* sections, individually and/or collectively, are vague, unreasonable, discriminatory, permit unfettered decisions, are overbroad and grossly disproportionate in relation to the s. 2 infringements.

198. The City admits that it does not issue permits for the Lawful Protests. Yet, the very foundational basis for the City's Petition, is that the Respondents do not have a permit for their Lawful Protests.

199. The Petitioner is using the Bylaws in a manner constituting equitable fraud, where equity will not permit a statute to be used as an instrument of fraud. Fraud in this context, does not require any moral turpitude. This applies in relation to Bylaw Officer Short's admission to his Arbitrary Decision, and, despite not having the power to so do, not releasing it publicly.

***Kew v. Konarski* 2020 ONSC 4677 CanLII para. 57, 59-62**

200. Equitable fraud does not strike the statute or Bylaw, but does prevent the Petitioner from using it in the manner it is so doing herein.

## C. *s. 1 of the Charter*

201. Either s. 3.1, 3.8, 6.1, 6.2 of the *Parks Bylaw*, s. 8.24, 10.1.1 of the *Traffic Bylaw* individually and/or collectively, apply to the Lawful Protests and Marches or they do not. If they do not apply, as not banning Constitutionally protected political protests and marches throughout the City, this cannot support the relief sought. If they do apply, then they are unconstitutional and are not saved by s. 1.

202. Under a s. 1 analysis, the Government or Petitioner, bears the onus of proof to "*demonstrably*" justify limiting the Respondents' rights and freedoms. This requirement places a high duty upon the Petitioner to provide a strong, cogent and persuasive evidentiary foundation to apply s. 1.

***R. v. Oakes* CanLII 46 SCC at para. 66**

203. Where there is a challenge to the Bylaws, the *Oakes* framework will apply. With respect to the secretive Arbitrary Decision, it appears the *Doré* test is likely the more applicable. Nothing of substance will turn on this herein.

***Doré v Barreau du Quebec* 2012 SCC 12 para. 55-57**

204. In order to be saved by s.1 the *Oakes* analysis requires the following:

A. The impugned law (or state action) must be prescribed by law;
B. The impugned law (or state action) must have a pressing and substantial objective;
C. The impugned law (or state action) must be proportional in terms of its objectives and its effects in that:
    i. the measure chosen must be rationally connected to its objective;

ii. the measure must impair the guaranteed right or freedom as little as reasonably possible; and
iii. there must be overall proportionality between the deleterious and salutary effects of the measure.

***R. v. Oakes*** **CanLII 46 SCC at para. 69-71**

205. The Arbitrary Decision is not prescribed by law and must simply be quashed on that basis, and on the below basis of being *inter alia*, arbitrary, bad faith, and unreasonable.

206. Section 3.1, 3.8, 6.2 of the *Parks Bylaw*, s. 7.3 of the *Good Neighbour Bylaw*, s. 8.24, 10.1.1 of the *Traffic Bylaw*, meet the test as being prescribed by law, as they were duly passed by the Petitioner.

207. Part of this test requires not just being passed by the City, but that they are certain and not vague, overbroad, unreasonable or grossly disproportionate. For reasons set out below, the Respondents take the position that the Bylaws at issue, fail to meet these tests.

## i. *The Impugned Law (or state action) must be Prescribed by Law*

### a. s. 3.8 *Parks Bylaw* "*event*" is Overbroad

208. Overbreadth may be considered when any Charter right or freedom has been infringed, including under a s. 1 analysis. "*Second, where a separate Charter right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the Charter.*"

***Ref. re. ss. 193 and 195.1(1) of the Criminal Code (Man.)*** **1990 CanLII 105 SCC Lamer J.**
***Sunshine Coast (Regional District) v. Sheppard and Delaney***
**2007 BCSC 1754 CanLII para. 38**
***Carter v. Canada (Attorney General)*** **2015 SCC 5 CanLII para. 85**

209. Laws that are overbroad, can intrude into being arbitrary or disproportionate, in whole or in part.

***Canada (Attorney General) v. Bedford*** **2013 SCC 72 CanLII para. 112, 114, 115**

210. Overbreadth examines the Bylaws from the effects upon the individual Respondents, not the public.

***Canada (Attorney General) v. Bedford*** **2013 SCC 72 CanLII para. 113-118**

211. To be classified as overbroad, there is a three-step analysis: 1. Interpret the scope of the Bylaw; 2. Determine its true purpose; 3. compare the purpose of the law with its scope.

***R v Khawaja*** **2012 SCC 69 para. 40**

#### ➢ *Scope of the Bylaws*

212. Section 3.8 of the *Parks Bylaw* is predicated upon the undefined word "*event*". It is not a limit prescribed by law, as per the Arbitrary Decision. As interpreted and applied by the City, it prohibits the Respondents from participating in all Constitutional Protests anywhere in the City, and every day of the week, not just Saturdays. The Petition is based on these same provisions. The wording of the

application form for permission confirms same.

213. S. 1.2.1, 2.1.2 of the *Outdoor Events Bylaw* ("*outdoor event*") and s. 8.2.2, 8.2.4 of the *Traffic Bylaw* also purport to deny the Respondents their freedoms for the Lawful Marches, anywhere in the City. With so many people, it is simply not reasonable to be using a sidewalk.

214. Section 7.3 of the *Good Neighbour Bylaw* also denies to the Respondents and listeners, their ability to express themselves and be able to hear and understand said expressions, anywhere in the City.

215. "*A law that is overly broad sweeps within its ambit activities that are beyond the allowable area of state control and in fact burdens conduct that is constitutionally protected.*" (my emphasis)

***Ref. re. ss. 193 and 195.1(1) of the Criminal Code (Man.)* 1990 CanLII 105 SCC Dickson J.**

216. Section 3.8 and 6.1, 6.2 of the *Parks Bylaw*, s. 7.3 and 12.1, 12.2 of the *Good Neighbour Bylaw*, as interpreted and enforced by the Petitioner, penalizes people participating in their Constitutional freedoms, including the Respondents, large family or friendship picnics, sports, small weddings, solemn gatherings, etc., punishable by a fine and possible incarceration contrary to the Respondents' common law and. 2(b)(c) Charter freedoms, and is not saved by s. 1 of the Charter.

217. This said interpretation and enforcement of this Bylaw by the Petitioner further and unconstitutionally denies to the Respondents their important freedom of surprise protests.

***Berube v City of Quebec* 2019 QCCA 1764 CanLII para. 60-75**

### ➢ *Purpose*

218. These Bylaws were never intended to capture all human relations and activities, nor incidental results or effects from same, but rather, materially significant actions that cause harm to others or the public.

219. The mischief these Bylaws were directed to, was not intended to include the Respondents or anyone else in the exercise of their Constitutional and common law freedoms, or the reasonable incidental effects therefrom, and the Lawful Activities have no connection with this Bylaw mischief.

***JH v Alberta Health Services*, 2019 ABQB 540 CanLII para. 161**

220. The Bylaws were not intended to deny or unreasonably restrict the date or location of the Lawful Protests and Marches. In effect, the Petitioner is hypocritically saying, assuming without prejudice that its allegations to be correct which is strongly denied, it is acceptable for the Respondents to violate the Bylaws in another part of the City, just don't violate them downtown, where the most politically sensitive and effective Government and MSM offices are located. Such interpretation is absurd, unacceptable, unnecessary and overbroad in its interpretation and intentions of these Bylaws.

***Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 113**

### ➢ *Comparison*

221. The Respondents have the freedom to protest, including the mode and method of so doing, which in turn, includes using sound equipment, and choosing their length, time, date, locus of so doing. There

will always be some inconvenience to others from almost all activities in parks and on streets. The Petitioner's interpretation is so narrow as to virtually and unreasonably require everyone to obtain a permit for almost all activities in a park or on a street.

222. "*A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights and Freedoms.*" This cannot be saved by s. 1 of the Charter.

***Reference re s. 94(2) of Motor Vehicle Act*** **1985 CanLII 81 SCCC para. 2, 81**

223. There is no rational connection where s. 3.8 of the *Parks Bylaw* is being used to obtain relief contrary to the funding, design and intention of Stuart Park in the first place.

224. There is no evidence provided that it is necessary for any reason to ban the Lawful Protests and Marches from the downtown core area as sought by the Petitioner, where its interpretation and enforcement of the impugned Bylaws are far broader than was ever intended, or necessary.

***Canada (Attorney General) v. Bedford*** **2013 SCC 72 CanLII para. 118**

225. For the *Community Charter* to permit applications for injunctive relief is not denied, but it is restricted only to where the Bylaws apply, where they are not so applicable herein. The scope of application of these Bylaws, as relied upon by the Petitioner, far exceeds what they were intended for, and is Constitutionally unacceptable, denying to the Respondents every aspect of their freedoms.

## b. *Void for Vagueness*

### ➢ s. 3.8 *Parks Bylaw* is– *"event"*

226. "*Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms.*

***Committee for the Commonwealth of Canada v Canada***
**1991 CanLII 119 L'Heureux-Dubé "*Vagueness*"**

227. The word "*event*", which is alleged by the Petitioner that the Lawful Protests are defined as, is undefined in s. 3.8 of the *Parks Bylaw*. "*A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit.*"

***Luscher v. Dep. Minister, Revenue Canada*** **1985 CanLII 5600 FCA p. 89**

228. Vague laws are invalidated as they fail to give citizens fair notice of the consequences of their conduct to avoid liability, to limit law enforcement discretion and have full answer and defence. They are a violation of due process of law. *Nullum crimen sine lege, nulla poena sine lege* - that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive.

