Form 32 (Rule 8-1(4))

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,

Respondent, Petitioner,

-v-

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

Applicants, Respondents.

Notice of Application of David Lindsay, CLEAR

Name of Applicants: David Lindsay, CLEAR

To: City of Kelowna
c/o Elizabeth Anderson
Young Anderson
1616-808 Nelson St.
Box 12147 Nelson Square
Vancouver, B.C. V6Z 2H2
Phone: 604 689-7400
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Email: anderson@younganderson.ca

TAKE NOTICE that an application will be made by the Applicants to the presiding judge or master at the courthouse at 1355 Water St., Kelowna, British Columbia, ~~on a time and date to be set~~, for the Orders set out in Part 1 below. the week of Feb 20 2024. D.O.

Part 1 Orders Sought

1. An Order dismissing the Petition against the Applicants David Lindsay and CLEAR, and John Doe, Jane Doe and Persons Unknown, pursuant to s. 4 of the *Protection of Public Participation Act* SBC 2019, c. 3 (*PPPA*).

2. An Order for costs of this Application and of the proceedings on a full indemnity basis against the Petitioner, pursuant to **s. 7** of the *PPPA*.

3. An Order for damages payable to the Petitioner David Lindsay and CLEAR, by the Petitioner, pursuant to **s. 8** of the *PPPA*.

4. Such further and other relief as this Honourable Court may permit.

Part 2 Factual Basis

A. Introduction

5. On January 16, 2023, the Petitioner filed its Petition and supporting materials with the BCSC at Kelowna.

6. On April 3, 2023, the Petitioner served the Applicant Lindsay (Applicant Lindsay) with a copy of its Petition and supporting Affidavits, including for the Applicant Common Law Education and Rights (Applicant CLEAR). Both the Applicant Lindsay and CLEAR are collectively referred herein as the Applicants.

7. It remains unknown who the Petitioner would have served with respect to John Doe, Jane Doe and Persons Unknown.

8. On August 1, 2023 the Applicants Lindsay and CLEAR, filed with the Court their Response and supporting Affidavits.

9. On August 3, 2023, the Applicants Lindsay and CLEAR served their Response upon the Petitioner.

10. Lloyd Manchester filed his Response to the Petition as a John Doe or Person Unknown as the case may be.

11. On August 9, 2023, the Applicant Lindsay filed a Form 17 Requisition seeking leave to file and serve his Constitutional Challenge and this Application.

12. On August 14, 2023, leave was granted by this Court for the Applicant Lindsay and CLEAR to file their Constitutional Challenge and this Application.

13. On October 10, 2023, at the behest of the Petitioner, a case planning conference was heard in Kelowna, before the Hon. Justice Morellato.

14. At this hearing, the Applicant Manchester was informed that he would have to apply to the Court to have his name added to the style of cause. He is now so doing.

15. Dates were then set for the completion of this issue, as follows:

Oct. 30, 2023	the Applicant Lindsay, CLEAR to file SLAPP application and written submissions
Nov. 7, 2023	the Applicant, CLEAR to file written submissions on conversion
Nov. 14, 2023	the Petitioner to file its responding materials on SLAPP
Nov. 21, 2023	the Petitioner to file its responding materials on conversion
Prior to Jan. 17, 2024	cross examinations to take place
Prior to Feb. 23, 2024	hearing of SLAPP application to take place

Within three weeks of judgment on the SLAPP application, if unsuccessful, parties to set a date for hearing of the conversion application

B. Background Facts

16. 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.[1]

17. The Applicant CLEAR, is not a legal person.

18. The Applicant herein, is David Lindsay. The Applicant 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.[2]

19. Within days of each other in March, 2020, the Provincial Government (Min. Farnworth) and Public Health Officer Bonnie Henry (Henry), declared a COVID-19 emergency and pandemic, despite only three deaths in the province at that time.[3]

20. Thereafter, lockdowns, restrictions, mandatory masks and experimental injections (vaccines) became standard fare especially for employment and travel, individually or collectively until the spring of 2022, and remain partially ongoing today in specific areas. The BC Government has incrementally reinstated these in hospitals and other areas in the fall of 2023, and threatens to reinstate them again widespread if it deems it necessary.

21. All of these measures and Orders were/are intensely and persuasively opposed by the Applicants, and hundreds of thousands of people living in B.C.[4]

22. In March 2020, the Applicants, 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

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1	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 15
2	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 5-8
3	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 81, 82
4	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 83, 84

of said mandatory vaccines, lockdowns or restrictions, or otherwise determined to so do.[5]

23. These assemblies were frequently and interchangeably called "*Freedom Rallies*", "*rallies*", and "*protests*." The original term used was "*protest*", and in substance and the Applicant's intention, that is what these assemblies are.[6]

24. The Applicants 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.)[7]

25. 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.[8]

26. 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 in the Park, as a condition of this financial subsidy.[9]

27. The land was subsequently converted into Stuart Park *circa* 2008-2010. Stuart Park was funded, built and designed as, and remains, a Town or Public Square for, *inter alia* outdoor meetings, public speaking, protests and demonstrations.[10]

28. Stuart Park was chosen by the Applicant Lindsay 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 location 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.[11]

29. There are little or no other reasonable alternatives to Stuart Park for the Lawful Protests. Even if there were, this would deny the Applicants their freedom of expressive choice, and effectiveness.[12]

5	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 24, 38
6	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 9, 259, 267
	Affidavit #1	Bettina Engler	Aug. 1, 2023	para. 6
7	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 49, 50, 52
	Affidavit #1	Bettina Engler	Aug. 1, 2023	para. 23
8	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 16, 17
9	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 18, Exhibit "E"
10	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 19-22 Exhibit "A", "B", "E"
11	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 30, 37, 45-50
	Affidavit #1	Tanya Gaw	June 27, 2023	para. 6, 7
12	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 54-56, 58, 59-61, 172

30. These Lawful Protests were, on rare occasions, held at Kerry Park, adjacent to Stuart Park.[13]

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 Applicant's messages to the public, and/or are located in residential areas.[14]

32. These Lawful Protests are religious 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 Applicants' opposition to the COVID-19 lockdowns and restrictions.[15]

33. The intentions and objectives of the Applicant Lindsay and others 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.[16]

34. The Applicants' further intentions and objectives were to express and convey their knowledge, facts and beliefs to Governments, protestors and public on these aforementioned points and issues, orally and by way of written materials, literature, brochures, signage, banners, stickers, and messages at the CLEAR Canopy, and vehicle advertising in the hopes of promoting truth finding, democratic discourse with the public and each other, self-fulfillment, and action taking by others. [17]

35. Many protestors wore clothes with expressive messages thereon, such as *The Resistance*. Signs and banners were a critical component of the Applicant's and protestors' expressive freedoms.

36. 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.[18] Indoor facilities were either closed due to COVID-19 restrictions, or prohibitively demanded wearing of masks, and remain financially prohibitive.[19]

37. These Lawful Activities were one of the most effective methods for protestors, including the

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13	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 57, 239
14	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 54-56, 58-61
15	Affidavit #1	David Lindsay	Aug. 1, 2023	para, 70, 73 Exhibits "F", "G", "H", "K"
	Affidavit #1	Tanya Gaw	June 27, 2023	para. 14
16	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 7, 8, 74, 84, 85-99, 122, 123, 130-138, 143-150, 156, 157, 159, 164 Exhibit "S", "T", "U", "V"
17	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 41, 48-50, 64, 69, 71, 72, 94, 111, 112, 114, 122, 123, 129, 136, 150, 165, 167, 190, 194 Exhibit "S", "Z" "
18	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 10, 35, 37, 51, 53, 111, 137
19	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 127

Applicant Lindsay, to communicate with others and share about businesses open to non-mask wearers, to strategize for ongoing opposition to the Government, to hold Government officials accountable for their actions, and to obtain volunteers. As a result, these Lawful Activities are of significant importance and value to the Applicants and many others.[20]

38. The Applicant Lindsay invited people from all over Canada and the world to express their views, opinions, statistics, personal experiences, research results, legal updates and beliefs in relation to the COVID-19 situation and additional threats to our rights and freedoms at these Lawful Protests.[21]

39. The Applicants, including Lindsay, arranged for various professional doctors, nurses, media personnel, court-appointed experts, professional computer modelers, politicians, terminated employees, vaccine-injured, opposition political party leaders and others to assemble to express their political and medical views, and provide a factual basis in support of our shared beliefs.[22]

40. Many of these Lawful Protests were recorded to permit others to see what the individual people speaking were expressing and conveying.[23] The Government supported media and cancel culture, individually and collectively, were silencing all voices of opposition to the COVID-19 mandates at all levels of Government.

41. No complaints have been registered or written to the Applicants nor the Petitioner in relation to the Lawful Protests nor that they interfered with anyone's reasonable use of the Park.[24] Alternatively, any complaints were fleeting, *di minimis*, trifling or minor in nature, necessarily incidental to, and do not affect, the Constitutional freedoms of the Applicants, and remain part of the sacrifices we make to live in a society.

42. The generator was initially obtained due to representations by City Bylaw Officers prohibiting the Applicants' use of the City's electrical services without a permit, but could use their own power supply, and of growing necessity to speak to larger and larger numbers of protestors.[25]

20	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 46, 71, 100, 111, 130, 146, 159 xxii, 169, 172, 190, 192, 193, 322, 325, 328, 337, 362, 364, 365
	Affidavit #1	Ted Kuntz	June 30, 2023	para. 11, 14, 16-18, 20, 21, 39, 40, 45, 47, 48
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 21, 22, 25, 28, 46, 49, 51, 53, 54. 56
	Affidavit #1	Bettina Engler	June 26, 2023	para. 9, 16, 20, 21, 27, 29
	Affidavit #1	Nadia Podmoroff	July 13, 2023	para. 16, 17, 19, 20, 21
	Affidavit #1	Tanya Gaw	June 27, 2023	para. 3, 4, 5, 7, 9, 10-13
21	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 121
22	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 32, 121, 123, 173, 174
23	Affidavit #1	David Lindsay	Aug. 1, 2023	Video Exhibit Dates and time frames
	Affidavit #2	David Lindsay	Nov. 6, 2023	Video Exhibits
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 36-42
24	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 45, 179, 180, 201, 204, 335
	Affidavit #1	Betina Engler	June 26, 2023	para. 25, 26
25	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 25, 65, 66, 226
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 47

43. Many protestors complained that they could not hear people speaking without sound equipment.[26]

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

45. The sound equipment did not interfere with others using the Park and 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.[27] Alternatively, any interference or complaints were fleeting, temporary, unintentional, *di minimis*, trifling or minor in nature, necessarily incidental to and do not affect the Constitutional freedoms of the Applicants and remain part of the sacrifices we make to live in a society.

46. Further common law and **s. 2** Charter freedom activities by the Applicants included the Lawful Marches on certain downtown streets over about 18 months, and Lawful Street Protests.[28]

47. The Lawful Marches started at Stuart Park and were about 25-40 minutes from start to finish. Large numbers of people and signs were involved in these marches as an exercise of their freedom of expression and assembly.[29]

48. 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 acknowledged that the Applicants had a Constitutional freedom to participate in these Lawful Marches and further provided traffic control, with the approval of the City, for many of the larger Lawful Marches.[30]

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

50. 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.[31] They were not loitering as this word is commonly defined.[32]

51. 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.[33]

26	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 198, 199, 200-203
	Affidavit #1	Bettina Engler	June 26, 2023	para. 32, 33
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 44, 45
27	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 67, 195, 199, 201, 204
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 44, 45
28	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 13, 20, 55, 99, 209, 217, 218, 306, 322, 362
29	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 49, 154, 188
30	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 48, 55, 56, 205, 227,
31	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 49-52, 69, 127, 190, 329
32	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 50,
33	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 51,

52. 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.[34]

53. All of these Lawful Activities were an integral part of the Applicant's expressive intentions and activities, and to obtain greater visibility[35] and to convey their messages to the public, Governments and protestors.

54. The Applicants have also had "*surprise*" Lawful Protests downtown at Interior Health, the RCMP, various mainstream media (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.[36]

55. Protestors assembled at the Lawful Protests desired to express support for each other and express their viewpoints,[37] especially those who were vaccine-injured or whose employment was terminated for refusing to be vaccinated (Victims),[38] to assist Victims, to connect like-minded people across Canada and show their individual and collective opposition to Government COVID-19 responses.