***Ref. re. ss. 193 and 195.1(1) of the Criminal Code (Man.)*** **1990 CanLII 105 SCC Lamer J.**

229. The definition of an "*event*", must be sufficiently precise and accessible; it may be the latter, but it is not the former. It gives no indication as to how to exercise any discretion or reach decisions, nor

factors to consider, despite possible incarceration pursuant to s. 6.1, 62 of the *Parks Bylaw*.

***Transportation Authority v Canadian Federation of Students***
**2009 31 CanLII para. 50, quoting Prof. Hogg**
***R. v. Glassman* 1986 CanLII 7326 ONCJ p. 181**
***R. v. Nova Scotia Pharmaceutical Society***
**1992 CanLII 72 SCC "(e) *Vagueness and the Rule of Law*"**
***Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 398, quoting,**
***R v Hufsky* 1998 CanLii 72 SCC De Dain J.**

230. "*It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.*"

***Ref. re. ss. 193 and 195.1(1) of the Criminal Code (Man.)***
**1990 CanLII 105 SCC Dickson J.**

231. This Court confirmed the vagueness doctrine test set out in *R. v. Nova Scotia Pharmaceutical Society*, as follows: "*...whether the provision in the by-law is so uncertain that it does not provide an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria, and taking into account the context of the legislative enactment...*"

***Service Corporation International (Canada) Inc. v. Burnaby (City of***
**1999 CanLII 7012 BCSC para. 261**

232. The Respondents' Constitutional freedom for their Lawful Activities cannot depend on the discretionary power of the Petitioner. "*A public authority cannot have an unfettered discretion to interfere with a fundamental freedom.*", including s. 2(b) of the Charter.

***Geller v. Reimer*, 1994 CanLII 10759 SK HRT para. 52, quoting**
***R.* v. *Oakes* (1986) 1986 CanLII 46 SCC**
***Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 466-468**

233. Impermissibly vague Bylaws, confer unfettered discretion to the Petitioner and its Bylaw officers, as evidenced by the Arbitrary Decision. This in turn deprives the Court of the means of controlling the exercise of this discretion. "*Limits on the freedom of expression cannot be left to official whim but must be articulated as precisely as the subject matter allows...*"

***International Fund for Animal Welfare, Inc. v. Canada* 1988 CanLII 9362 FCA p. 355**
***R. v. Nova Scotia Pharmaceutical Society* 1992 CanLII 72 SCC para. 58-59**

234. Criteria used to determine if a statute or Bylaw is vague, includes whether the definition in this case requires the addition of words that would alter or clarify its meaning. Due to the lack of definition, intentions of participants, specificity of an "*event*" and as to location, as well as the Arbitrary Decision of the Petitioner, this is exactly the situation at present.

***Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City)***
**1983 CanLII 3114 ONCA para. 21, 26**
***Regina v. Sandler*, 1971 CanLII 478 (ON SC)**

235. Some, but invariably not all questions without answers from the Respondents and the public, considering the word "*event*", include: What factors are to be considered in determining if an activity constitutes such an "*event*" or a "*protest*"? Who makes this decision? What role does the subjective

intention of the Respondents have in this decision? Is this a subjective or objective analysis? What guidelines is this person provided in reaching his determination? What occurs where there is an overlap between activities that may be considered part of an "*event*" and also present in the exercise of Constitutional and/or common law freedoms? If there is a conflict, who decides if the Bylaws apply and upon what criteria?

236. The Petitioner's Arbitrary Decision not only evidences bad faith and improper motives, but is a tacit admission that the Petitioner did not know and was uncertain as to what an "*event*" included or how it was to be defined.

***Service Corporation International (Canada) Inc. v. Burnaby (City of)***
**1999 CanLII 7012 BCSC para. 263**
***Ubi jus incertum, ibi jus nullum* - Where the law is uncertain, there is no law**
**Broom's Maxims of Law 1856**

237. The situation in this case is exactly what this Court and the ONCA recognized as an impermissible result of a vague law: the interpretation of the words becomes wholly subjective, and open to municipal officers to administer it, with unfettered discretion and with no real direction or guidance.

***Service Corporation International (Canada) Inc. v. Burnaby (City of)***
**1999 CanLII 7012 BCSC para. 263**
***Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City)***
**1983 CanLII 3114 ONCA para. 21**

238. Consideration of the entire *Parks Bylaw* fails to lead to any assistance in determining what an "*event*" is, should encompass, or any criteria to support same.

239. Alternatively, the word "*event*", as interpreted and enforced by the Petitioner, overlaps with all of the activities in the Lawful Protests. Every common law and s. 2 activity by the Respondents, would fall under the Petitioner's interpretation, such that they would be destroyed and meaningless. There is no objective standard by which to differentiate between an event and the Lawful Protest.

240. Peaceful protests, as a form of expression include, indeed of necessity, one's presence, literature and brochures (and tables to put them on), canopies, street marches, and individual public speakers/presenters with sound equipment.

241. Subjective intentions to protest and not have an event, are the primary governing factor for the exercise of all Constitutional freedoms, not the objective, arbitrary decision of the Petitioner's Bylaw Officers.

242. Considering the massive and punitive financial penalties and incarceration within the *Parks Bylaw*, the implications of having the word "*event*" undefined and open to interpretation, cannot be permitted to remain. Once this word is removed, the Respondents do not fall under any of the other stated categories in s. 3.8, and all the relief sought herein with respect to prohibiting their Lawful Protests, will fail.

243. Alternatively, where, as here, there is difficulty (indeed, impossibility) in determining the meaning of this word "*event*", and general principles of interpretation do not resolve the issue, it will be accorded a meaning favourable, in this case, to the Respondents. "*A statutory provision conferring an imprecise discretion must therefore be interpreted as not allowing the rights guaranteed by the Charter to be violated .*"

***Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)***
**1990 CanLII 105 SCC Lamer J.**

***Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 400, quoting, *Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J.**

### ➢ s. 7.3 *Good Neighbour Bylaw – "noise"*

244. In the absence of a definition of "*noise*" in the Bylaw, this word is vague and uncertain for similar grounds as above. This is completely subjective to the listener and leaves the Respondents with nothing to base their decisions upon and leaves the Petitioner with completely unfettered discretion. One person's sound is another person's noise.

245. There are no rules as to what is noise, quantity of noise, quality of noise, volume of noise, location of noise, or required effects of noise, or any or other considerations.

246. Noise is somehow differentiated in s. 7.2 from "*sound.*" Noise does not automatically include all sounds. Where is the dividing line? It is ambiguous, uncertain and vague to say the least.

247. Noise is defined as: "*A sound or sounds, especially when it is unwanted, unpleasant or loud. Grammar: Sound or noise. Sound and noise are nouns. We can use them both as countable or uncountable nouns. Both refer to something which you can hear, but when a sound is unwanted or unpleasant, we call it a noise.*" Making sound is not, *ipso facto* sufficient to be making "*noise*".

**https://dictionary.cambridge.org/dictionary/english/noise Cambridge Dictionary**

248. If it materially requires others to be offended, as the Bylaw Officers admitted to the Respondent, Applicant Lindsay, there have been no such complaints of people being offended.

## c. *Arbitrary, Unreasonableness, Discriminatory, Bad Faith*

### ➢ *s. 3.8, 4.2 Parks Bylaw, the Unreasonable Arbitrary Decision*

249. Many of these principles, as with overbreadth and gross disproportionality, overlap in application.

250. Bylaws, in terms of process and content, can be struck as being unreasonable, including actions taken for improper purposes. Both the impugned Bylaws and the Petitioner's relief are unreasonable.

***Catalyst Paper Corp. v. North Cowichan (District)* 2012 SCC 2 CanLII para. 28, 32**

251. Alternatively, this case involving Constitutional issues, the test may be that of correctness.

***Canada (Min. Citizenship and Immigration) v Vavilov* 2019 SCC 65 CanLII para. 17**

252. The standard for reasonableness in relation to the Bylaws, is whether the Bylaws are ones that, "*...no reasonable body informed by these* [Constitutional] *factors (the City may legitimately take into account) could have taken.*" (my insertion)

***Penticton Society for Transparent Governance and Responsible Development v Penticton (City)* 2022 BCSC 2111 CanLII para. 18**

253. To be reasonable, there must be a rationale connection of the legislation to the purpose. The purpose in s 8.2.2 and 8.2.4 of the *Traffic Bylaw*, s. 7.3 of the *Good Neighbour Bylaw*, s. 1.2.1 of *Outdoor Events Bylaw*, and an "*event*" in s. 3.1, 3.8, 3.41 of the *Parks Bylaw* is not to restrict or deny the Respondents' common law and s.2 Charter freedoms; alternatively, then they are unconstitutional. If the Bylaw effects do same, there is no such connection between the Bylaws and their purpose.

***Jackson v Joyceville Penitentiary* 1990 CanLII 13005 p. 92 MacKay J.**

254. S. 10.1.1 of the *Traffic Bylaw* and s. 12.2 of the *Good Neighour Bylaw* impose up to $10 000.00 fines for each infraction and up to 90 days in jail. Section 6.2 of the *Parks Bylaw* impose a blanket prohibition upon the Respondents from exercising their common law and s. 2 Charter freedoms coupled with up to $10 000.00 fines and 90 days in jail.

255. This is an unreasonable prohibition with possible jail time against the Respondents for exercising their Constitutional freedoms. It denies them surprise Lawful Protests and Marches, and their power to determine their own length of protest, time, date and location to so do. To obtain permission, the Respondents must apply to the very Petitioner whom they are protesting about, thus resulting in the City impermissibly and unlawfully being a judge in its own cause, contrary to natural justice.

***Axion Ventures Inc. v Bonner* 2023 BCSC 149 CanLII para. 99, 100**
***Giles v. Newfoundland (Constabulary Public Complaints Commission)* 1996 CanLII 6612 NLSC Part I**
***Moncton v. Buggie and N.B. H.R.C.* 1985 CanLII 3135 NBCA para. 15**
***City of Montreal v 2952-1366 Quebec Inc.* 2005 SCC 62 CanLII para. 171**
***Garbeau v Montreal (City of)* 2015 QCCS 5246 para. 168-173**
***Berube v City of Quebec* 2019 QCCA 1764 CanLII para. 60-75**
***In propri cuus nemo judex* - No one can be judge in his own cause**
***In repropri iniquum admodum est alicui licentiam tribuere sententiae* - It is extremely unjust that any one should be judge in his own cause**
***Iniquum est aliquem rei sui esse judicem* - It is against equity for anyone to be judge in his own cause 12 Co. 13**
**Broom's Maxims of Law 1856**

256. The *Local Government Act* nor *Community Charter* empower the Petitioner to pass Bylaws contrary to or that infringe the Constitutional rights and freedoms of the Respondents. It is unreasonable to interpret the powers of the Petitioner to pass Bylaws that amount to same.

***Constitution Act* 1982 s. 52**
***Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J.**

257. Even ambiguous or discretionary Bylaws and powers emanating from same must be interpreted in a manner consonant with the Constitution.

***Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC**

258. Multiple possible interpretations of the word "*event*" in s. 3.8 of the *Parks Bylaw*, or of words in the other Bylaws at issue, where one infringes the Respondents' Constitutional freedoms and the other does not, require the latter is to be preferred. The City has unreasonably chosen the former.

***Steinberg's Limited v. Joint Retail Food Committee, Montreal Region et al.***

**1968 CanLII 69 SCC 971, 983**
***Bell v. R.* 1979 CanLII 36 SCC p. 222, 223**

259. Reasonableness involves considerations of both the reasonableness of the decision outcome, and the process of so doing.

***(Canada (Attorney General) v. Igloo Vikski Inc.* 2016 SCC 38 CanLII para. 18**

260. With respect to the Arbitrary Decision, the Bylaw Officers did not have the statutory power to define words in a Bylaw ("*event*") upon which they would then enforce, *a fortiori* in the absence of public accessibility, Respondent input and consultation, nor to make City policies.

***Greater Vancouver Transportation Authority v. Canadian Federation of Students***
**2009 SCC 31 CanLII para. 50, 65**

261. Actions such as the Arbitrary Decision that are not authorized by statute, are not prescribed by law and thus the Arbitrary Decision upon which all the Bylaw tickets against the Respondent, Applicant Lindsay were based upon and this Petition, is of no force and effect. So too was the outcome, when the Bylaw tickets were issued without jurisdiction to so do.

***Little Sisters Book and Art Emporium v. Canada (M.J.)* 2000 69 CanLII para. 141**

262. Bylaw Officer Short *et al* was required to give effect as fully as possible, to the common law and s. 2 Charter freedoms of the Respondents. Instead, they applied, via their Arbitrary Decision, a blanket prohibition upon the Respondents.

***Law Society of British Columbia v. Trinity Western University* 2018 SCC 32 para. 80-82**

263. In making the Arbitrary Decision, Bylaw Officer Short and his superiors, failed or intentionally refused to consider the values (and their importance) of the Respondents' common law and in s. 2 of the Charter freedoms. The Arbitrary Decision cannot stand as being contrary to the *Doré* test.

### ➢ *Bad Faith*

264. Bad faith in municipal law, includes unreasonable conduct, improper motives or ulterior purpose, including dishonesty, fraud, bias, discrimination, abuse of power, corruption, oppression, beyond the powers of the City and its officials, and unfairness.

***Macmillan Bloedel Ltd. v. Galiano Island Trust Committee***
**1995 CanLII 4585 BCCA para. 153, 154**

265. The flip side of bad faith, is good faith, which has been described as carrying out the Bylaws according to its intent and purpose, "*...it does not mean for the purpose of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.*"

***Roncarelli v. Duplessis* 1959 CanLII 50 SCC 121, 143**

266. Dicey articulated the rule of law's concern with preventing arbitrary power: "*[The rule of law]*

*means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.*"

***References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11 CanLII para. 274**
**Rule of Law**

267. Unjust being defined as, "*...contrary to the enjoyment of his rights, by another...*", the Petitioner's denial to the Respondents of their common law and Constitutional freedoms, fulfills this test.

**Black's Dictionary of Law, 4th Revised Ed. p. 1705**

268. As in *Ronvcarelli*, and as tacitly admitted at para. 8 of the Petition, the Petitioner's actions are intended to punish the Respondents for exercising their Constitutional freedoms.
269. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.

***Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 98**

270. The decision on whether to grant a permit or permission and upon what terms or criteria, if required, are left completely to the unrestricted, secretive discretion of some unknown official with the Petitioner. Said decision amounts to being arbitrary and unconstitutional, and is demonstrably open to favoritism. A discretion is never absolute, regardless of the terms conferred in the Bylaws.

***Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 11, 12**
***Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J.**
***R. v Hufsky* 1988 CanLII 72 SCC para 16**
***Roncarelli v Duplessis* 1959 CanLII 50 SCC**
***Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 51, 55, 63, 64**
***Dhillon v. Richmond (Mun.),* 1987 CanLII 2623 BCSC para. 16, 22, 23**
***Bell v. R.* 1979 CanLII 36 SCC p. 222, 223**
***R. c. Nova Scotia Pharmaceutical Society* 1992 CanLII 72 SCC para. 642**
**s. 4.2 *Parks Bylaw***
***Garbeau v. Montreal (City of),* 2015 QCCS 5246 para. 361-365**

271. A discriminatory Bylaw will operate unfairly and is partial and unequal in their operation between people. The impugned *Bylaws* and/or City policies associated therewith, are absent any standards or guidelines to issue permits or permission.

***Dhillon v. Richmond (Mun.)* 1987 CanLII 2623 BCSC para. 16, 22, 23**

272. The City has applied these Bylaws and filed this Petition in a discriminatory, repressive, abusive and/or punitive manner against the Respondents, including the Respondent, Applicant Lindsay. There is no rationale or legal purpose, it is strictly for the improper purpose of denying the Respondents their Constitutional freedoms, or improperly moving them to an area of the City where they will have little or no effectiveness.

273. Unreasonable, arbitrary, and/or bad faith includes Bylaws that are partial and unequal in their

operation between different classes; or manifestly unjust; unreasonable conduct, improper motive or ulterior purpose, dishonesty, fraud, bias, discrimination, abuse of power, corruption, oppression, unfairness, bad faith; or oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men, or purposes not covered by legislation. This voids the Bylaw and/or actions taken pursuant thereto.

***Macmillan Bloedel Ltd. v. Galiano Island Trust Committee***
**1995 CanLII 4585 BCCA para. 153, 154**
***Immeubles Port Louis Ltée v. Lafontaine (Village)***
**1991 CanLII 82 SCC 1991 p. 349 (b) Abuse of Power**
***Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)***
**1993 CanLII 7201 AB KB para. 51, 52, 56, 62**
***Catalyst Paper Corp. v. North Cowichan (District)* 2012 SCC 2 CanLII para. 20, 21, 24**
***Bell v. R.* 1979 CanLII 36 SCC p. 222, 223**

274. Evidence of bad faith by the Petitioner, arbitrariness and Bylaw unreasonableness, includes *inter alia*:

A. The Petitioner went 17 months without handing out any tickets or any enforcement action to the Respondent, Applicant Lindsay, suddenly, tickets were arbitrarily issued weekly;

B. The Petitioner represented to the Respondent, Applicant Lindsay that a permit was not required and the City could not take any action as long as he did not use City electrical or other services which he did not;

C. A City official informed the Respondent, Applicant Lindsay that the City was contacted by the Province and instructed to take enforcement action with the specific objective of prohibiting the Lawful Protests/Marches, which the City did, despite its prior representations and assurances it would not;

D. Bylaw Officers for the City had secret meetings where they arbitrarily came up with their own private definition of the word "*event*" in s. 3.8 of the *Parks Bylaw*, which they kept confidential and enforced upon the Respondent, Applicant Lindsay, and did not tell him only until after repeated questioning in a Bylaw adjudication hearing in January, 2022;

***Animus moninis est anima scripti.*- the**
**intention of the party is the soul of the instrument**
**3 Bulstr. 67.**

E. This Arbitrary Decision is only being applied to the Respondent, Applicant Lindsay, and not to any of the people who participated in protests at Stuart Park since its inception, nor any other persons or groups who are having their own downtown protests and marches;

F. Over 200+ tickets and $50 000.00 in fines have been levied against the Respondent, Applicant Lindsay since August, 2021;