56. 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.[39] 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.[40]

57. 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[41] and who have blossomed in large part because they were able to express themselves at our Lawful Protests to achieve credibility and publicity.

58. Castanet Reporter Rob Gibson readily conceded to the 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 the Kelowna protestors opposing the Government COVID-19 narrative "*a platform*" in

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34	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 121 xliv, 159 xxix, 160 Exhibit Video "DD", "MM", "NN"
35	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 10, 42, 45, 59, 61, 100, 113, 164, 172, 191, 325, 358, 370
36	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 169, 173, 371
37	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 4, 29, 37, 50, 74, 95, 104, 122, 143, 159 xxiii, 328
38	Affidavit #1	Nadia Podmoroff	July 13, 2023	para. 4-6
39	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 120, 121, 159 xvii, 252, 358
	Affidavit #1	Ted Kuntz	June 30, 2023	para. 9, 10
	Affidavit #1	Bettina Engler	June 26, 2023	para. 12-16
40	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 38
41	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 36, 116, 159 xxxiii, xxiv, 162

their media.[42] Castanet could not and would not publish anything indicative of the details of the Applicant's opposition to the B.C. Government and Dr. Bonnie Henry's COVID-19 narrative, including evidence discrediting Government testing procedures, statistics and models.

59. In part, as a result of these instructions to the MSM, there were no other effective methods for the Applicants to get their messages across to the public and each other, save for their Lawful Activities.[43] This remains to the present.

60. These Lawful Activities, in whole and in part, were critical for people, including the Applicant Lindsay to assemble and express their concerns in relation to all aspects of the COVID-19 situation, including all Government responses, legislation and Orders.

61. The Applicants have dutifully cleaned up after every Lawful Protest, removing their Canopy, tables, literature, sound equipment, etc. and even debris and garbage that that was there prior to our arrival, leaving Stuart Park cleaner than it was when they arrived.

62. After many of the Lawful Protests, protestors would frequent downtown businesses who were prepared to allow them in to make purchases, order and/or eat therein without a mask.[44]

63. From March 2020 to August 2021, no Bylaw tickets were served upon any of the Applicants in relation to their Lawful Activities including sound amplification.[45]

64. During this time, the Kelowna RCMP and Bylaw Officers admitted publicly and privately to the Applicants 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.[46]

65. At no time have the Applicants used any City electrical or other services.[47]

66. Bylaw Officers for the Petitioner began issuing tickets exclusively to the Applicant Lindsay *circa* August 14, 2021, 17 months after the Lawful Protests began.[48]

67. The Petitioner has harassed the 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.[49]

68. No other person from any other protest has been ticketed for organizing political protests in parks,

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42	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 31, 152, 242 Exhibit "BB"
43	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 11, 37, 45, 47, 327, 362,
44	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 75
45	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 205, 213, 336, 348 Exhibit Video "ZZZ"
46	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 224-227, 245, 306, 335 Exhibit Video "W"
47	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 65 Exhibit "B"
48	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 141, 179, 213, 224,
49	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 213 Exhibit "PP"

street marches, using sound equipment, or signage since Stuart Park was created.[50]

69. The Petitioner has knowingly and recklessly ticketed the Applicant Lindsay for offences that he was not a party to such as selling selling merchandise, and on days where he was not even present.[51]

70. The Applicant Lindsay is not responsible for the actions of others.[52]

71. Kevin Mead, Bylaw Services Manager from the Petitioner, has admitted publicly that the City was issuing these tickets in order to shut down the Lawful Protests.[53]

72. The City did not issue any trespass orders to the Applicants, demanding that they leave the Town or Public Square in Stuart Park, nor were any such signs posted anywhere. Nor were any signs posted that sound equipment could not be used.[54]

73. 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 assumed and arbitrarily agreed upon between himself and at least one superior Ken Hunter in a closed door, back room, covert, secret meeting.[55]

74. Neither the public nor the Applicants were ever notified of this secret meeting and arbitrary definition, nor any test to be met to constitute an event ("*Arbitrary Definition*").[56]

75. The Applicant Lindsay repeatedly noticed Bylaw Officers and the RCMP that 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.[57] He was ignored. Officer O'Hanlon ignored and discarded the BCSC *Beaudoin* case given to him from the Applicant Lindsay[58] in response to O'Hanlon's questioning Lindsay if he had a permit.

76. Both Bylaw Officers Short and O'Hanlon informed the Applicant Lindsay that while the Petitioner recognizes that they did have their common law and **s. 2(b)** Constitutional freedoms, the Arbitrary Definition is what they were following.

50	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 213
51	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 216, 238, 308, 319, 320
	Affidavit #1	Betting Engler	June 26, 2023	para. 18
	Affidavit #1	Tanya Gaw	June 27, 2023	para 8
52	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 216, 238, 308
53	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 348
54	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 40
	Affidavit #2	David Lindsay	Nov. 6, 2023	
55	Affidavit #1	James Short	Dec. 23, 2022	para. 7, 12
56	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 214, 215, 236
57	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 205, 209, 230,
58	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 210
	Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 32

77. The Petitioner has admitted that it has not issued in the past, and 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.[59]

78. 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 project approval.[60]

79. The Source, as well as various Bylaw Officers have admitted to the Applicant Lindsay that there have been no complaints, especially of a formal nature, filed with the Petitioner in relation to these Lawful Protests and that no files for any complaints were opened by the Petitioner.[61] Alternatively, any complaints were fleeting, *di minimis*, trifling or minor in nature, remain part of the sacrifices we make to live in a society, and are necessarily incidental to, and do not affect, the Constitutional freedoms of the Applicants.

80. 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.[62] No pedestrian, or anyone from the Stuart Park concrete/skating rink area has ever complained to the Applicants or the Petitioner that the Applicants were, by way of their Lawful Protests, interfering with, or preventing them from using or enjoying the Park in any way.[63]

81. The Applicants have not denied access to, or use, or interfered with any of the Park facilities to anyone.[64] Alternatively, any interference was temporary, unintentional, fleeting, *di minimis*, trifling and/or insignificant in nature, and remain part of the sacrifices we make to live in a society.

82. 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 and downtown Kelowna.[65] Many of them have used, and continue to use both Stuart Park, Kerry Park, and City Hall property for political protests, including the queers who just had a protest on October 14, 2023

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59 Affidavit #1 David Lindsay Aug. 1, 2023 para. 208 Exhibit "OO"

60 Affidavit #1 David Lindsay Aug. 1, 2023 para. 247-250

61 Affidavit #2 David Lindsay Nov, 6, 2023

62 Affidavit #1 David Lindsay Aug. 1, 2023 para. 114, 185, 187, 312
See Video Exhibit "X" 20210710 Lawful Protest Time: 3:53-4:03
See Video Exhibit "AA" 20210911 Lawful Protest Time: 13:11-15:01; 15:11 – 15:40; 15:54 – 16:10 21:31 – 22:57; 23:50 – 24:10; 24:40 – 25:32
See Video Exhibit "BB" 20211016 Lawful Protest Time: 4:39 – 4:55; 5:10 – 5:16
See Video Exhibit "CC" 20220402 Lawful Protest Time: 38:26 – 38:37; 49:48 – 49:56; 59:09 – 50:20
See Video Exhibit "O" 20220822 Lawful Protest Time: 1:51 – 2:10; 14:59 – 15:41; 25:10 – 25:34 33:46 – 33:49; 33:57 – 34:15
See Video Exhibit "K" 20220922 Lawful Protest Time: 9:36 – 10:37
See Video Exhibit "DD" 20211120 Lawful Protest Part 1 Time: 17:17 – 19:51

63 Affidavit #1 David Lindsay Aug. 1, 2023 para. 179-186
Affidavit #1 Leo Beauregard Aug. 1, 2023 para. 34

64 Affidavit #1 David Lindsay Aug. 1, 2023 para. 57, 182-186

65 Affidavit #1 David Lindsay Aug. 1, 2023 para. 252-297 Exhibit "WW" – "GGGG"

and a counter protest on Oct. 21, 2023 at Stuart Park. No permits were issued to most if not all of them.[66]

83. These other Protest Groups for years have done, in their protests and in public parks and streets, all activities that the Applicants 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,[67] or demanded to have permits.

84. Counter protestors regularly assembled in front of City Hall, simultaneously with the Lawful Protests. Some of these people were swearing and screaming at the top of their lungs and causing a disturbance, and using sound amplification equipment such as a megaphone.[68] The Petitioner has approved of and/or supported these other Protest Groups by allowing same to occur. None of these counter protestors were charged with any offences.

85. Virtually all remaining parks in the City are either too small and/or impracticable for use, or in residential or remote, outlying areas and will likely raise complaints by residents that are simply not applicable at Stuart Park.[69] These Lawful Protests, not being in a residential area, are least likely to materially affect the public, while simultaneously permitting the Applicants to exercise their common law and s. 2 Charter freedoms in an effective manner.[70]

86. If this Petition is granted, the Applicants 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 and their messages, will effectively deny to them their common law and **s. 2** Charter freedoms.[71]

Part 3 Legal Basis

A. Proper Interpretation and Application of the Protection of Public Participation Act

87. The underlying basis for the *Protection of Public Participation Act* (*PPPA*), as set out by the BCAG David Eby (at that time), in the Legislature:

> *"The B.C. Attorney General, the Honourable David Eby, stated the following:*

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66 Affidavit #2 David Lindsay Nov. 6, 2023
67 Affidavit #1 David Lindsay Aug. 1, 2023 para. 275
68 Affidavit #1 David Lindsay Aug. 1, 2023 para. 189 Exhibit Video "WW"
69 Affidavit #1 David Lindsay Aug. 1, 2023 para. para. 58-59
70 Affidavit #1 David Lindsay Aug. 1, 2023 para. 37, 45, 58-60, 62,
71 Affidavit #1 David Lindsay Aug. 1, 2023 para. 54-60, 126, 172, 221, 327, 328, 362, 363

> *The purpose of this act is to enhance public participation by protecting expression on matters of public interest and litigation that unduly limits such expression ...*
>
> *... [T]he act would provide for a legal basis and expedited process by which, at an early stage in the proceedings, a court would be able to determine whether a lawsuit arises out of expression on a matter of public interest and, if so, to weigh whether the likely harm to a plaintiff is serious enough that the public interest in allowing the lawsuit to continue would outweigh the public interest in protecting the expression that gave rise to the lawsuit. In so doing, the act would improve access to justice, would balance the protection of freedom of expression with the protection of reputation and economic interests."*[72]
>
> ...
>
> *This is a bill that is intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day, and in particular, to respond to a mischief that has arisen, which is people who are powerful and wealthy and able to afford lawyers initiating lawsuits or threatening lawsuits against individuals who are critical of them in order to stop them from participating in that public debate."*[73]

88. The Supreme Court of Canada (SCC) opened the *Pointes* referencing the general intention of statutes such as the *PPPA*, by acknowledging where litigants such as the Petitioner herein are using its Bylaws to limit or deny expression, indeed effective expression, to the Applicants:

> *"Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs."*[74]

89. The provisions of the *PPPA* mirror that of legislation in Ontario, and accordingly, it would be apt for this Honourable Court to consider and apply the purposes of the Ontario legislation to the *PPPA*:

> *"137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,*

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72 *British Columbia, Legislative Assembly, Official Report of Debates (Hansard),* 41st Parl, 4th Sess, No 197 (13 February 2019) at 6974

73 *British Columbia, Legislative Assembly, Official Report of Debates (Hansard),* 41st Parl. 4th Sess. No 198 (14 February 2019) at 7018

74 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 2

(a) *to encourage individuals to express themselves on matters of public interest;*

(b) *to promote broad participation in debates on matters of public interest;*

(c) *to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and*

(d) *to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action."*[75] (my emphasis)

90. The words "*within the law*" in the below quote, can only mean in our Constitution. For what use is the law if municipal Governments' can simply Bylaw our Constitutional rights and freedoms away?

> "[76] *More than a decade before the enactment of* ***s. 137.1****, sitting at this same courthouse, Mr. Justice Pedlar dismissed a lawsuit for defamation brought by the Corporation of the Township of Montague against one of its vocal critics: Montague(Township) v. Page, 2006 CanLII 2192 ONSC. In that decision, Mr. Justice Pedlar stated at para. 29:*
>
> *"In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an* ***absolute privilege,***[A] *without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms."*[76]**([A] Note: see para. 221-224 herein – Hohfeld on privilege)**

91. The emphasized words above are apposite herein, where the relief sought by the Petitioner will run afoul of the very reasons this legislation was enacted herein B.C.

92. The *PPPA* should be given a wide and generous interpretation to achieve these laudable goals.

93. **Section 4(1)(a)(b)** of the *PPPA* provides that the Applicants may seek to have the Petition dismissed on the basis that:

a. the proceeding arises from expressions made by the Applicant, and
b. the expression relates to a matter of public interest.

94. If the Applicants meet this test, then the obligation falls upon the Petitioner to avoid having the

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[75] *An Act to Amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act* Nov. 3/15
[76] *McLaughlin v Maynard* 2017 ONSC 6820 CanLII para. 76

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 Applicant 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.*[77]

95. If the Petitioner fails to meet its burden with respect to any of these last three steps its case will fail.[78]

96. If the Petitioner fails to establish either **s. 4(2)(a)(i) or (ii)**, there is no requirement to discuss **s. 4(2)(b)**.[79]

97. Procedurally, hearings under **s. 4** cannot be bi-furcated between **s. 4(1) and 4(2)**.[80]

98. **Part 4(2)(a)(i)(ii)** are discretionarily determined on a "*grounds to believe*" standard.[81]

99. Insofar as the impugned Bylaws are contrary to the *PPPA*, they are of no force and effect for Provincial legislation overrides these Bylaws,[82] 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 Applicants' **s. 2(b)(c)** freedoms in the Charter.

100. 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.*"[83]

101. A further category of SLAPP suits involves public officials using the legal system to stifle expression critical of Government officials, just as herein.[84]

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

a. The Proceeding Arises from an Expression Made by the Applicant

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77 *Hansman v. Neufeld* 2023 SCC 14 CanLII para. 53
78 *Todsen v Morse* 2022 BCSC 1341 CanLII para. 30
79 *Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 61-63, Quoting, *Lang v Neufeld* 2022 BCSC 130, *Durkin v Marlan* 2022 BCSC 193
80 *Reynolds v Deep Water Recovery Ltd.* 2023 BCSC 600 CanLII para. 63
81 *Cheema v Young* 2021 BCSC 461 CanLII para. 15
82 s. 3(a), 10(1)(2) *Community Charter*
83 *Galloway v. Rooney* 2022 BCCA 243 CanLII para. 8
84 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

102. This **s. 4(1)(a)(b)** test is set on a balance of probabilities.[85]

103. 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*".[86]

104. The Supreme Court of Canada acknowledged that this provision need not require any elaboration – it is "*... defined expansively.*"[87]

105. Whether the proceeding "*arises from*" the expressions of the Applicants, implies an extremely low level of causality. If the proceeding is "*somehow*" related to the expression, this test is met.

> "*[59] The meaning of the words "arises from" and "expression", within the context of ss. 137.1(2)-(3) of the Ontario Act, was considered by the Supreme Court of Canada in Pointes as follows:*
>
> > *[24] ... what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding. What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those directly concerned with expression, such as defamation suits.*"[88] (my emphasis)

106. A precise level of causation need not be identified.[89]

107. The words "*made by*", include any positive actions, whether verbal or non-verbal, taken by the Applicant Lindsay or others, to cause or create the expressions.[90]

108. The Applicant Lindsay spoke, expressed himself and conveyed his own messages at almost every Lawful Protest, including the dates in the Affidavit #1 of Bylaw Officer Short in support of the Petition. Further, he took positive action to cause or create the expressions of other individuals, which he supported, by seeking out, requesting and authorizing them to speak, convey and express themselves at the Lawful Protest. Further he took the positive action of creating signs that were set up and used in all the Lawful Activities.[91]

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85 *McDonald v Goranko* 2023 BCSC 231 CanLII para. 46; *Lang v Neufeld* 2022 BCCSC 130 para. 64
86 *Protection of Public Participation Act* s. 1 Definitions
87 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 25
88 *Linkletter v. Proctorio, Incorporated*, 2023 BCCA 160 (CanLII) para. 20, quoting the SCC in *Pointes* para. 59
89 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 24, Footnote
90 *Waterton Global Resource Management Inc. v Bockhold* 2022 BCSC 499 CanLII para. 19
91 Affidavit #1 David Lindsay Aug. 1, 2023 para. 121, 123, 159, 190

109. This Petition proceeding arises from the expressions made by the Applicants. But for the Applicant Lindsay's presence, expressions and seeking out and authorizing others to express themselves and them so doing, this Petition would never have been filed.

110. In *Pointes*, the entire evidence of the witness Mr. Gagnon was considered and accepted for purposes of determining if it constituted an expression, without detailing any specific words made. This is because it was not a defamation case which does rely upon specific words to be uttered.[92]

111. The expressions and information expressed by the Applicants at their Lawful Activities 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, and geoengineering by way of spraying toxins from airplanes in our atmosphere.[93]

112. Individual people speaking on COVID-19, their experiences and involvement, and other rights and freedoms related issues, included *inter alia*, professional medical doctors, nurses, pastors, vaccine injured, national group leaders such as Vaccine Choice Canada and Action4Canada, lawyers, politicians, candidates, children, school teachers, media persons, retired police officers, court mask experts, and protest singers, from B.C., Canada and globally.

113. Expressions at the Lawful Activities were not restricted to verbal communications either.[94] The Applicants Lindsay, CLEAR and others created dozens of signage and banners for use at the Lawful Protests, and the CLEAR Canopy for further expressive messaging to the public and protestors.

114. Whether or not the allegations or concerns of these people, including the Applicant Lindsay are valid is irrelevant, because "*... there is no qualitative assessment of the expression at this stage.*"

115. The Petition itself recognizes the expressive activities of the Applicants as providing the factual basis for the Petition at **Part 2, para. 3, 4(b)(d)** therein.

116. It is not possible to claim that the expressions by the Applicant Lindsay and others he authorized to speak were not expressive, as they were made and did communicate to a segment of society at each and every Lawful Protest, from which this Petition arises from.

117. The Applicants, including the Applicant Lindsay clearly meet this part of the test.

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92 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 98, 99
93 Affidavit #1 Bettina Engler June 26, 2023 para. 11, 12, 16
94 *Bent v. Platnick*, 2020 SCC 23 CanLII SCC para. 84

b. Said Expression Relates to a Matter of Public Interest

118. "*Public Interest*" is to be given a "*broad and liberal interpretation.*"[95]

119. "*The following principles apply to a consideration of whether a matter is of public interest:*

a) A matter of public interest must be distinguished from a matter about which the public is merely curious or has a prurient interest.

b) The phrase "public interest" must be given a broad, although not unlimited, interpretation.

c) The public interest is to be determined objectively, having regard to the context in which the expression was made and the entirety of the relevant communication.

d) An expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression.

e) The characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made.

f) Neither the merits of an expression, nor the motive of the author in making it, should be taken into account in determining whether an expression relates to a matter of public interest.

g) To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or to which considerable notoriety or controversy has attached."[96]

> "*As Chief Justice McLachlin, as she then was, said in Grant v. Torstar Corp., 2009 SCC 61 at paras.105–106:*
>
> *[106] The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.*"[97]

120. 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.*"[98] An extremely broad interpretation is recognized where the expression need only be in relation to a matter of public interest.[99]

121. Even where "*...much of the general public may not be interested...*" in the expressions or subjects from the Applicants, it is sufficient if there is "*some segment of the community*" that would have a

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95 *Bent v. Platnick*, 2020 SCC 23 CanLII SCC para. 81
96 *Grant v Torstar Corp.* 2009 SCC 61 CanLII para. 103-106
97 *Peterson v Deck* 2021 BCSC 1670 CanLII para. 30
98 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
99 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 26-29

genuine interest in receiving the information.[100] Hundreds and at times thousands of people in attendance,[101] with MSM (TV, radio, print and internet) and Government and community attention, on a precedential issue of local, provincial, national and international interest to these Lawful Protests, meets this low threshold test.[102]

122. The expressions at issue are not exclusively private in nature, nor are the parties and Governments involved, directly or behind the scenes.

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

124. The expressions of the Applicants are further of public interest, in part simply due to the nature of the expressions in relation to medical science, the effect of the COVID-19 issue on all Canadians, the nature and threats to their rights and freedoms from various upcoming Government legislation and plans,[103] the nature and dangers of the experimental mRNA vaccine, and because the Government and MSM have refused to give the Applicants a platform for their COVID-19 opposition.[104] Having the Government instruct the MSM to withhold opposing COVID-19 information, facts and studies, is another matter of public interest, all for which judicial notice can be taken.

125. The expressive activities of the Applicants are highly political in nature,[105] directed to the public and especially at all levels of Government and their responses to the COVID-19 situation. Judicial notice can be given that pretty much all discussions in relation to COVID-19 are political, as are upcoming issues such as 15 min. prison cities, digital ID and currencies, running for political office or school trustee, and changes to our supplement laws. The expressive activities involved *inter alia*, medical information, scientific information, Government financial information, legislation, encouraging political activism by running for offices, studies, reports, comments, opinions, legal and Constitutional issues all meet the benefit of the highest accord to be given to political issues.

126. The COVID-19 issue was precedent setting, in terms of medical and legal concerns. It polarized communities, the entire country and world. It was a divisive issue, separating friends and families, terminating employees, resulting in public fights and altercations, hundreds of local and national protests with thousands of protesters including at the Lawful Protests, and many other issues. A

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100 *New Dermamed Inc. v Solaiman* 2018 ONSC 2517, para. 25
Affidavit #1 Leo Beauregard Aug. 1, 2023 para. 21

101 Affidavit #1 David Lindsay Aug. 1, 2023 para. 117, 124, 154

102 Affidavit #1 David Lindsay Aug. 1, 2023 para. 34 Exhibit Videos, 151 Exhibit "I", "J"
Affidavit #1 Betting Engler Aug. 1, 2023 para. 4, 7-9

103 Bill 31 *Emergency and Disaster Management Act* 2023; Bill C-47 Amendment to the *Food and Drug Act* concerning Natural Health Products

104 Affidavit #1 David Lindsay Aug. 1, 2023 para. 6, 31, 96, 146, 147, 152, 159 xiii, 242, 364,

105 Affidavit #1 David Lindsay Aug. 1, 2023 para. 27, 45, 72, 97, 100, 106, 159 xi,, 165, 208, 216, 229, 356

very large segment of society was deeply concerned over the issues being expressed by the Applicants.

> *"This was a matter that affected "people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others" (per Lord Denning in London Artists, Ltd. v. Littler, [1969] 2 All E.R. 193 (C.A.), at p. 198, cited in Torstar, at para. 104)."*[106]

127. It is not possible to claim that the expressions the Lawful Protests were not in relation to matters of public interest, including for the medical community. There is a serious public interest in the public receiving information opposing the Government narrative on the COVID-19 issues, restrictions, lockdowns, how the Government arrives at their statistics, how their computer modeling works, having supporters run for political office, looming threats to our rights and freedoms on the horizon, and many other vital issues. The Applicants clearly meet this test.in **s. 4(1)(a)(b)** of the *PPPA*.

ii. *Petitioner must satisfy the Court that there are grounds to believe its proceeding has substantial merit*

> ***4(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that***
>
> ***(a) there are grounds to believe that***
> ***(i) the proceeding has substantial merit***

128. Again, the term "*satisfies*" requires the Petitioner to meet the test at this level, on a balance of probabilities to show that **s. 4(2)(a)(i)(ii)** of the *PPPA* are met.[107]

129. "*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.[108]

130. It cannot be said that the Petitioner can claim that it has substantial merit and a real prospect of success to its claim when all or almost all of its Bylaw interpretations are either incorrect for a variety of interpretative and statutory interpretative reasons, or that they are unconstitutional as violating the Applicants' common law and/or Constitutional rights and/or freedoms.