G. The Petitioner has repeatedly ticketed the Respondent, Applicant Lindsay for offences the City knows he did not commit and was not responsible for, particularly for selling merchandise;

H. The Petitioner ignored the *Beaudoin* case the Respondent, Applicant Lindsay gave to Bylaw Officer O'Hanlon;

I. The The City, including former Mayor Basran and RCMP Supt. Triance, went public in a video after the *Beaudoin* case conceding publicly on TV that the Respondents had the Constitutional freedom to have their Lawful Protest. The City knows the Respondents are acting lawfully and Constitutionally;

J. City has permitted all other persons and groups to have downtown core protests, rallies, and marches, using sound equipment and signs in the ground during this time, without any permit, tickets or enforcement action, for many years;

K. The permit form requests to know the purpose of the event that one wishes to do. The only reason for this demand is to screen out undesirables, in concert with the fact that there are no criteria making this determination, permitting unfettered discretion;

L. A high-level official of the City of Kelowna administration on Water St., personally informed the Respondent, Applicant Lindsay that the City was being threatened from the Provincial and Federal Government with financial and approval denials unless they took this herein legal action to stop the Respondent, Applicant Lindsay from having these Lawful Protests;

M. Rob Gibson from Castanet, personally informed the Respondent, Applicant Lindsay that the media in B.C. including Castanet, were contacted by the Provincial Government in 2020 and ordered not to give anyone opposing the Government's COVID-19 narrative, a platform in their media;

N. In response to an FOI request for a copy of all permits issued to use any City park or street for political protests and/or expression, Chris Babcock for the Petitioner, confirmed by email that no such records exist, the City does not issue permits for rallies/protests or political expression, and recognizing that the Respondents have the Constitutional freedom to so do. Despite the Petition grounds that no permit was obtained, no such permit can or could be obtained anyway;

**A l'impossible nul n'est tenu - no one is bound to do what is impossible**
**1 Bouv. Inst. n. 601**

O. Section 4.2 of the *Parks Bylaw* expressly omits the word, "*event*" therein from being required to obtain permission. This Petition including s. 8 is, *ipso facto* being taken for improper purposes and/or to further inflict punishment upon the Respondent, Applicant Lindsay;

P. This Petition is now taken with relief sought to ban the Respondents from the entire downtown core, without any basis in fact or law to so do where all the major protest locations are situated, including City Hall, various MSM outlets, the RCMP and Interior Health, leaving all ineffective areas of the City open;

Q. The Respondents have done nothing to support this relief, which is frivolous and vexatious;

R. The Respondents were the only organized group publicly opposing all Government narratives and corruption on COVID-19 in Kelowna, and had a massive influence on many people.

275. The Petitioner cannot deny the Respondents' Constitutional and common law freedoms under the colour of Bylaws (law). This is merely giving injustice the colour of justice.

**The Colour of Law : Law Is Constituted from the Colour of Right**
**2008 CanLII Docs 446 p. 396**
***Prince George (City of) v. Payne* 1977 CanLII 161 SCC 1 SCR 458, 468**

276. The Petitioner is aware it does not have the power or grounds to seek this relief. It is frivolous and/or vexatious and/or an abuse of process. Using the Court to prohibit the Respondents from the exercise of their Constitutional freedoms at the most effective locations, on the basis of not obtaining a permit the City admits was not required nor would/can be provided in any event, making secretive, arbitrary backroom legal interpretations for enforcement of Bylaws in the absence of any underlying improprieties by the Respondents, is an abuse and vexatious.

***Behn v. Moulton Contracting Ltd.* 2013 SCC 26 CanLII paras. 39, 40**
***Behn v. Moulton Contracting Ltd.* 2013 SCC 26 CanLII paras. 39, 40**

277. Section 3.8, 4.2 of the *Park Bylaw* and Arbitrary Decision are, individually and/or collectively as interpreted and enforced by the Petitioner, not authorized by the *Community Charter* nor these Bylaws, are unconstitutional and interpreted and enforced for improper purposes or bad faith, where no reasonable body could have adopted them in said interpretation and enforcement, *a fortiori* on public property open as of right to the Respondents for their Lawful Protests and Marches.

**s. 1(1)(a), (2)(a)(b)(e), s. 2(1)(a),(2)(a)(b)(c)(ii)(g), 3(a) Community Charter**

### d. *The Impugned Law (or State Action) must have a Pressing and Substantial Objective*

278. The objective of s. 3.1, 3.17, 3.8, 6.2 of the *Parks Bylaw*, do not meet this requirement.

279. The preamble of the *Parks Bylaw* clearly sets out its application to "*...nuisances, disturbances and other objectionable situations.*"

**Preamble, *Parks Bylaw***

280. The *Parks Bylaw* was not passed in relation to any pressing or substantial objective that was occurring at that time or even ongoing, but rather simply to prevent or address *possible* issues of a material nature, that might arise in the future. That some incident *may happen* at some future time, does not imply that the Bylaw complies with this test. A review of cases on this factor will show that they all claim to address present, pressing and substantial objectives at that specific time.

281. There have been dozens of protests at Stuart Park and downtown over the years, by many political organizations, including Black Lives Matter, the Iranians, queers, counter protestors to the Lawful Protests, student, environmentalists and more. Many protests occurred weekly for over a half year.

282. That no tickets were issued to anyone other than Respondent, Applicant Lindsay, clearly shows that protests have not reached any level of being a pressing and substantial objective, nor were they considered to be a problem when the *Parks Bylaw* was passed, as protests and accompanying marches are intentionally not prohibited and are omitted therein. The "*shifting purpose*" theory was rejected.

***R v Zundel* 1992 CanLI 75**

283. Section 3.17 of the *Parks Bylaw* was passed to prevent people from building long-term constructions

or shelters, outside of parks. Though of some importance, it is not a pressing and substantial concern to deny the Respondents' Lawful Protests. Alternatively, it is intended at preventing homeless from taking over the parks long term without any relation to the protests, or prevent Occupy movements.

284. Section 3.17 3.8 of the *Parks Bylaw* also fails this test, as a "*park*" is not even mentioned therein, and clearly there was no pressing concern or objective to apply there, unlike most of s. 3, which does. In the absence of any mention of a park in s. 3.17, 3.8 of the *Parks Bylaw*, s. 3.1 is inapplicable.

285. There is an obligation upon the City to ensure that parks and streets are available to be used by the Respondents and the Bylaw respects that. It is presumed despite that there were no pressing concerns or objective sufficient to deny the common law and s. 2 Charter freedoms of people.

286. The City does not have the power to grant certain persons a right of non-conformity, ie: to have protests and marches in the downtown core without a permit while using sound equipment and signs, while demanding same of the Respondents, ie: denying the Respondents their Constitutional freedoms. If there was a pressing and substantial problem, it would exist for everyone, not just the Respondents.

***Loblaw Québec Ltée c. Alimentation Gérard Villeneuve (1998) Inc.*** **2000 CanLII 30002 QCCA para. 79**
***Immeubles Jacques Robitaille Inc. v. Québec (City)*** **2014 SCC 34 CanLII para. 25**

287. Far too many cases have simply given this a perfunctory recognition, as if it was to be a *fait accompli* simply upon being pleaded or a law being passed, or simply given judicial notice. This would be in error. Assuming Governments are concerned about anyone other than themselves, is an error.

288. Similar factors apply to s. s. 8.2.2, 8.2.4 of the *Traffic Bylaw*, s. 7.3 of the *Good Neighbour Bylaw*, and s. 1.2.1(f) of the *Outdoor Events Bylaw*.

289. There is no pressing and substantial objection of these Bylaws in relation to the Lawful Protests, or any other protests, that would survive s. 1 and permit the relief sought in the Petition.

### ii. *The Impugned Law or State Action) must be Proportional in Terms of its Objectives and its Effects*

#### *a. The Measure Chosen must be Rationally Connected to its Objective*

290. This is examined from an objective viewpoint on the balance of probabilities test. There must be a causal link between the impugned Bylaws (and relief sought therefrom in the Petition) and its pressing and substantial objective, and the actions taken pursuant to the Bylaws or policies.

***Thomson Newspapers Co. v Canada (A.G.)*** **1998 CanLII 829 para. 39**
***RJR-MacDonald Inc v Canada (Attorney General)*** **1995 CanLII 64 SCC para. 153**

291. This requirement is directed toward arbitrary limits being enforced upon the Respondents. Both the Arbitrary Decision and the relief sought by the Petitioner in banning the Respondents from their Lawful Protests just in the downtown area of the city, fail to meet this test on this basis.

***R. v Coban*** **2022 BCSC 14 CanLII para. 49**
***Harper v. Canada (Attorney General)*** **2004 SCC 33 CanLII para. 41**

292. Other than hate speech claims which is not at issue herein, any alleged causal relationship between the objectives of the impugned Bylaws, and the limits on the Respondents' common law and Constitutional freedoms, must be shown by direct evidence. No such evidence exists or alternatively, is minimal, *di minimus* and/or trifling in nature, and more akin to an incidental inconvenience.

***Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 CanLII para. 132**

293. Though this part may not be particularly onerous, there must be established "*a link or nexus based on and in accordance with reason, between the measures enacted and the legislative objective*".

***Trociuk v. British Columbia (Attorney General),* 2003 SCC 34 para. 34**

294. That the relief sought is only against the Respondents, it is discriminatory. City Bylaws cannot result in inequality, where one person's freedom to protest is recognized but denied to the Respondents.

295. As the Arbitrary Decision verifies, coupled with City policies in permitting every other person to hold political protests without a permit for over a decade, discrimination against the Respondent, Applicant Lindsay *et al* is not rationally connected to the objectives of s. 3.1, 3.8 of the *Parks Bylaw*, s. 8.2.2, 8.2.4 of the *Traffic Bylaw*, 1.2.1(f) of the *Outdoor Events Bylaw* or s. 7.3 of the *Good Neighour Bylaw*.

***Benner v Canada (Secretary of State)* 1997 CanLII 376 SCC para. 95**

296. The objective of the Arbitrary Decision and Petitioner's interpretation of these Bylaws, is nothing short of banning the Respondents, improperly, and without jurisdiction, in the exercise of their common law and s. 2 Charter freedoms, with no factual, lawful or Constitutional basis to support it.

297. Banning the Respondents' Lawful Protests in the downtown core has no rationale connection to the *Parks Bylaw*, which is intended to regulate "*objectionable situations*", and which applies throughout the City. Protests, including the Lawful Protests are not objectionable situations and are Constitutionally recognized and protected forms of expression, for which Stuart Park was funded, designed and built.

298. That the Petitioner seeks relief to ban the Respondents from a strategic area, demonstrates improper purposes and/or abuse of process. The Lawful Protests and Marches are not objectionable downtown and acceptable in every other park and street in the City. If anything, it would be the reverse.

299. The Constitutionality of s. 3.1, 3.8 of the *Parks Bylaw*, s. 8.2.2, 8.2.4 of the *Traffic Bylaw*, 1.2.1(f) of the *Outdoor Events Bylaw* or s. 7.3 of the *Good Neighour Bylaw*, cannot rest upon the unfettered discretion of the person responsible for the maintenance of these areas.

***Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 467**

### *b. The Measure must Impair the Guaranteed Right or Freedom as Little as Reasonably Possible*

300. The next section below shares the same attributes and considerations herein, and apply to this section.

301. The starting point is the oft repeated "*... highest degree of constitutional protection...*" accorded to s. 2 political expressive activity of the Charter by the SCC. Comparing any benefits from the Bylaws and/or relief sought, is far outweighed by the harm done to the loss of the common law and s. 2 freedoms of the Respondents.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 121**

302. Section 2(b)(c) of the Charter includes the freedom to participate in peaceful demonstrations, protests, parades, meetings, picketing and other assemblies, and expressive activities.

***Ontario (A.G.) v. Dieleman* 1994 20 O.R. (3d) 229 Ont. Court G.D. p. 329-330**

303. "*...the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary.*" (original emphasis)

***RJR-MacDonald Inc v Canada (Attorney General)* 1995 CanLII 64 SCC para. 160**

304. S. 1.2.1(f) definition of "*outdoor event*" and s. 2.1.2 of the *Outdoor Events Bylaw*, if an "*outdoor event*" was to include the Lawful Protest or Marches, prohibits outright these Constitutional freedoms.

305. S. 8.2.2 of the *Traffic Bylaw*, interpreted to the facts herein, permits the Respondents to exercise their Lawful Marches. Where there are hundreds or a thousand or more people walking, it is not reasonable to use public sidewalks. Alternatively, this would further be an unreasonable restriction on the Respondents' freedoms.

306. S. 8.2.4 of the *Traffic Bylaw*, would not apply to protestors standing on the side of a street, with placards and signs in the exercise of their Constitutionally protected freedoms.

307. S. 3.8 of the *Parks Bylaw*, insofar as it is alleged that an "*event*" includes the Lawful Protests, which is denied, imposes a blanket prohibition of all protests in all areas of the City. Only if a permit is obtained, which can be and admittedly by the City will be refused, can a protest occur, however the starting point, is that they are all banned. It is upon this basis, that the relief in the Petition is sought.

308. A blanket prohibition on expression is an intentional interference with the Respondents' common law and s. 2(b)(c) Charter freedoms, as it does not target a particular activity or content. Alternatively, even if it did, these sections remain contrary to the Respondents' said freedoms, as outlined above.

**Toronto's 2018 Municipal Election, Rights of Democratic Participation, and Section 2(b) of the Charter 2021 CanLII Docs 814 p. 12, footnote: 94**

309. These Bylaw provisions, which impose a complete prohibition to protest, fail to meet this test as a result of the Petitioner in this case failing to consider the Constitutional freedoms of the Respondents, and falling outside a range of reasonable options to achieve whatever the objective may have been.

***Garbeau v. Montreal (City of),* 2015 QCCS 5246 para. 168-173**

310. Considering that there are no pressing and substantial Bylaw objectives in relation to protests, this should end this discussion. Alternative positions are put forth below on this branch of the test.

311. In the minimal impairment test, prohibitions are judged more severely than restrictions, "*...especially if it concerns freedom of expression, which must be restricted as little as possible*".

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 111**

312. The relief sought has the effect of banning the Respondents in all the most important political venues/locations in the City, without any material basis for same. This is not by coincidence, and is not a minimal Charter impairment, but rather, virtually and intentionally destroys the efficacy of these freedoms.

313. The Respondent, Applicant Lindsay incorporates para. 346-350 below as to the deleterious effects from interpreting and enforcing the Bylaws in the manner sought by the Petitioner, including in its relief.

314. These provisions, being not minimally impairing and unconstitutional, cannot sustain the Petitioner's relief sought. "*It denies the* [Respondents] *the right of effective political communication...*"

***Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 41**

315. The Petitioner bears the onus to call evidence that shows less measures than the relief they are seeking will not achieve whatever the City's or the Bylaw's objectives are. "*It is a process of demonstration, not intuition or automatic deference to the government's assertion...*" This cannot be done.

***R v Ndhlovu* 2022 SCC 38 CanLII para. 126**

316. The Petitioner, via the Arbitrary Decision took no consideration of the Respondents' Constitutional and common law freedoms. In so doing, their said freedoms were not minimally restricted as possible.

317. Notwithstanding the Bylaws, the Petitioner appears to proceed on the assumption that all protests are acceptable, just not the Respondents'. Fundamentally, this is simply pure bias and likely vengeance.

318. Reasonableness and proportionality are synonymous. The Lawful Protests, tailored to an average time period of 60 minutes, though occasionally 75 or 90 minutes one Saturday/week, are completely reasonable, in duration and location. The Lawful Marches, lasting 25-40 minutes or so several times/year, are also perfectly reasonable. The RCMP admits of no violence. Restricting them any more would be unreasonable and seriously defeat the Respondents' common law and s. 2 Charter freedoms.

***Law Society of British Columbia v Trinity Western University* 2018 SCC 32 CanLII para. 80**

319. Any pressing or substantial Bylaw objectives, which are denied, are not in relation to nor encompassing, nor cannot justify restricting these Lawful Activities any more than they are.

320. The Bylaws themselves are not minimally impairing. The wording of s. 12.1 of the *Good Neighbour Bylaw* (*who does any act which constitutes an offence against the bylaw is guilty of an offence*) imposes a finding of guilty upon proof the alleged offence. Coupled with s. 12.2 then, s. 7.3 amounts to an absolute liability offence coupled with incarceration, which in turn is prohibited in our law.

***Regina v. Sault Ste. Marie (City)* 1978 CanLII 11 SCC**

321. This applies with similar vigour to s. 6.1 and 6.2 (*who does any act which constitutes an offence against the bylaw is guilty of an offence*) of the *Parks Bylaw*, where s. 3.41, 3.1 and 3.8 create an absolute liability offence coupled with incarceration.

322. This further applies to s. 8.2.2, 8.2.4, 10.1.1 of the *Traffic Bylaw*.

323. Alternatively in *Bérubé*, measures regulating "*peaceful demonstrations*" that were enforceable through a strict liability offence punishable by fines were similarly not justifiable under s. 1.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 158**

324. This case applies herein, where these impugned Bylaw sections further provide for incarceration in addition to fines, applied to the Lawful Activities.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 10**

325. Strict liability offences require the Respondents, if they were breaking the Bylaws which is denied, to exercise due diligence. Considering the Petitioner admits that it does not approve of or give permits for political protests, there was nothing further that they could do in any event.

326. That in over 150 Lawful Protests over three years, there have been no registered complaints over volume of sound, clearly shows that the Respondents have exercised due diligence in this regard by maintaining the volume at a minimum level and direction required for protestors to hear.

327. *Bérubé* further recognized that compelling protestors to provide notice of time, location or routes of a demonstration, were not minimally impairing nor justified under this branch of s. 1.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 117, 157, 158**

### *c. There must be Overall Proportionality between the Deleterious and Salutary Effects of the Measure*

328. Frequently this has been portrayed as being an analysis of the proportionality of the objective to the deleterious effects. However, in some cases it is necessary to measure the actual salutary effects of the impugned legislation against its deleterious effects rather than considering the proportionality of the objective itself.

***R. v. Sharpe* 1999 CanLII 6380 BCSC para. 32, Quoting *Dagenais v. Canadian Broadcasting Corp.* 1994 CanLII 39 SCC p. 888-889**

329. See para. 99-116 above, in support of the Constitutional Challenge, for consideration of the importance of the common law and s. 2 Charter freedoms.