131. The Petitioner relies upon several affidavits in support of its Petition. This evidence can be

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106 *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22 CanLII para. 100

107 *Lang v Neufeld* 2022 BCSC 130 CanLII para. 70, 71

108 *Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 24, 25 [49, 50], Quoting, *1704604 Ontario Ltd. v Pointes Protection Ass'n* 2020 SCC 22, para. 36, 37, 39, 48, 49; *Cheema v Young* 2021 BCSC 461 CanLII para. 16

summarized here as follows:

i. the Applicant Lindsay and others arrived at Stuart Park and set up sound equipment, the CLEAR Canopy, a sandwich board and tables for their Lawful Protests;

iii. there was a sandwich board set up to notify the public of upcoming Lawful Protests;

iv. Bylaw Officer Short noticed on the CLEAR website that flyers were put up advertising at least some of the upcoming Lawful Protests at Stuart Park;

v. people were speaking and expressing themselves at the Lawful Protests, including the Applicant Lindsay, in various way including signs, banners and the CLEAR Canopy;

vi. amplified sound was used in the exercise of the Applicant's expressions at the Lawful Protests;

vii. a tent as the Petitioner refers to the CLEAR Canopy, was set up;

viii. the Applicants had Lawful Protest Marches on city streets on certain dates;

ix. people other than the Applicants, were allegedly selling merchandise;

x. there were protest singers on occasion;

xi. other people other than the Applicants, set up tables, some of whom are alleged to have been selling merchandise;

xii. the Applicants would proceed down the boardwalk to protest on Hwy 97;

xiii. the Applicants did not have a permit to be assembling and speaking in the Park or using sound equipment without a permit.

132. All of these allegations fail to meet the high threshold test of *substantial merit.*

133. The Petitioner has conceded it does not issue permits for protests which are Constitutionally protected,[109] but claims the Lawful Protests are not so protected simply because of the use of sound equipment, a tent (CLEAR Canopy), selling merchandise and advertising for these Lawful Protests, which it claims thereby transforms the Lawful Protest into a Bylaw, undefined event.[110]

134. The supporting evidence of the Petitioner is not to be taken at face value. There is to be a limited weighing of the evidence and credibility. Bald allegations, unsubstantiated damage claims will not meet the "*grounds to believe*" requirement.[111]

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[109] Affidavit #1 David Lindsay Aug. 1, 2023 para. 208 Exhibit "OO"
[110] Affidavit #1 James Short Dec, 23, 2022 para,. 7, 12; Petition para. 3, 4, 7
[111] *Galloway v A.B.* 2019 BCSC 1417 CanLII para. 82

135. Each allegation is examined below both factually and legally to show that all the allegations by the Petitioner fail to demonstrate substantial merit, the grounds to believe test and do not have a real prospect of success.

Factually/evidentiary

- ***Parks Bylaw - s. 3.8 - "Event"***
  Petition – para. 3-5

136. The Petitioner seeks an order that the Applicants are conducting an event, contrary to **s. 3.8** of the *Parks Bylaw*. **(Part 1, para. 1(a), Part 3, para. 3, 4**, Petition)

137. The Petitioner simultaneously concedes that the Applicants' have the Constitutional freedom to protest[112] which does not include a requirement for a permit or permission from the City, while trying to "*pigeon hole*" or "*deem*" the Applicant's Lawful Protests into the impugned Bylaws to effect the same result of prohibiting the Lawful Protests without the fiat of the City. The City is trying to do indirectly what it cannot do directly, to achieve the same prohibitive result.

138. City Bylaw Officer Short has admitted that the facts being considered by the City to constitute an event, were arbitrarily agreed upon in a secret, backroom meeting between himself and his superior Ken Hunter, and never made public.[113] This alone constitutes an arbitrary decision or definition and is a violation of natural justice and procedural fairness to the Applicants, including Lindsay, who was subsequently issued over 200 tickets and $50 000.00 in fines for something that did not happen.

139. There is a conspicuous absence of evidence to support this claim of an event, such as to not have a real prospect of success. Mr. Short evidences **para. 7, 12** in his Affidavit #1, that it is his opinion only, that using electronic speakers powered from a generator to amplify individual voices, setting up a tent, selling merchandise, and setting up signs advertising the Lawful Protests each Saturday, constitute an event upon which he issued his tickets and upon which this Petition is based.

140. All other Affidavits in support of the Petition, simply assume or piggyback on Mr. Short's evidence that there was an event taking place, with no facts provided to support their assumptions.

141. Despite which, the Petitioner has permitted every other protest with similar actions to take place, without objection or offence tickets issued.[114]

142. The Petitioner is attempting, arbitrarily, to "*pigeon hole*" or deem every activity, including the Lawful Protests as being an event so that it requires a permit or permission. There is no basis in fact or law for this. If the allegations relied upon by the Petitioner were correct, all protests would

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[112]	Affidavit #1	Davd Lindsay	Aug. 1, 2023	para. 208, 214, 236, 366, Exhibit "OO"
[113]	Affidavit #1	Davd Lindsay	Aug. 1, 2023	para. 214, 215, 236, 366
[114]	Affidavit #1	Davd Lindsay	Aug. 1, 2023	para. 253-297
	Affidavit #2	David Lindsay	Aug. 1, 2023	para. 252-297

be prohibited despite their claims to the contrary.

143. There is no substantial merit nor real prospect of success.

➢ *Good Neighbour Bylaw - s. 7.3 - Sound Equipment Petition – para. 13, 14*

144. Dealing then with these factors that Bylaw Officer Short and his boss interpret as constituting an event, the fact that sound equipment was being used does not transform the Lawful Protests into an event. Virtually every protest has sound equipment, or the protest itself would fail.[115]

145. Protests take place adjacent to streets and buildings on these streets, which have noisy traffic. Large numbers of people attend protests. It is not possible to effectively, or at all, convey expressions without the use of sound equipment, as the video evidence being relied upon by the Applicant Lindsay confirms.[116]

146. All or virtually all other protests as evidenced by David Lindsay in his Affidavit #1, had sound equipment in use, including megaphones and were permitted to do so as part of their Constitutional freedom of assembly and expression.[117] Clearly the City recognizes that this is not something that is a necessary or required part of an event.

147. Sound equipment use requires electricity. The City has notified the Applicants that they cannot use City power sources without a permit.[118] The new, super quiet generator used by the Applicants is necessarily incidental to, and part of the sound equipment.

148. At one Lawful Protest, the sound equipment failed temporarily while the Applicant Lindsay was speaking. As soon as this occurred, his voice was barely audible from 10-12' away from the video camera, and people in the back could not hear him at all.[119]

149. Minimally, as both events and all or virtually all Constitutionally protect freedom to protests use sound equipment, it is not a factor that has substantial merit to it. The Petitioner has provided no evidence that sound equipment is not permitted in the exercise of the Constitutional freedom of protest, and in fact has repeatedly condoned so doing with a wide variety of other groups and persons. There is little or no merit to this factor and the Petitioner does not have a real prospect of success.

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115 Affidavit #1 Davd Lindsay Aug. 1, 2023 para. 66, 195, 196
116 Affidavit #1 David Lindsay Aug. 1, 2023 para. 66, 195-204
117 Affidavit #1 Davd Lindsay Aug. 1, 2023 para. 253, 259, 260, 261, 265, 268, 271, 272, 274, 275, 279, 280, 284, 285, 286, 287, 289, 292, 293, 297, 311
Exhibit "EEE" https://globalnews.ca/news/9170069/hundreds-join-in-solidarity-for-irans-mahsa-amini-in-kelowna/
Exhibit "HHH" https://www.pentictonwesternnews.com/news/pain-on-the-other-side-of-the-world-is-pain-in-canada-too-iranian-freedom-protest-in-kelowna-3632113
Exhibit "KKK", "LLL", "PPP", "QQQ", "UUU", "VVV", "WWW", "XXX", "SSS", "UUU", "DDDD"
118 Affidavit #1 Davd Lindsay Aug. 1, 2023 para. 65, 225
119 Affidavit #1 Davd Lindsay Aug. 1, 2023 para. 196

➢ *Parks Bylaw - s. 3.17 - Canopy or Tent? Petition – para. 8, 9*

150. Bylaw Officer Short claims that the Applicants have set up a tent. This is false and misleading, where the City is claiming that every structure is a tent, with just different styles, ie: "*gazebo-style tent.*" (**Part 2, s. 4(a)**, Petition)[120]

151. The Applicants in fact have set up a canopy, which, factually by definition, is not a tent.[121] The difference is important, as a tent is an expressly prohibited structure in **s. 3.17** of the *Parks Bylaw*, a canopy is not. If the word 'tent' was used, it was so done colloquially and metaphorically, much in the same way the word 'rally(ies)' was used to describe the Lawful Protests.

152. As evidenced in Affidavit #1 of David Lindsay, a tent must have, by definition, four sides to permit sleeping in it. A canopy, including the CLEAR Canopy, does not. One side was obtained as an extra for expression so people walking by would see who the Applicants are and understand their position.[122] One cannot sleep in the CLEAR Canopy which was never designed for this – it was temporary in nature, but one can sleep in a tent indefinitely.

153. In the face of the Applicant Lindsay's evidence, and the want of evidence from the Petitioner other than a bald unsupported and erroneous allegation that the CLEAR Canopy structure is a tent, it is not a factor that has substantial merit to it nor real prospect of success.

➢ *Sandwich Board*

154. The Applicants made use of a sandwich board. Though originally located on the public sidewalk on occasion, it was permanently moved to be located adjacent to the curb.[123]

155. The City also assumes or deems that a sandwich board was erected advertising the Lawful Protests each Saturday for pedestrians and drivers to see, is part of an event. All protests require some form or method of advertising, or they would not occur. Whether flyers, internet, media, posters on telephone poles or other methods, factually, the Applicants' intention of getting the word out is a critical component of their Lawful Protests,[124] as it is for all protests.

156. As both events and protests require and do some form of advertising, having a sandwich board to inform the public of future Lawful Protests against the COVID-19 Orders, mandates and legislation, or even to advertise their political position to the public, it is not a factor that has substantial merit

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120 Affidavit #1 James Short Dec. 23, 2022 para. 9

121 Affidavit #1 David Lindsay Aug. 1, 2023 para. 42, 43, 112, 216, 310 Exhibit "O" p. 93-98
https://economytent.com/canopy-and-tent-difference/#:~:text=Depending%20on%20where%20you're,fully%20enclosed%2C%20it's%20a%20tent.

122 Affidavit #1 David Lindsay Aug. 1, 2023 para. 310

123 Affidavit #1 James Short Dec. 23, 2022 Exhibit "B" p. 7, 8
Affidavit #1 Daniel Hogan Jan. 4, 2023 Exhibit "C" p,. 7, 8
Affidavit #1 David Lindsay Aug. 1, 2023 para. 193

124 Affidavit #1 David Lindsay Aug. 1, 2023 para. 193

to it. In other words, advertising the future exercise of the Applicant's common law and **s. 2** Charter freedoms, does not transform a protest into an event, and is necessarily incidental to the Applicants' common law and s. 2 Charter freedoms.

157. There is no substantial merit nor real prospect of success.

➢ *Traffic Bylaw - s. 8.2.2, 8.2.4 – Standing, loitering, walking in parades, processions*
Petition - Para 4(d), 16-18

158. The Petitioner alleges at **Part 2, para. 4(d)** of its Petition, that people were standing around and loitering on public roadways next to the Park, and walking in parades or processions.

159. Whether a person's activities such as standing around constitute loitering, is an issue of law or mixed fact and law, not pure fact and should not have been listed here. This is a classification or judicial determination resulting from two necessary elements: physical actions taken by people of standing around, and with evidence of no obvious reason. This is dealt with further below on the law surrounding this issue, at **para. 298-306**.

160. People were standing to express themselves and receive information at the Lawful Protests to seek the truth on issues that the Applicants were opposing in relation to COVID-19.[125] There are insufficient benches to seat a hundred or more protestors and not everyone has a chair to bring.

161. All protestors clearly had a reason for being present at the Lawful Protests or they would not have been present. To say that a hundred or more people showed up at Stuart Park each Saturday for no reason at all other than to just stand around, is an absurdity.

162. There is no evidence in any of the supporting Affidavits for the Petitioner, that the Applicants were standing around with no obvious reason. Indeed, the Petitioner's Affidavit evidence and Exhibit pictures clearly confirm that the people were there with their signs to support the Lawful Protests and oppose the COVID-19 restrictions, orders, mandates, masks and lockdowns.[126]

163. As there is no evidence that people were present with no obvious reason for being there, as is required to constitute loitering, this is not a factor that has any substantial merit to it. Indeed, all evidence and pictures confirm that everything was there for a reason and/or purpose, including the CLEAR Canopy, signs, banners, and people expressing themselves in a variety of ways to a number of people, in opposition to Government COVID-19 actions.

164. Do the Applicants walking in protest on public streets in opposition to the COVID-19 measures, constitute a parade or procession? Whether walking with signs and for political expression and protests on public streets constitutes a parade or procession, is not an issue of fact, it is mixed fact

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[125] Affidavit #1 David Lindsay Aug. 1, 2023 para. 49-51

[126] Affidavit #1 James Short Dec. 23, 2022 Exhibit "W" p. 96, 98, 99, 100, 106
Affidavit #1 David Lindsay Aug. 1, 2023 para. 49-51, 69, 111

and law, or law, as set out further below. It should not have been pleaded as fact and should be removed.

165. Factually, there is no doubt that the protestors, with their signs, chants and hand out literature, were walking in protest against Gov't COVID-19 orders, restrictions, mandates and lockdowns.[127] Indeed, Bylaw Officer Short admits that these marches were a form of protest.[128]

166. Additionally on this point, Bylaw Officer Short and the City have tacitly admitted and recognized that the Lawful Marches were respected as part of the Applicants' freedom to protest, which is why Bylaw Officer Short does not evidence that he issued tickets to the Applicants or anyone else for so doing.[129] All tickets under **s. 3.8** of the *Parks Bylaw* were for allegedly holding an event only, not in relation to the Lawful Marches. Alleging now that this walking constitutes a Bylaw-encompassing term so as to be prohibited without a permit, is unsupported and contradictory, and the Petitioner is estopped from so doing.

167. Further, as both events (such as outdoor and indoor concerts) and political protests require or involve people to be standing, and including street protests and walking in marches, this is not a factor that has any substantial merit to it nor real prospect of success.

- ***Parks Bylaw - s. 3.3 - Selling Merchandise***
  Petition – para. 6, 7

168. There is no evidence, including Affidavit Exhibit pictures from the Petitioner[130] that the Applicants, including Lindsay and CLEAR, were selling merchandise in Stuart Park. Pictures showing other people *purportedly* selling something from other organizations which the Applicants are not responsible for, is not evidence against the Applicants herein.

169. The Petitioner alleges at **Part 2, para. 4(b)** of its Petition, that the Applicants were involved in the specified actions, "*... in a manner that is liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals r the public.*" Whether or not the impugned actions meet this test, is one of mixed fact and law. These words in the Facts part of the Petition do not state whether the Applicants did this or that action.

170. This is not a factor that has any substantial merit or real prospect of success.

- ***Parks Bylaw* - s. 3.41 - *Creating a nuisance or interfering with use <u>and</u> enjoyment, comfort or convenience of the park by other persons***
  Petition, para. 10, 11

127	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 165	
128	Affidavit #1	James Short	Dec. 23, 2022	para. 106	
129	Affidavit #1	James Short	Dec. 23, 2022	para. 7, 12, generally	
130	Affidavit #1	James Short	Dec. 23, 2022	para. 31, 38, 96, 102, 103, 104	Exhibit "E", "F", "G", "Y", "CC", "DD"

171. There is no evidence of anyone being interfered with in their use and enjoyment, comfort or convenience of the Park by the Applicants on any of the alleged dates identified, and have thus caused a nuisance. The words "*nuisance*" and "*interfere*" are not even in any of the Petitioner's Affidavits.

172. There is simply no evidence that anyone was interfered with in their use of the Park, nor that a nuisance was created as defined in the *Parks Bylaw*. This is not a factor that has any substantial merit to it nor real prospect of success.

➢ *Other defects*

173. Questions of statutory interpretation, which includes the meaning of the impugned words, "*event*", "*tent*", "*procession*", "*parade*", "*loitering*" etc., are issues of law. What actions are alleged to have been taken or said by the Applicants are issues of fact. Whether the alleged facts satisfy these definitions, constitutes mixed fact and law.[131]

174. Applying this test *mutadis mutandis* herein, what "*loitering*" means for example, is an issue of law. Whether the alleged facts meet this definition or test, is one of mixed fact and law. What the alleged actions allegedly taken by the Parties, ie: who, what, when, where, why and how, are issues of fact.

175. The Petitioner alleges at **Part 2, para. 3** of its Petition, that the Applicant Lindsay was the organizer and, "*...began and continues to organize, lead, and carry out weekly 'Freedom Rally' events every Saturday at Stuart Park, located at 1430 Water Street, Kelowna BC (the "Park"), and on public streets and roadways in the downtown core of the City, on behalf of and with the participation of other supporters of the C.L.E.A.R. Applicant.*"

176. Alleging that the actions of organizing, leading and carrying out weekly Freedom Rallies or Lawful Protests are an "*event*", is a conclusion of mixed fact and law, by applying a presently undetermined legal definition of an "*event*" to the facts so stated.

177. Further, the words, "*...on behalf of...*" in **para. 3** of its Petition, are absent any supporting evidentiary facts at all.

178. The Petitioner alleges that the Applicants erected a gazebo-style tent,[132] without ever evidencing or defining just what that even is. More importantly, the definition of what a tent is, as used in the *Parks Bylaw*, is an issue of law. Whether the structure erected by the Applicants constitutes a tent as alleged in the Facts section, is one of mixed fact and law, not fact. All evidence in the Affidavits of the Bylaw Officers that this structure was a tent, is not evidence but opinions, conclusions and/or assumptions.

179. There is no evidence that the CLEAR Canopy for example, had four walls that could not be walked

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131 *Canada (Director of Investigation and Research) v Southam Inc.* 1997 CanLii 385 SCC para. 35, 36

132 Affidavit #1 James Short Dec. 23, 2022 para. 9

through or slept in, so as to meet the general definition of what a tent is.

180. This case is precedential. Hundreds of protests occurred throughout B.C. in relation to the COVID-19 situation, involving tens of thousands of justifiably angry people. This case will be used by other municipalities to prohibit protests in those locations as well. For example, at the recent Million Children's March on Sept. 20, 2023, City of Vernon Bylaw Officers have now started ordering protestors that they cannot use sound equipment to express themselves to almost 500 protestors in attendance.[133] In short, it is starting already. Precedential issues herein, such as these definitions and Bylaw interpretation, are generally issues of law as it will potentially apply to many other cases in the future[134] as the level of anger continues to rise in the public and there are more protests throughout the Province.

181. From this analysis alone, it can be seen that the Petitioner is pleading issues of law or mixed fact and law, in the Facts part of its Petition. Further, it cannot be said that the Petitioner has a reasonable prospect of success in claiming that the Lawful Protests constitute an event so as to require a permit. There are fatal defects in all of its allegations in **Part 2 Facts** of its Petition, and in the evidentiary record it has filed in support of its Petition, where the Petitioner's case relies upon assumptions and simply quoting from the Bylaws in its evidence.

182. In order to support any claim for a reasonable prospect of success, the Petition and must provide grounds to believe in both fact and law, in the court record, to satisfy the judge. It is not so supported in fact to the high standard required.

Legally

- ***Parks Bylaw* - s. 3.1, 3.8, 4.2 – "*Event*"**
  Petition - Part 3 Legal basis - para. 2-5

> *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.*
>
> *4.2 The City may, upon request, issue written permission for any procession, march, drill, performance, ceremony, concert, gathering or meeting and may charge rent for the use of any Park or portion thereof as set by Council.*

183. For a number of reasons, the City's claim is without any substantial legal merit nor any real prospect of success.

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133 Affidavit #2 David Lindsay Nov. 6, 2023

134 *Canada (Director of Investigation and Research) v Southam Inc.* 1997 CanLii 385 SCC para. 35, 36

184. The Petitioner is stretching the interpretation of the impugned Bylaws more than they were designed to withstand, and this is where it snaps back. The City is basing its position upon an intentional misclassification or mischaracterization of the Lawful Protests as being an "*event*" as used in the *Parks Bylaw*, which is undefined. To accept the Petitioner's claim that the Lawful Protests are an event, implies in this definition that every family picnic is an event requiring a permit to do so.

185. The interpretation of the Bylaws by the Petitioner infringes upon the Applicant's common law and **s. 2** Charter freedoms of assembly and expression, remembering and considering that the Applicants' Charter rights and freedoms come from the common law, not the reverse.

o *Allegations of Conducting an "Event" are Issues of Law or Mixed Fact and Law, not Fact*

186. The Petitioner's allegations at **Part 2, para. 3** of its Petition that the Applicants were conducting an event at Stuart Park and on public streets in downtown Kelowna, are not a factual basis, but either an issue or conclusion of law or mixed fact and law, and the Applicants tender it is the latter as it requires applying the definition of an event to the evidence of the nature and activities of Applicants and their subjective intentions. Whether an issue of law or mixed fact and law, it is prohibited in the Facts section of the Petition and is being concealed there by the Petitioner.

187. The City is given no statutory deeming powers to arbitrarily or otherwise define this word,[135] or covertly or secretly decide on factors they will use to deem the Lawful Protests to be an event, or deem the Lawful Protests to be an event to suit its own political agenda or any other reason. The City's reliance upon legal fictions in this regard, cannot be maintained nor sanctioned by this Hon. Court.

o *The Lawful Protests are a Protest – Not an Event, as used in the Parks Bylaw*

188. Because the definition of words is a question of law, neither party bears the onus or proving same – the duty lies with the judge.[136] Legally, the term "*event*" is undefined in the *Parks Bylaw*. Undefined words are given their ordinary meaning.[137] The primary general definition of an event is: "*Anything that happens, especially something important or unusual.*"[138] A meteor shower is an event and does not require any subjective intentions by the Applicants or anyone else. It is a term

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135 Affidavit #1 David Lindsay Aug. 1, 2023 para. 214, 215, 236,

136 *Placer Dome Canada Ltd. v Ontario (Min. of Finance)* 2006 1 SCR 715 para. 28

137 *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 (CanLII) para. 6, 134; ***Bérubé v City of Quebec*** 2019 QCCA 1764 CanLII para. 40-43, 50-55; Access to Public and Private Property under Freedom of Expression 1988 CanLII Docs 3 Richard Moon p. 339; Sullivan on the Construction of Statutes 6th Ch. 3

138 Cambridge Dictionary https://dictionary.cambridge.org/us/dictionary/english/event ; Oxford English Dictionary 1539 – present: "*Something that happens or takes place, esp. something significant or noteworthy; an incident, an occurrence.*" https://www.oed.com/search/dictionary/?scope=Entries&q=event

of general use.

189. A "*protest*" is not expressly defined or encapsulated in any of the Bylaws and they do not apply to same, which agrees with the City's admissions that it does not and will not provide permission for protests. On this basis alone, the Petition is doomed to fail on this issue.

190. A "*protest*" (aka demonstration) is a recognized Constitutional freedom of both assembly and expression.[139] It is defined in the Oxford English Dictionary as: "*Originally a formal declaration of disapproval or dissent; a remonstrance, a complaint. In later use more generally: any action, act or statement.*"[140] Other dictionaries mirror and support this definition.

191. By definition, a protest requires a subjective intention to oppose something, an event does not require this. The evidence shows that the Applicants have repeatedly stated their opposition to the COVID-19 Orders, lockdowns, restrictions, vaccinations and others aspects to this issue, as well as opposition to 15 min cities, digital ID, digital currencies and other new or ongoing threats.[141]

192. The Petitioner will attempt to argue it is an event as a result of the use of sound equipment, selling merchandise, and the CLEAR Canopy.[142] These are hitherto secret, arbitrary considered factors only. These are not the determinative factors for an event. It is the subjective intention of the Applicants that differentiates between an event and a protest.

193. This is due as well in part to the principles of our law that, when the law recognizes anything, it recognizes the means to the end, ie: all things necessary to exercise the Applicants' freedoms, including sound equipment and other expressive activities and materials/signs.