330. If the Petitioner intends to deny the common law and s. 2 freedoms of the Respondents, it must "*...offer good and sufficient justification for the infringement and its ambit. This has not been done.*"

***RJR-MacDonald Inc. v. Canada (Attorney General)* 1995 CanLii 64 SCC**

331. This issue focuses on the practical impact of the impugned Bylaws (and Arbitrary Decision). The Courts are required to assess the extent, degree and severity of the effects of the Bylaws, the Arbitrary

Decision, and relief from the Petitioner pursuant to same, for proportionality.

332. Governments are required to adduce evidence as to why less intrusive and equally effective measures were not chosen here.

***Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 para. 118-119**

333. Protests, even peaceful ones are, by their very nature, disruptive to varying degrees. These effects from Lawful Protests and Marches are not a nuisance to be repressed or controlled. The measures adopted by authorities *"...cannot be aimed at eliminating..."* such inconveniences. This is reasonable lest the results be exactly as here, where the Government attempts to ban all protests.

***Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 163-165**

334. The possibility of harm (herein, without prejudice or agreement, from the Lawful Protests) was held not to displace freedom of expression in s. 2(b). Similarly, herein, the possibility that there may be minimal interference or inconvenience with the use of the Park once/week or the streets even less often, is insufficient to deny the Respondents their s. 2 Charter freedoms.

***Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 SCC para. 94**

335. Succinctly, there are very few if any practical benefits to the Petitioner and much to lose to the Respondents and the public. The public accept inconveniences in public property use for lawful and Constitutionally protected, protests and marches.

336. The relief sought by the Petitioner would defeat all SCC and other superior court cases recognizing the freedom of the Respondents to use these parks and streets in their political expressions.

337. "*The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*" The importance of any objective, does not warrant overriding the extreme importance of freedom of expression.

***R. v. Oakes* CanLII 46 SCC at para. 71**

338. The relief sought is either only against the Respondents, or everyone in the public, whereby the relief sought would enjoin and prohibit all protests in the downtown core. In the former case, the singling out of the Respondent, Applicant Lindsay *et al*, is evidence of improper purposes, bias and/or discrimination. If the objective was that serious, then all protests would be banned, not just the Respondents. If all protests by everyone are being banned in the relief sought, this then, is a violation of s. 2 of the Charter and is not saved by s. 1. In either case, there are Constitutional violations and the deleterious effects far outweigh the salutary effects and objective of the Bylaws.

### ➢ *Salutary effects*

339. In the facts of this case, there are no material benefits by granting the relief sought, nor by interpreting the Bylaws in a manner to permit same. Alternatively, any benefits are *di minimus* or trifling, unknown, speculative, hypothetical, and/or accepted as part of the sacrifices for living in the public.

340. Members of the public know and expect that protests will take place especially in parks, town squares, city halls, etc. and accept that as part of the normal uses of these areas.

341. If there was an illegality to the Lawful Protest and/or Marches or material problems caused by same, which is denied, the Petitioner's relief would be nothing more than moving an alleged illegality to another location. There is no benefit, logic or reason to that.

342. Other than bald allegations of receiving unknown informal, generalized objections, and a hearsay letter from the Downtown Business Association over a year ago in relation to the Lawful Marches on Bernard Ave. at that specific time only, there is no evidence of anyone wanting to use Stuart Park and being prohibited or prevented from so doing as a result of the Lawful Activities.

343. Alternatively, the City would have the real and desired benefit of having the most effective protests against the City and BC Gov't in Kelowna's history, removed from its front door to somewhere it can be ignored.

344. Very few people actually "*use*" Stuart Park, especially on Saturdays, where most businesses are closed at that time. Most people are there for pictures on the top landing with the Bear, or are walk-throughs or use the boardwalk, roller blading or skating. There are three stages, the Respondents use one of them. The Respondents do not interfere with anyone using the skating cement area or other stages, and on almost all occasions, the Bear. There are a larger number of people using the boardwalk and using the sidewalks to simply walk through the Park. The Respondents' presence has not deterred any such activities, and this allows the Respondents to talk to these people and hand out brochures.

345. The salutary benefits to the public or City are minimal, and certainly not proportionate to the serious harms done to the Respondent's and public's s. 2 Charter freedoms, including date, time and locus.

### ➢ *Deleterious Effects on Freedom of Expression and Assembly*

346. The factors herein apply to the minimal impairment branch above.

***Harper v. Canada (Attorney General)*** **2004 SCC 33 CanLII para. 40**

347. A denial to the Respondents of their freedom of expression, *a fortiori* in the manner of their choosing, *ipso facto*, constitutes harm to the Respondents, without further proof, similar to *Frank.*

***Frank v Canada*** **2019 SCC 1 CanLII para. 82**

348. The reason and benefits for choosing Stuart Park and downtown Kelowna including for the Lawful Protests and Marches (considering that the Petitioner must prove this branch of the test, the Respondents do not have to justify their reasons for using this Park nor the downtown area), include but are not restricted to:

A. there is significant amount of parking available in walking distance, including for larger vehicles;

B. it is centralized to attract people from West Kelowna and other areas of the City;

C. it is directly across from City Hall, for political visibility and messages, including buses, and trucks;

D. it allows for convoys down Harvey Ave. for greater visibility and expression by supporting people who drive to the Lawful Protests;

E. it is within walking distance of the downtown major bus loop connecting to all parts of the City;

F. there are significant numbers of people on the boardwalk and doing walkthroughs – many of these people are different from week to week and include tourists;

G. it has excellent access to parking on Water St., for further visibility of our vehicles and their signs;

H. it has excellent visibility for our signs in the actual Park;

I. it has many benches for seniors and others to sit;

J. we can have many protestors without using the entire Park;

K. it has an excellent stage with places for people to speak, including the Respondent, Applicant Lindsay;

L. there is a large area, so at most of the Lawful Protests people are not jammed into each other;

M. the Park was funded, designed and built to accommodate Lawful Protests such as ours; it is the very purpose the Park was constructed for and its design facilitates the Respondents' common law and s. 2 Charter freedoms;

N. with the speaker system they have excellent and reasonable sound communications;

O. it has excellent esthetics and beauty;

P. there is an excellent otherwise unused grass area for literature tables and our CLEAR Canopy;

Q. it allows people to relax after the protests on warm days, right next to the lake, and accessible to many local downtown businesses that are frequented thereafter;

R. it is close to other political venues that we protest against, including City Hall, RCMP, the local media, and Interior Health;

S. it is in a commercial area, not residential, so there is no impact on residential communities;

T. it is an excellent starting base for Lawful Protests at other downtown areas;

U. it is within walking distance to Hwy 97 which has been used for maximum public visibility from vehicular traffic;

V. there is excellent visibility from Water St. and which has been used to maximize public visibility from vehicular traffic in that area;

W. the Park provides an excellent starting and ending point for short Lawful Marches in the downtown area, without the loss of protestors;

X. it is within walking distance of Kerry Park as a substitutional area with many of these same attributes, if Stuart Park has on the rare occasion, been booked by another group;

Y. it was the Respondents' choice to make in the exercise of their common law and s. 2 Charter freedoms;

Z. no other protests take place at other parks in the City – only Stuart Park or Kerry Park. That is where the action is…that is the most effective area in the City to so do; and,

AA. is generally the best and most effective place in the City for our Lawful Protests to occur.

349. Moving to another location outside the City core and present location, is absurd and unreasonable, and is being requested only to give injustice the colour of justice. Amongst other non-exhaustive

problems and considerations (considering that the Petitioner must prove this branch of the test, the Respondents do not have to justify their reasons for using this Park nor the downtown area);

A. it denies to the Respondents all of these aforementioned benefits and Constitutional freedoms;

B. the importance of the Respondents' messages, *a fortiori* where the B.C. Government has ordered all media not to publish anything by protestors opposing the Government narrative. Locating the Respondents in an area of little visibility or effectiveness, defeats the purpose of s. 2 of the Charter and gives the Petitioner and B.C. Government in the background complete monopoly over information in the public;

C. it puts a wall between the Respondents and the public on political issues of major societal importance, and removes the effectiveness of the Lawful Protests as most other parks or areas have very few people there;

D. the City will simply then, enforce any such relief against the Respondents in other areas of the City, effectively using this as a platform to ban them everywhere. It allows them to do what they could not do directly by seeking relief up front to ban the Respondents everywhere in the City;

E. virtually all, if not all protests occur downtown at Stuart Park, or alternatively, Kerry Park, by all protest groups, due to its effectiveness and visibility. People do not protest at parks in the suburbs;

F. there is no other place for the Respondents to go, especially of such an effective location. Not all parks are created equal;

G. all other parks bring a host of problems that are simply not present at Stuart Park, such as parking, residential complaints, children playing, and lack of visibility and credibility – out of sight out of mind for the Petitioner's benefit;

H. forcing the Respondents into areas not of their volition, is a s. 2 Charter violation;

I. it is not possible to have people speaking on sidewalks, nor to set up literature tables, imposing serious restrictions on their freedom of expression, denying people their right to hear professionals and other people speaking, in part due to volume of noise from traffic immediately adjacent to the sidewalk, cars splashing water or dirt on people etc.;

J. there are no stages in other parks and to purchase materials, build and take down such a stage after every Lawful Protest, would be unreasonably time consuming, and require more vehicles and storage areas than is available;

K. people in the vicinity of suburban parks all generally live in the area and it seriously restricts the Respondents' ability to express themselves to new people;

L. all or virtually all parks considered in all major cities in Canada for protests, are in the downtown core areas;

M. the Respondents would lose downtown visibility and recognition;

N. other locations would raise a host of parking issues not present in the downtown core area and seriously restrict the number of people that can be attracted to the Lawful Protests;

O. because of the nature of the Kelowna downtown area, the sound is limited in its area. At suburban parks, the sound is likely to carry to a much farther distance and possibly cause other issues in that regard that again, are simply not present downtown;

P. it would also seriously limit or completely deny the effectiveness of the Lawful Marches, in part because distances are much greater to travel than the downtown area;

Q. where the MSM is only publishing the Government narrative, this seriously denies or restricts the effectiveness of the Respondents getting information out to the public and for the public to obtain accurate, alternative information as well;

R. it removes the presence of the Respondents out of the public mind and consciousness, who in turn eventually forget about them, again, restricting or denying their common law and s. 2 Charter freedoms;

S. almost all other areas of the City are not designed to accommodate large numbers of people if and when Government actions stir up anger in people to bring such numbers to the Lawful Protests;

T. almost all other areas of the City with a large surface area, are private in nature and do not permit such protests, including Orchard Park Mall;

U. if the Lawful Protests are in any way bifurcated, this will result in many people leaving and not returning, restricting or denying the Respondents' common law and s. 2 Charter freedoms further;

V. this will have a demoralizing effect on all protestors. The downtown has a certain and higher energy and character than the suburbs and supports such Lawful Protests and Marches;

W. this would set a dangerous precedent to permit municipalities and Governments the power to ban protests that they do not approve of, or relocate protests to much less effective areas, under the colour of restrictive Bylaw application, and effectively usurps the Respondents' Constitutional freedom to choose their own location, which is now determined by the Government;

X. this permits the City, in this case, to discriminate based on political beliefs, under the guise of Bylaw enforcement;

Y. the City would then simply issue tickets and/or apply to the Court using this case as a precedent, to ban the Respondents from other parks, shutting them out of the entire City;

Z. there would be serious uncertainty for protestors who would lose the benefit of certainty in their Lawful Activities;

AA. any claims by the City of harm, are speculative, hypothetical, *di minimus*, trifling, a minor inconvenience, and/or part of the inconveniences the public accepts by other members of the public exercising their Constitutional freedoms.

350. There are no substantial benefits that will outweigh the importance of freedom of expression in this case, or the harms that will result if the relief is granted, in whole or in part.

### d. *Gross Disproportionality*

351. Issues that are grossly disproportionate to the results, will not satisfy this test either.

***R v M-M* 2022 ABQB 197 CanLII para. 8**

352. This principle exists where, taking the law's purpose at "*face value*", the impact of the restriction on

the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure.

***Carter v. Canada (Attorney General)* 2015 SCC 5 CanLII para. 89**

353. S. 3.1, 3.8, 6.2 of the *Parks Bylaw*, s. 8.2 and 10.1.1 of the *Traffic Bylaw*, and 7.3, 12.2 of the *Good Neighbour Bylaw* prohibit all forms of effective political protest and marches within City limits, under penalty of massive fines and/or jail. The Petition relief purportedly flows from these Bylaws

354. The relief sought in the Petition is also subsumed in this principle, effectively prohibiting the Respondents from having their Lawful Protests anywhere in the downtown core, where all the major Government and political institutions are located.

355. The negative effects on the Respondents common law and s. 2 Charter freedoms if this relief is granted is extreme, prohibiting the effective political Lawful Protests and Marches in the most effective areas of the City.

356. Any purpose of the *Parks Bylaw* and Petition relief, is "*... totally out of sync*" with the results, neither of which is weighed against society, only the Respondents.

***Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 120-122**

357. Considering the Respondents have the Constitutional freedom to use Stuart Park and the public streets for their Lawful Protests and Marches, were in the peaceful exercise at all times of so doing, for short temporal duration, and the results of shutting down all effective opposition to the Government's COVID-19 and other threats to their rights and freedoms, neither the impugned Bylaws nor the Petition survive this principle.

## *Jurisdiction*

358. If any link in the chain of jurisdiction is missing, jurisdiction will fail.

***R v Sproule* 1886 SCR**

359. Once determined that the impugned Bylaw provisions are contrary to the Charter, or that the actions and Arbitrary Decision by the City and its Bylaw Officers are unconstitutional, jurisdiction will fail *ab initio*. The Court cannot award or permit Government actions, even offence tickets, in the absence of jurisdiction to so do.

**s. 24 Charter, s. 52 *Constitution Act***

360. The Court should respectfully, issue an Order that all tickets are void for want of jurisdiction *ab initio*.

***Regina v Van Wezel* 1972 6 WWR BCCA 197, 199**

## D. *RCMP Act*

The following are the general particulars to be argued for this challenge, pursuant to s. 8 (4) (d) of the *Constitutional Question Act*, R.S.B.C. 1996 CHAPTER 68, with respect to the *Royal Canadian Mounted Police Act* and the *Police Act* of British Columbia, including but not restricted to:

361. The *Constitution Act* 1867, formerly the *British North America Act*, was passed by the English Parliament in 1867.

362. The *Constitution Act* 1867 was based on Resolutions from the London Conference, 1866-1867, not the Quebec Conference 1864.

363. This English statute did not federate the provinces into one country called Canada, nor is it a Confederation document, as it is erroneously called.

364. Canada was, and remains a Dominion, a union of Provinces under the Crown or King of England.

365. The *Conada Act* 1982 of England, did not alter this status.

366. The exclusive powers of the Provinces (which were drafted first) were set out in s. 92 of the said *Act*, based upon London Resolution 41.

367. The Provinces were given the exclusive power to pass laws in relation to "*matters*" in the itemized Classes of Subjects set out in s. 92.

368. The remaining, residual powers of Parliament were in s. 91, based upon London Resolution 28, with examples set out therein.

369. The 29 illustrations of classes of subjects in s. 91 were, as expressly stated therein "*...for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section...*".

370. Provincial legislative powers were exclusive and enumerated, while Federal powers were residuum and illustrative, only.

371. The whole range of legislative powers were exhausted.

372. As Lord Carnarvon read into Parliament of England in 1867, the classifications of powers, as agreed to by a previous treaty amongst the four provinces at that time, was fourfold: 1. Those subjects of legislation which are attributed to the Central Parliament exclusively; 2, Those which belong to the Provincial Legislatures exclusively; 3. Those which are the subject of concurrent legislation; and 4. a particular subject which is "dealt with exceptionally.

373. The concurrent powers of legislation extend over three separate subjects--immigration, agriculture and public works.

374. The class of subject of the administration of justice, inclusive of the matter of policing, was/is an exclusive Provincial head of power.

375. The "*matter*", or pith and substance in this Challenge, is policing within the Provinces.

376. Because Parliament can pass laws in relation to policing in the Territories but not the Provinces, the locus is an essential element of this matter.

377. Once established that policing falls as a matter under s. 92(14), that ends the debate and the Petitioner's relief cannot be granted.

378. There was no analogous or expressed power given to Parliament to pass laws in relation to matters coming within the administration of justice in any of the Provinces, including the matter of policing in the Provinces.

379. Parliament passed a law in relation to policing on **May 22, 1868** with the creation of the Dominion Police. This force, inclusive of constables, operated primarily in Eastern Canada, though the legislation expressly stated that the Force was providing policing duties within the Provinces.

380. The RCMP were originally a para-military police force known as the North West Mounted Police (NWMP), and then subsequently the Royal North West Mounted Police (RNWMP).

381. The enabling legislation for the RCMP was passed by Parliament on **May 23, 1873**, for use exclusively in the North West Territories only.

382. The duties of the NWMP were the preservation of the peace and prevention of crime and offences of the North West Territories, and apprehension of criminals.

383. Then Prime Minister Sir John Macdonald defined its purpose as: "*The preservation of peace and the prevention of crime*" in the NWT.

384. S. 35 of *An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories*, CHAP. 35, **May 23, 1873**, expressly authorized the Governor in Council to enter into agreements with the Government of Manitoba for the use or employment of the Police Force to aid in the administration of justice in that Province.

385. In 1905, upon Alberta and Saskatchewan becoming Provinces of Canada, the first agreements were entered into, reluctantly by Prime Minister Laurier, for the rental of the RNWMP for those newly formed Provinces.

386. This was temporarily ended during WWI.

387. Both Provinces eventually contracted with the Federal Government again, to have the RCMP utilized as a Provincial police force, during the late 1920s and Great Depression in the 1930s.

388. **January 1, 1917:** The RNWMP was relieved of provincial policing duties in Manitoba and Saskatchewan, with the creation of their own Provincial Police forces.

389. Members of the RNWMP already had their bags packed and knew that they were being transferred to the Territories to work as that is the only area that Parliament could utilize a police force in the Territories.

390. The Royal Canadian Mounted Police were formed in 1920, absorbing the Dominion Police and Royal North-West Mounted Police.

391. **June 1, 1928:** The RCMP took over provincial policing duties for Saskatchewan again.

392. **April 1, 1932:** The RCMP absorbed the provincial police organizations for Alberta, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island.

393. British Columbia signed its first agreement with Ottawa for use of the RCMP in 1950, for a six year

period, for the RCMP to "*...undertake the duties of policing the Province of British Columbia and shall perform all the duties and services of a law enforcement nature formerly undertaken by the former British Columbia Provincial Police...*". (the Agreement)

394. In 2012, both Canada and British Columbia, following upon the expiration of previous such agreements, entered into a Municipal Police Service Agreement (Agreement), with a term ending March 31, 2032.