194. There is no "*one size fits all*" description of a protest. Protests take many forms – there is no one legal standard for activities that constitute a protest, other than a requirement to be opposing something.[143] They can be from single digits to six digits in quantum. Some may not use sound equipment, but most do in order to have effective communication, the objective of all protests. There may be signs in all kinds of shapes and sizes, there may not. Attendance alone may constitute the expression and/or assembly.[144]

195. Alternatively, nor is a protest restricted in its activities. A protest by definition, encompasses all means to do so effectively, and will include sound amplification equipment, tables, booths,

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139 *Beaudoin v British Columbia* 2021 BCSC 512 CanLII; Access to Public and Private Property under Freedom of expression 1988 CanLIIDocs 3 Richard Moon p. 339; *Garbeau v. Montreal (City of)*, 2015 QCCS 5246 para. 110, 112

140 Oxford English Dictionary https://www.oed.com/search/dictionary/?scope=Entries&q=protest "*protest*": Cambridge Dictionary: https://dictionary.cambridge.org/us/dictionary/english/protest "*A strong complaint expressing disagreement, disapproval, or opposition; an occasion when people show that they disagree with something by standing somewhere, shouting, carrying signs etc.*"; See also, Merriam-Webster Dictionary Protest https://www.merriam-webster.com/dictionary/protest

141 Affidavit #1 David Lindsay Aug. 1, 2023 para. 7-9, 25, 30, 32, 39, 93, 105, 134, 174, 178

142 Affidavit #1 James Short Dec. 23, 2022 para. 7, 12; Petition para. 3, 4

143 *R v MacKenzie* 2012 NSPC 19 CanLII para. 6

144 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 43,

canopies, signs and promotion of the protest. In the absence of promotion for example, how are people to know that there is a protest happening and the locus of same? A protest includes all means to the end.

196. The Applicants 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 Applicants were exercising their common law and **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).*"[145]

> "*quando lex aliquid alicui concedit, monia incidentia tacite conceduntur* - When the law gives anything to anyone, all incidents are tacitly given.[146]
>
> *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** [147]

197. If an event is to be an all-encompassing nature as the Petitioner alleges, and a protest being clearly more particularized, these two words are subject to the implied exception maxim, *generalia specialibus non derogant*, where the general dictionary definition of an event, cannot override the particular dictionary definition of a protest, where the specific definition of a protest applies to the exclusion of the more general definition of an event.[148]

198. Even if, alternatively, the general word event, can be applied in a reasonable and sensible application independent of a protest, the maxim applies so that the special provision, or Constitutional freedom of protest, cannot be vitiated or derogated from by the general words.[149] There is no indication in the *Parks Bylaw* that it applies to Constitutionally protected freedoms, as confirmed by the City's admissions that they do not give out permits for same.[150]

199. Legally, the supporting Affidavits of the Applicants confirm that the entire series of Lawful Protests were an expression of the Applicant's intentions opposing Government actions.[151] There is an evidentiary record supporting this. There is no evidence by the Petitioner that the Applicants were present at any Lawful Activities for any other reason, or no reason at all. Indeed, Bylaw Officer Short's evidence[152] that he saw promotional flyers on the Applicant CLEAR's website, confirms that these Lawful Protests did not just "*happen*", they were planned protests.

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145 *R v Richards* 1992 CanLII 141 BCSC
146 2 Inst. 326
147 Broom's Maxims of Law 1856
148 Maxwell on Interpretation of Statutes 11th p. 168-169; Sullivan on the Construction of Statutes 6th §11.58 – 11.63
149 *Beaver Trucking Company Ltd. v Clearly Drilling Company Ltd.* 1958 CanLII 621 MBCA p. 193
150 Affidavit #1 David Lindsay Aug. 1, 2023 para. 77 Exhibit "Q"
151 Affidavit #1 David Lindsay Aug. 1, 2023 para. 24, 38, 86, 88, 97, 117, 122, 123, 131, 132, 139, 159, 164
152 Affidavit #1 James Short Dec. 23, 2022 para. 9, 18, 27, para. 43 Exhibit "H", para. 54 Exhibit "L", para. 63 Exhibit "N", para. 76 Exhibit "T"

200. Moreover, the supporting Affidavits by the Petitioner of Daniel Hogan (**para. 3, 5**, Sarah Stokes (including her Exhibit pictures), James Short (*inter alia* **para. 25, 43, 76, 87, 88** and numerous Exhibit pictures), also confirm their recognition and knowledge that these Lawful Protests were in fact, a protest against all Government's COVID-19 restrictions, lockdowns, mandatory vaccinations and other rights and freedoms threats. It is not reasonable that hundreds or thousands of people coincidentally arrived for each Lawful Protest without planning and notice.

201. Each date in the supporting Affidavits filed by the Petitioner, evidences some form of protest, or opposition against COVID-19 actions taken by all levels of Government.

202. All evidence supports that the Applicants were in the exercise of their common law and **s. 2** Charter freedoms. Alternatively, if there is an overlap between activities taken in the exercise of these Constitutional freedoms, and a Bylaw definition, pursuant to **s. 52** of the *Constitution Act*, the freedoms of the Applicants prevail.

203. If there are two interpretations of the impugned Bylaws, one which is consistent with the common law and/or the Charter and the other which is not, the former prevails.[153] As shown in the Response, **s 1** of the Charter will not operate to support the Petitioner's Petition.

204. If the Lawful Protests, including the speeches by the Applicant Lindsay and others did constitute an event, which is denied, then they would be prohibited throughout the City, not just in the downtown core, as the Bylaws apply city-wide. That the Petitioner has restricted its relief to this strategic area, coupled with the City's admissions that it does not and will not give permits for protests, are irrefutable proof that the Lawful Protests are not an event or the Petitioner would have sought city-wide relief, and further are being sought for improper purposes.

205. Is there a substantial merit that the Applicants were conducting an event without a permit, without the Petitioner evidencing that the Applicants did not have any intention to oppose something, including but not restricted to the COVID-19 situation? No.

206. The subjective intentions of the Applicants are one of the primary indicators of what differentiates their Lawful Protests from an event, and the Lawful Marches from a procession etc.

207. The Petitioner's contention that an event includes the Lawful Protests simply because of the methods employed by the Applicants to exercise their common law and Constitutional freedoms, does not have any real prospect of success.

208. Alternatively, even if there are legally arguable, opposing interpretations of the impugned Bylaws, this does not ensure that the Petition has substantial merit or a real prospect of success. Minimally, the Applicant's interpretation, with supporting evidence, law and maxims, provides a real response to the Petition to lower its case to merely "*arguable*", if not destroying the Petition altogether, both

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[153] *R v Sharpe* 2001 SCC 1, para. 33; Sullivan on the Construction of Statutes 6th ed p. 260-262, 264-265, 267-268, 292-294, 299-300, 308, 311-312, 319-321, 328-330, 523-533, 535-539, 690-693; *Hills v Canada (A.G.)* 1988 Carswell 654 para. 92, 93; *Rizzo & Rizzo Shoes Ltd. (Re)* 1 SCR 27 para. 34, 35

of which fail to meet this high test.

209. The power to pass Bylaws is not an unlimited power. The Petitioner's attempts to ban the rallies runs afoul of our Constitution and the Applicant's common law and Constitutional rights and freedoms. The Constitutional Challenge to the Bylaws by the Petitioner is a complete answer to why the City's Petition on this basis does not have a reasonable prospect of success.

o *A Park is Not Included in s. 3.8 of the Parks Bylaw*

210. No signs are posted anywhere that Stuart Park cannot be used for the Lawful Protests,[154] and even if same were posted, they would amount to Constitutional infringements and found unconstitutional.

211. There are two relevant definitions in **Part 2**, Definitions in the *Parks Bylaw*, "*Park*", and "*Public Space.*" The provisions of this Bylaw apply to one or the other, or both if so stated. A "*public space*" requires use of real property that is owned or leased by the City where the public is ordinarily invited or permitted to be in or on, and does not include a park. A "*Park*" means real property owned or subject to a right of occupation by the City. The City holds Stuart Park in trust and the public has a right of occupation without invitation.[155]

212. There is no provision in **s.3.8** of the *Parks Bylaw* under the head of **Part 3** – Prohibitions that applies to a park, including Stuart Park. *Noscitur a sociis, ejusdem generis* applies to exclude Stuart Park as does the maxim: *expressious unius est exclusio alterius* and the modern principle of statutory interpretation.[156] These maxims are "*...frequently invoked because it is an essential tool of efficient communication and is likely to play a role in most successful communication efforts.*"[157]

213. Certain sections in **Part 3** reference prohibitions in a park, however many including **s. 3.8** do not. Applying the principles of statutory interpretation, clearly **s. 3.8** was not meant to apply to parks which is why this location was intentionally omitted.

214. 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 arbitrary and unfettered discretion to grant or refuse any such request that might have been made and to determine its own temporal basis, even if it could be granted, which is denied.

215. Applying these said maxims, there is nothing in the words used in **s. 3.8** that has a common feature of a Constitutional freedom of protest. The listed items are more in line with that of entertainment or related type of activities.

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154 Affidavit #1 David Lindsay Aug. 1, 2023 para. 40

155 *Abbotsford (City) v Shantz* 2015 bCSC 1909 CanLII para. 197

156 Sullivan on the Interpretation of Statutes 6th Ch. 8 §8.53, 8.54; Interpretation of Legislation 4th Cote p. 336, "*contextual interpretation*" as it is frequently referred to

157 Sullivan on the Construction of Statutes 6th Ch. 8 §8.106

216. There is no substantial merit to this claim, nor real prospect of success.

o *Freedom of Expression Cannot be Prohibited nor Licenced in the Park*

217. If one accepts the Petitioner's interpretation of the word "*event*" in the *Parks Bylaw* as including protests which require the City's permission, there must, of necessity, be an underlying prohibition against every protest no matter what the cause, time, location, date, or purpose, unless permission is granted. The Bylaw provides for no exceptions.

218. **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.[158] The likelihood of the Petitioner surviving the Bylaw Challenge and the Court granting the relief sought, is highly unlikely.

219. Restrictions on the right or freedom of protest, whether in parks or on streets, has the effect of limiting expression, such that a common law and **s. 2** Charter freedom is established.[159]

220. This Bylaw is based on the premise that all protests are prohibited, hence the necessity for a permit. The City is claiming that it has the power to pass a Bylaw that allows it to convert Constitutional freedoms, into licenses, or more appropriately to ban all protests first and then license them, which is Constitutionally and lawfully incorrect. This requires consideration of just what a "*privilege*" is.

221. Hohfeld's analysis of the fundamentals of our law is relevant at this stage. His description of a "*privilege*" is synonymous with a "*freedom*" or "*liberty*", being the freedom from the right or claim of another.

222. The Applicant has the Constitutional guarantee to be able exercise his Constitutional freedom of expression.

223. What does this mean in this situation? The clue can be found in the correlative of a privilege – which is "*no-right*" or claim. The City, who does not own Stuart Park,[160] cannot have any claim against the Applicants in the exercise of their Constitutional freedoms, *a fortiori* in the face of all SCC and Superior Court decisions that the Applicant has the Constitutional right and/or freedom to use all parks and streets, without distinction for protesting.[161]

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158 *Vancouver (City) v. Zhang* 2010 BCCA 450 CanLII para. 69, 75

159 *Garbeau v Montreal (City of)* 2015 QCCS 5246 para. 170-173; *Figueiras v. Toronto (Police Services Board)* 2015 ONCA 208 CanLII para. 74, quoting: *Canadian Broadcasting Corp. v. Canada (AG)* 2011 SCC 2 CanLII para. 54

160 Affidavit #1 David Lindsay Aug. 1, 2023 para. 2, 16-21

161 *Montréal (City) v. 2952-1366 Québec Inc.* 2005 SCC 62 CanLII para. 74; *Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 30, 35, 41, 43; *Committee for the Commonwealth of Canada v Canada* 1991 CanLII 119 SCC Part 1 a., p. 393, 426, 449 Lamer CJ; *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 40-43, 50-55; *Garbeau*

224. Hohfeld's definition of a licence as being a permission, to do an act which, without such permission, would be unlawful, illustrates the foundation upon which the City's claim to permission rests. Clearly the Applicant does not require nor can the City compel him to obtain its fiat or permission to do that which he has the Constitutional freedom to so do, including assembly and expression.[162]

225. The City does not have substantial merit and no real prospect of success by attempting to claim, as must be inferred from its position that a licence/permit is required, that the common law and Constitutional freedoms of the Applicant to his Lawful Protests are now suddenly converted into licensed activities subject to the fiat or authorization, unfettered or otherwise, from the City.

226. The Petitioner alleges four facts at **para. 4** of its Petition that it is relying upon to support its relief sought, which all turn on the definition of an event and whether the Lawful Protests are an event as arbitrarily defined by the Petitioner and its Bylaw Officers.