395. This Agreement remains in full force and effect to the present date.

396. This Agreement requires the creation of a Companion Document, comprised of members of each of the Provincial and Federal Governments to provide for the details, purpose, background, interpretation and administration of the Agreement. This Companion Document expressly recognizes policing as being an exclusively Provincial legislative power.

**2012 RCMP Provincial and Territorial Police Service Agreements – Companion Document 2014**

397. The history of policing in English and Canadian history has always been restricted to that of a local level, since the concept was realized by Sir Robert Peel. National police forces to enforce local, Federal and/or criminal laws are unknown to the common law and to this country and are a Constitutional anomaly.

398. This was incorporated into the *Constitution Act* 1867, aka the *British North America Act* 1867.

399. There is no reference in any debates prior to 1867 at either the Quebec Conference or London Conference, during passage of the *BNA Act* nor thereafter, of the matter of policing in the Provinces being encompassed or intending to be encompassed by Federal legislation, exclusively or duplicitous with Provincial legislative powers.

400. There is no legitimate concept of 'Federal policing' or where the RCMP can police for Federal legislation in the Provinces. Such a concept runs afoul, for example, of enforcement of the *Criminal Code* which would leave all Provinces either not policing and enforcing the *Code*, or being unlawfully duplicitous with the Parliament.

401. As noted above, there are only three (3) areas of overlapping subject matter, and the administration of justice, inclusive of the matter of policing, is not one of them.

402. Parliament has no jurisdiction to pass the impugned sections of the *Royal Canadian Mounted Police Act*, R.S. c. R-9, s.1 as this is legislation which is, in pith and substance, in relation to the matter of policing in the Province, which is a matter that comes exclusively within the class of subjects identified as the administration of justice, pursuant to s. 92 (14) of the *British North America Act* 1867.

403. Parliament has no jurisdiction to pass the impugned sections of the *Royal Canadian Mounted Police Act*, R.S. c. R-9, s.1 insofar as they purport to authorize Canada to enter into Agreements with any of the Provinces, including British Columbia, to permit a Federal police force operating in the Province.

404. The RCMP have been repeatedly used by the Government of Canada and/or Parliament to intrude into the matter of policing assigned exclusively to the Provinces.

405. Parliament has no legislative jurisdiction to create and/or constitute its own police force to operate in the Provinces and cannot, by way of legislative authorization to enter this said Agreement with the Province of British Columbia, permit its own police force to operate in the Province.

406. This Agreement, as with previous similar agreements in British Columbia and other Provinces, was entered into primarily for economic expediency, and political reasons.

407. There is no presumption of regularity when jurisdiction is challenged. It is incumbent on the person or party (or Government) claiming jurisdiction, to prove it.

408. Applicable principles of Constitutional and statutory interpretation do not permit any interpretation of s. 91 and 92 (including the peace, order and good government (POGG) of Canada clause) of the *Constitution Act* 1867, aka the *British North America Act* 1867, that would permit Parliament to legislate in relation to the matter of policing, ie: for a Federally constituted police force to exist and/or enforce Provincial, Federal or criminal laws in the Province of British Columbia.

409. The only area where the RCMP have jurisdiction to operate, and where Parliament can pass legislation in relation to the matter of policing, is in the Territories.

410. The use of legal fictions in s. 14(2) of the B.C. *Provincial Police Act*, is an unreasonable, unconstitutional use of legal fictions, to accomplish indirectly what both levels of Government could not do directly. *Nemo potest facere per obliquum quod non potest facere per directum.*

411. *Res judicata* and/or *estoppel* are applicable to the Petitioner and/or Attorneys General of B.C. and/or Canada, inasmuch as the Supreme Court of Canada has, on no less than five (5) occasions, held that the power to pass legislation in relation to the policing in the Province, ie: of enforcing all Imperial, Federal and Provincial laws, is *exclusively* vested in the Provincial Legislatures, not Parliament.

***Re: Public Inquiries Act: Re: Clement*** **1919 CanLII 551 BCCA 237, 239**
**Reference re: The *Adoption Act*, 1938 S.C.R. 398, 403**
***In re: Prohibitory Liquor Laws*** **1895 CanLII 95 SCC 170, 249**
***Di Iorio v. Warden of the Montreal Jail*, 1976 CanLII 1 (SCC) p. 152, 205**
***Attorney General of Alberta et al. v. Putnam et al.*, 1981 CanLII 206 SCC p. 289-297**
***The Queen v. St. Louis*** **1897 CanLII 110 QCCS 141, 145**
***R. v. Hauser*** **1979 CanLII 13 SCC 984, 1032, 1035**

412. Both levels of Government, via the wording of the said Agreement purporting to authorize the RCMP to police in the Province, freely concede that, in pith and substance, this is in relation to the matter of policing, encompassed within the class of subjects in 92 (14) of the *British North America Act* 1867, *Constitution Act* 1867, the administration of justice in the Province.

413. Both Provincial and Federal Governments are estopped from arguing or submitting any position to the contrary. They cannot do indirectly what they cannot do directly and neither level of Government can contract out of the *Constitution Act* 1867, s. 91 and 92.

414. The Supreme Court of Canada in 1950 has conclusively and repeatedly held that delegation of legislative powers is not permitted by the *British North America Act* 1867, aka the *Constitution Act* 1867. "*The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by the British North America Act, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by sections*

*91 and 92 of the Act, and these powers must be found in either of these sections....no power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the British North America Act there were to be, in the words of Lord Atkin in The Labour Conventions Reference (1), 'watertight compartments which are an essential part of the original structure.'"* Neither level of Government, independently or cooperatively can do indirectly what it cannot do directly.

***Attorney General of Nova Scotia v. Attorney General of Canada* 1950 CanLII 26 (SCC)**

415. Any purported judicial change to this finding of "*watertight compartments*", amounts to a change to our law without jurisdiction to so do, amounts to making law from the Bench, and further violates the intentions of the drafters of this English statute at the London Conference 1867. Again, economic expediency and/or politics are not grounds to re-write the *Constitution Act* 1867.

416. Such further and other particulars and grounds as may be put forth by the Respondents, who are not bound nor restricted by the points listed herein and who reserve the right to amend any and all parts of this Notice at any time, including by way of any future written position.

417. s. 16-1(5), Form 67 (Part 5, Legal Basis), *Civil Rules of Court*

418. s. 2(1), 7(3), 12.2 Kelowna *Good Neighbour Bylaw* #11500

419. s. 1.2.1(f), 2.1.2 Kelowna *Outdoor Events Bylaw* #8358

420. s. 8.2.2, 8.2.4, 10.1.1 Kelowna *Traffic Bylaw* #8120

421. s. Part 2, 3.1, 3.3, 3.7, 3.8, 3.17, 3.41, 6.1, 6.2 Kelowna *Parks and Public Spaces Bylaw* #10680

422. s. 1(1)(a), (2)(a)(b)(e), 2(1)(a), (2)(a)(b)(c)(ii)(g), (3(a), 10(1)(2), 8(1), 64, 274(1) *Community Charter* SBC 2003 CHAPTER 26

423. s. 523(1)(2) *Local Government Act* RSBC 2015 CHAPTER 1

424. s. 4, 5, 6, 9 *Protection of Public Participation Act* SBC 2019 CHAPTER 3 SLAPP

425. s. 8(1)(2)(4) *Constitutional Question Act* RSBC 1996 CHAPTER 68

426. s. 18(a)(b)(c)(d), 20 (1)-(5) *Royal Canadian Mounted Police Act* (*RCMP Act*) R.S.C. 1985, c. R-10

427. s. 3, 14(l), (2)(a)(b)(c)(d), (3) *Provincial Police Act* RSBC 1996 ch. 367

428. Memorandum of Agreement, Government of Canada and Government of British Columbia April 1, 2012, Order in Council P.C. 2011-1344

429. s. 2, 7, 15, 24(1) Charter of Rights and Freedoms

430. s. 52 *Constitution Act* 1982

431. Inherent jurisdiction of this Honourable Court

## *Material to be Relied Upon*

| | | |
|---|---|---|
| 432. | Affidavit #1 of Ted Kuntz | June 30, 2023 |
| 433. | Affidavit #1 of Tanya Gaw | June 27, 2023 |
| 434. | Affidavit #1 of David Lindsay | July 32, 2023 |
| 435. | Affidavit #1 of Bettina Engler | June 26, 2023 |
| 436. | Affidavit #1 of Jacquelyn Rose | August 1, 2023 |
| 437. | Affidavit #1 of Leo Beauregard | July 31, 2023 |
| 438. | Affidavit #1 of Nadia Podmoroff | July 13, 2023 |
| 439. | Others | |

Time estimate: 5-8 days , dependent on judicial directions on how to proceed

Dated this 31st day of July, 2023 August 1

David Lindsay

David Lindsay
P.O. Box 21113 Cherry Lane Mall
Penticton, British Columbia V2A 8K8

The City of Kelowna v David Lindsay, *et al*
Respondents

Supreme Court file no. KEL-S-S-136195

Kelowna, B.C. Registry

Proceedings commenced at Kelowna, B.C.

# Response to Petition
# David Lindsay

## David Lindsay