227. The SCC has repeatedly confirmed that the Applicants have the Constitutional freedoms to use public parks and streets for protests, as have many other Superior Courts.[163]

228. The City has further admitted that it cannot give out permits for protests because they are Constitutionally protected freedoms. **S. 4.2** of the *Parks Bylaw*, quoting directly from **s 3.8**, provides that the City can give written permission for these activities, and charge rent for the use of any Park or portion thereof.

229. The City thus, cannot give permission nor charge a fee to the Applicants for the use of the Park for their Constitutionally protected freedom of expression, assembly and protest.

230. It cannot be argued factually nor lawfully that the Lawful Protests and Activities of the Applicants constitute an event that requires permission or a license from the City to so do.

231. The City's evil attempt to deny the most fundamental of our freedoms, ie: assembly and expression (protests) into an unknown, qualified license dependent upon the fiat of some benevolent City Council or bureaucrat, must be rejected.

232. There is no substantial merit to this claim, nor real prospect of success.

➢ *Parks Bylaw - s. 3.3 - Selling merchandise*

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v. Montreal (City of), 2015 QCCS 5246 CanLII para. 120-127, 136, 140, 150, 151, 166; *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 CanLII para. 33; *Ontario (A.G.) v Dieleman* 1994 CanLII 7509 ONSC para. 612

162 Fundamentals of Law Applied in Judicial Reasoning Hohfeld 23 Yale L.J. 16 1913-1914 p. 44 *Thomas v Sorrell* 1673 Vaughan 331, 351: "*A licence properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful*".

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

Petition – para. 6-7

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.

233. As the Affidavit evidence of David Lindsay and even the Affidavit evidence of Bylaw Officer Short confirm, there is no evidence that the Applicant Lindsay or CLEAR were selling anything.[164]

234. Even if responsible for organizing the Lawful Protests, the Applicant Lindsay is not legally responsible for the actions of those who attend. If someone is breaching a Bylaw or committing a criminal offence – it is up to the City to charge that person, or seek an injunction against that person, not the Applicants.

235. And the selling of shirts or materials to promote opposition to Government actions by the protestors, especially by people who are not organizers, does not legally transform the Lawful Protest into an event.

236. Alternatively, the most that could be said is that someone other than, and independent of the Applicants was selling items or had items for sale. This does not legally make the Lawful Protests an event. This may be a violation of a Bylaw, but the relief is to charge the individual breaking the Bylaw.

237. All alleged people selling merchandise as evidenced in the Affidavit of James Short, are from people or groups that the Applicants are not a part of.[165] There is no evidence that the Applicants gave any authorization for, or permitted anyone to sell merchandise, nor are the Applicants deputized by any Bylaw to enforce them upon anyone else.[166]

238. The Petitioner cannot obtain relief against the Applicants in the absence of necessary evidence to support the allegations in the Petition, as is the case here.

239. As the Applicants are not selling anything themselves and there is no evidence of same, the Petition has no substantial merit and has no real prospect of success.

➢ *Parks Bylaw – s. 3.17 - Erecting a tent*
Petition – para. 8-9

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.

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[164]	Affidavit #1	James Short	Dec. 23, 2022	para. 96 Exhibit "Y", para. 24 Exhibit "E", para. 38 Exhibit "G", para. 102, 103, 104 Exhibit "CC", "DD"
	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 216, 238, 308, 309
[165]	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 216, 238, 308, 319, 320
[166]	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 308

240. A tent is included in the definition of "*camping equipment*" in **Part 2**, Definitions of the *Parks Bylaw*, where it is recognized that tents are for camping purposes. The CLEAR Canopy is not a piece of camping equipment, nor can it be used for camping.

241. Applying principles of statutory interpretation, such as *noscitur a sociis*, *ejusdem generis*, 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, and all reference closed or able to be closed, structures. To state otherwise, would result in absurdities. This interpretation is more in agreement with preventing "*Occupy*" activities and people sleeping overnight in parks.

242. This fits perfectly with the use of the word "*tent*" in **s. 3.17** of the *Parks Bylaw*, which generally all items listed there refer to things that people use for shelter or to live in.

243. A gazebo is neither a tent nor a canopy, which as can be seen from this website from Costco,[167] 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.

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

245. As the evidence and Exhibit pictures indicate, a person cannot sleep in the CLEAR Canopy and its design is intended for temporary use only, not camping.

246. As with virtually all of its claims, the Petitioner relies upon bald, unsupported statements in its supporting Affidavits where it has simply and intentionally mischaracterized the CLEAR Canopy as being a tent.

247. Alternatively, insofar as this position may be, without prejudice, incorrect, the Applicants rely upon their position as set out in their Constitutional Challenge, as being used in the exercise of the common law and s. 2 Charter freedom of expression guarantees.

248. The Petitioner's attempt to mischaracterize the CLEAR Canopy as a tent, has no substantial merit and does not have a real prospect of success on this basis alone.

➢ *Parks Bylaw - s. 3.41 - Causing a nuisance*
Petition – para. 10-11

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.***

Def. ***Nuisance means any activity or action(s) which interferes with the use and enjoyment, comfort or convenience of the park by other persons.***

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[167] Affidavit #2 David Lindsay Nov. 6, 2023

249. 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.*"[168]

250. The Petitioner's reliance upon the defined word "*nuisance*" in the *Parks Bylaw*, is overly and unreasonably restrictive and literal. There is much judicially recognized room within the tort and/or law of nuisance to allow for a degree of interference and inconvenience with the use of streets and parks by the Applicants during their Lawful Protests.

251. The wording of **s. 3.41** and the Definition section, are worded in the imperative. There must be demonstrable evidence of someone being interfered with in his use, enjoyment, comfort or convenience of or while using the Park. The Bylaw does not say "*may interfere*" or "*liable to interfere*", but says "*which interferes*", requiring demonstrable evidence of this occurring.

252. The use of the word, "*which*" in the definition, is a relative pronoun which is used referring to something previously mentioned when introducing a clause giving further information.[169] In this case, it is used to link the word "*activity*" to "*interferes with the use and enjoyment, comfort or convenience of the party by other persons.*" The word "*interfere*" is a verb, implying the result that must occur.

253. Further, two results are required to be evidenced: "*use*" and "*enjoyment, comfort or convenience*". It is not enough to say someone was interfered with their use of the Park, unless it is also shown in evidence that one of the remaining three factors resulted.

254. The Petitioner admits of this at **Part 3, para. 11** of its Petition, "*The Applicants are violating...*".

255. This SLAPP application must be based on the evidentiary record and legal basis provided. There is no evidence of anyone being interfered with in their use and enjoyment, comfort or convenience of the Park by the Applicants and have thus caused a nuisance. The words "*nuisance*" and "*interfere*" are not even in any of the Petitioner's Affidavits.

256. Alternatively, if there was any such nuisance, it would be *di minimus* or trivial so as to not warrant consideration. 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.*"[170] Again, there is no evidence of any nuisance, much less to this high degree.

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

169 https://grammar.collinsdictionary.com/us/easy-learning/what-is-the-function-of-the-relative-pronouns-who-whom-which-and-that

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

257. In the further alternative, one should not confuse a nuisance with an inconvenience. All protests by their inherent nature, will involve some inconvenience, or even some minor nuisance. These are the sacrifices we make in society to preserve our common law and **s. 2** Charter freedoms. Stuart Park was designed for the very reason it is being used – this was recognized and agreed to by the City when it applied for a $500 000.00 grant to build the Park as the Town or Public Square.

258. Protests, by their nature, are inherently disruptive to some degree and to this extent, should not be "*repressed or controlled.*"[171]

259. 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 Applicants their reasonable use of their freedoms.[172] "*Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society.*"[173]

260. As the Canadian Civil Liberties Association acknowledges:

> "*It's worth remembering that protests are intended to cause disruption and this is protected activity in a democracy. Strong protections for the right to protest are essential to meaningful and informed political debate and discussion.*
>
> *A democratic society welcomes debate and disagreement on the key issues of the day, and protest is a big part of this process.*
>
> *Protests can be messy and disruptive, but they are also crucial to our well-being as a society.*
>
> ***We only have the right to vote every few years, but protests provide opportunities to express our views and grievances at any time.***"[174] (emphasis in original)

261. 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.[175]

262. The fundamental importance of permitting freedom of expression, of necessity, permits some interference with the activities of others. There is a high 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.[176] The Lawful Protests, for 60-90 minutes, fails to meet this high

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

172 *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

173 *Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 77

174 https://ccla.org/our-work/fundamental-freedoms/right-to-protest/

175 *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

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

interference.

263. The U.S. Supreme Court has indicated that in the context of protests, parades, and picketing in such public places as streets and parks, "*...citizens must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.*"[177]

264. Insofar as these sacrifices must be made, and so they must, this Bylaw gives way to the Constitutional freedoms of the Applicants. Otherwise, every protest would result in nuisance charges and/or offences.

265. Alternatively, any inconvenience caused by the Lawful Protests was temporally and factually insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

266. In the absence of evidence in the record on this allegation, especially to the high "*substantial and unreasonable*" hurdle, and in the context of an expectation by society that protests by their nature will involve inconvenience, even upset, it too does not have substantial merit to it and does not stand a real prospect of success.

- ***Good Neighbour Bylaw – s. 7.3 - Use of amplified sound Petition – para. 13-14***

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.

Public Space means any real property or portions of real property owned or leased by the City to which the public is ordinarily invited or permitted to be in or on, and includes, but is not limited to, the grounds of public facilities or buildings, the surface of Okanagan Lake and the lake foreshore, any public transit exchange, transit shelter or bus stop, and public parkades or parking lots

267. This is the relief the Petitioner seeks most after locus, for by this relief all effective communications in the Lawful Protest would immediately end and is an indirect method of limiting the size of the Lawful Protests where the City could not so do directly.

268. Judicial notice can be given that it is physically impossible to talk to hundreds or thousands of people without sound equipment. Put another way, the prohibition on sound equipment for these

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[177] *Boos v. Barry* 485 U.S. 312, 322 1988

short Lawful Protests, would result in denial of effective expressions and communications,[178] contrary to common law and **s. 2** of the Charter.

269. The word "*noise*" is undefined in this Bylaw. 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.*"[179] Simply making sound is not, *ipso facto* sufficient to be making or constitute "*noise*".

270. Construction noise is defined in **s. 2.1** of this Bylaw. 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. These factors also underlie regular noise.

271. The elements of this Bylaw, that must be in the evidentiary record of the Petitioner, are as follows:

i. The person must make or cause or permit to be made
ii. Noise or bass sound
iii. From the listed actions, including voice amplification equipment
iv. In or on private property, in any public space or street
v. In such manner that is liable to disturb the quite, peace, rest, enjoyment, comfort, or convenience of individuals or the public

272. The evidence of Bylaw Officer Short and Bylaw Officer Hogan, only is that the Applicants used sound amplification equipment to amplify speaker's voices, evidencing element **i.**[180] There is no evidence that the sound being amplified met elements **ii, iv or v**, including on the Lawful Marches.

273. **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.

274. Because Stuart Park is held in trust by the City,[181] it is not property owned or leased by the City. There is no evidence that the City actually owns this Park as its own property, or leases it.

275. **Section 7.3** does not, expressly, inferentially or by statutory interpretation 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*, *ejusdem generis*, applies to exclude Stuart Park and the Applicant's sound equipment, as

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178 *Harper v Canada (A.G.)* 2004 SCC 33 CanLII para. 2, 9, 14-20
Affidavit #1 David Lindsay Aug, 1, 2023 para, 37, 45, 47, 54-56, 195, 196, 216, 217

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

180 Affidavit #1 James Short Dec. 23, 2022 para. 10, 12, 19, 21, 25, 29, 31, 32, 34, 39, 42, 49, 50, 53, 59, 62, 71, 72, 74, 82, 86, 91, 94, 105, 108
Affidavit #1 Daniel Hogan Jan. 4, 2023 para. 5, 8, 12

181 Affidavit #1 David Lindsay Aug. 1, 2023 para. 16, 21

does the maxim: *expressious alterius est exclusio alterius* and the modern principle of statutory interpretation. The common denominator is the use of the equipment for musical playback or events.

276. 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 Applicants are entitled to use as of right. This difference is further illustrated when comparing this definition to that of a "*street*" in this definition section, which does recognize an entitlement by the public to access as of right. See **para. 390-415** below of the Constitutional Challenge.

277. Further, there is no evidence from the Petitioner that this megaphone was being used on the streets "*in such manner*" that would be liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals of the public, especially during a busy Saturday in the downtown core. There are no complaints filed about the use of this megaphone, nor evidence as to the level of sound or words spoken that might support the sound being liable to disturb the listed examples.

278. The use of sound amplification equipment is also part of, and necessarily incidental to the Applicants' Constitutional and common law freedom of expression.

279. Bylaw Officer Short's only evidence is that a megaphone was being used on the roadway. Again, making sound, even a loud sound does not, *ipso facto*, mean that it is liable to result in the disturbances listed in this definition, nor that it constitutes noise. More evidence is required for which none exists. Nor does it change the Lawful Protest into an event or require a licence.

280. Tellingly, the Applicant Lindsay has not been issued any tickets for the Lawful Marches nor for using a megaphone during them.[182]

281. All or virtually all other protests as evidenced by David Lindsay in his Affidavit #1,[183] had sound equipment in use, including megaphones and were permitted to do so as part of their Constitutional freedom of assembly and expression including the recent Climate Change protest at City Hall in Sept. 2023, where speakers relied upon the sound amplification equipment of a megaphone and they did not have a permit.[184] Clearly this is not something that is an exclusive necessity or requirement of an event.

282. Further to all of the above, and in consideration of the Constitutional Challenge to the impugned *Good Neighbour Bylaw*, this allegation does not have substantial merit nor stand a real prospect of success.

➢ *Traffic Bylaw – s. 8.2.2, 8.2.4 - Walk on road, stand or loiter*
Petition – para. 16-18

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[182] Affidavit #2 David Lindsay Nov. 6, 2023

[183] Affidavit #1 David Lindsay Aug. 1, 2023 para. 253, 259-261, 265, 268, 271, 272, 274, 275, 279, 284, 285, 286, 287, 289, 292, 297

[184] Affidavit #2 David Lindsay Nov. 6, 2023

- *s. 8.2.2 Traffic Bylaw*

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

283. As part of the Lawful Protests, the Applicants 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.

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

285. These Lawful Marches, which were highly political in nature, consisted of various forms of expression, including protestors with literature for distribution, various signs, and banners. Occasionally there would be lead and rear vehicles, with signage and flags. Frequently a person would be using a megaphone to get their message across.[185]

286. The vast majority of the Lawful Marches involved hundreds, and occasionally thousands of protestors.[186] Judicial notice can be given that sidewalks, especially where as on Doyle St., may be only be located on the opposite side of the street in places, were not designed for and cannot physically accommodate this number of people. Efficiency and necessity require the use of a full lane on the street to permit the protestors to complete their Lawful March in a reasonable period of time and to minimize any inconvenience to other pedestrians and traffic. With even a hundred or more protestors, a sidewalk is not reasonably passable without blocking others from walking in either direction.

287. This provision is located in Part 8 – Pedestrian Regulations of the Traffic Bylaw. Section 8.1.1

288. Protestors became involved in the Lawful Marches because it did not take more than ½ hour to start their political marching. If the Lawful Marches were restricted only to sidewalks, people would have had to wait in Stuart Park for likely up to 90 minutes or more, which by then, many would have left, thus defeating the message being sent to the Governments and public.

289. The Applicants did not have any intention to force a captive audience upon anyone, nor for any indefinite period of time, and their Lawful March and Protest simply continued until they were done. The route was carefully planned and chosen, and made known to the police. Once done, they reassembled at Stuart Park. Members of the public had the choice whether to listen or leave.[187]

290. The City clearly recognizes these are lawful, where it permitted other groups to do likewise, with

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185	Affidavit #1	Sarah Stokes	Dec 20, 2022	Exhibit "B", p. 2, 3
	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 49, 50, 100, 127, 159, 164, 165, 191, 192
186	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 164, 188, 190, 192
187	Affidavit #1	David Lindsay	Nov. 6, 2023	

no tickets or punitive or injunction actions being taken against them.[188]

291. This issue again, reverts back to the subjective intentions of the Applicants who can do so for purposes and part of their Constitutionally and common law protected freedoms of assembly and expression. As the City recognizes, if no permit is required for a protest, then it logically follows that no permit is required for a political street march. "*The constitutional right to demonstrate on a public road can be exercised by thousands of citizens.*" [189] The word "*demonstration*" is used synonymously or interchangeably with marches for political purposes.

292. The aforementioned points in relation to the inconvenience that the public is expected to put up with, apply herein as well.

293. 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.*"[190]

294. For the same reasons that permits are not required for the Lawful Protests, inasmuch as so doing presumed all protests are unlawful, so doing here further presumes that all political street marches are unlawful, which case law, our common law and Constitution do not support.

295. Again, as with all the Petitioner's allegations, it has provided no evidence that the sidewalks were reasonably passable with that large number of protestors.

296. More significantly is the lack of public visibility on public sidewalks to effectively convey the messages the Applicants were attempting to do.

297. In consideration of the above, the Petitioner's claim that the Protestors were required to use the sidewalk, is not with substantial merit nor stand a real prospect of success.

- ***s. 8.2.4 Traffic Bylaw***

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

298. This requires the Petitioner to evidence people standing or loitering in a manner that they are obstructing or impeding or interfering with traffic on a roadway. By its very wording, it does not apply to the Lawful Marches which are addressed above for **s. 8.2.2.**

299. There is no evidence, especially in the Exhibit pictures in the Petitioner's Affidavits, of anyone standing in the driving lane on Water St. All protestors are in the parking lane where people are

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188 Affidavit #1 David Lindsay Aug. 1, 2032 para. 263, 268, 285

189 *Garbeau v. Montreal (City of)*, 2015 QCCS 5246 CanLII para. 120-127, 136, 140, 150, 151, 166, 466, 482

190 *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.

parked and there is no evidence of any interference, obstruction or impediment to traffic moving on the roadway.

300. The term "*loiter*" is defined as: "*to move slowly around or stand in a public place without an obvious reason.*"[191] Used in combination with the word "*stand*", this clearly is inapplicable to the Lawful Protests, Street Protests and Lawful Marches which in fact do have a purpose(s), including conveying public opposition to the COVID-19 restrictions and other threats to the Applicants' rights and freedoms, and where people were constantly moving about or walking.[192]

301. The Applicants, *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. Their presence is the message to Governments and the public of their opposition to various Government COVID-19 restrictions, vaccinations, and other rights and freedoms threats.[193]

302. The protestors were not at the Lawful Protests to be entertained – they were there to get protest messages across to the various levels of Government and to the public.[194]

303. 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.*"[195]

304. Otherwise, and in the alternative, any alleged interference was temporally and factually *di minimus*, insignificant, minimal, trifling and/or inconvenient and is inherent to all protests.

305. Insofar as this position may be, without prejudice, incorrect, the Applicants are exercising their Constitutional freedom to so do.

306. In consideration of the above, the Petitioner's claim that the Protestors were standing or loitering in such a manner as to obstruct or impede or interfere with traffic on a roadway is evidentially unsupported, does not have substantial merit nor stand a real prospect of success.

Outdoor Event Permit

Outdoor Events Bylaw #8358 - s. 1.2.1, 2.1.2

"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

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191 *R v Heywood* 1994 3 SCR 761 Cory J. quoting, *R v Cloutier*
https://dictionary.cambridge.org/dictionary/english/loiter Cambridge Dictionary

192 Affidavit #1 David Lindsay Aug. 1, 2023 para. 49-51

193 Affidavit #1 David Lindsay Aug. 1, 2023 para. 111

194 Affidavit #1 David Lindsay Aug. 1, 2023 para. 53

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

307. Whether the protestors walking on the public street constituted a "*group parade*" or "*procession*" as the Petitioner alleged at **para. 4** of the Petition, and itemized in this definition of an "*Outdoor Event*", is a question of mixed fact and law, not fact. The Petitioner provides no facts to support these conclusions.

308. The Applicants' Lawful Marches are also identified as a "*protest march*"[196] 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.*"[197]

309. There is a commonality in the restricted ("*means*") activities listed in this definition, none of which include or even reference Constitutionally protected, political street marches. Generally speaking, they all involve celebrations of some kind or something. This is completely opposition of a "*protest.*"

310. Not being defined in the Bylaw, the normal meaning applies to these words:

Parade

> *a large number of people walking or in vehicles, all going in the same direction, usually as part of a public celebration of something*[198]
>
> *A **parade** is a procession of people or vehicles moving through a public place in order to celebrate an important day or event.*[199]

Procession

> *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*[200]
>
> *a group of individuals moving along in an orderly often ceremonial way*[201]
>
> *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*[202]

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196 Affidavit #1 David Lindsay Aug. 1, 2023 para. 164, 165
197 https://dictionary.cambridge.org/dictionary/english/protest-march Cambridge Dictionary
198 https://dictionary.cambridge.org/dictionary/english/parade
199 https://www.collinsdictionary.com/dictionary/english/parade
200 https://dictionary.cambridge.org/dictionary/english/procession Cambridge Dictionary
201 https://www.merriam-webster.com/dictionary/procession
202 https://dictionary.cambridge.org/dictionary/english/procession

an organized group or line of people or vehicles that move together slowly as part of a ceremony

- *a funeral/wedding* procession
- *There was a* procession *of children carrying candles*[203]

311. The Applicants were not doing a "*parade*" nor "*procession*" nor celebrating anything, but were involved in their Constitutionally Lawful Political 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**)

312. This again, requires the subjective intentions of the Applicants as to what they are doing and why. The Applicant Lindsay does evidence that these activities were political marches with expressive signs, brochures and messages.[204]

313. The only evidence by Bylaw Officer Short and Security Analyst Sarah Stokes, on this issue was where pictures show that the Applicants were walking on the streets, and at times were handing out pamphlets and with their political signs.[205]

314. Indeed, Bylaw Officer Short does not evidence that he warned the Applicants that their Lawful Marches were unlawful or that he would ticket them if they did so, nor that any tickets were ever issued for so doing, including using a megaphone during these Lawful Marches.[206]

315. 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.

316. The claim that the Applicants' Lawful Marches of a political nature/protest, constituted a parade or procession, is evidentially and legally unsupported and has no substantial merit and does not stand any real prospect of success.

Generally

317. 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 Applicants') freedom for its Lawful Protests. Granting the relief sought would put the City in a breach of contract situation.[207]

203	https://www.britannica.com/dictionary/procession			
204	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 49, 69, 100, 164, 165, 212
205	Affidavit #1	James Short	Dec. 23, 2022	para. 13
	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 159 (xviii)
206	Affidavit #1	James Short	Dec. 23, 2022	para. 7, 12 and throughout
	Affidavit #2	David Lindsay	Nov,. 6, 2023	
207	Affidavit #1	David Lindsay	Aug. 1, 2023	para. 16-23 Exhibit "A", "B", "E", "F",

318. The Petitioner is estopped from seeking relief that would violate its contractual promises and duties by preventing the Applicants from using Stuart Park as of right.

319. The Petitioner's only factual basis for its relief is that the Applicants failed to obtain a permit or caused a nuisance. Yet the City hypocritically admits no permit was available to be given or obtained, nor would be given to the Applicants for their Lawful Protests as the City recognizes their Constitutional freedom for same.[208] *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.[209]

320. Protests by their very nature, involve and must contain effective expressions and communications or they would not exist. The Petition is a frivolous and vexatious sham.

321. Because the Lawful Protests cannot be banned directly, the Petitioner has unsuccessfully attempted to so do indirectly by trying to "*pigeon hole*" or deem the Applicants' Constitutionally protected activities into the definitions and provisions in the Bylaws, that admittedly were never designed nor intended to include same. The result would be the same as being a complete denial to the Applicants of their common law and **s. 2** Charter freedoms, including their choice of location.

322. Freedom to choose the time, date and location of their Protests is encompassed in the Applicants' **s. 2(b)(c)** Charter freedoms;[210] not if, when, how and where it is agreeable to, or on consent of the Petitioner.

323. 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,[211] including the Applicants' **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 substantial merit and 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.

324. The Petitioner cannot escape the only conclusion that it is attempting to obtain this relief against Applicants, 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

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208 Affidavit #1 David Lindsay Aug. 1, 2023 para. 208 Exhibit "OO"

209 *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

210 *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. 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

211 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

malicious purposes not sanctioned by law.

iii. 4(2)(a) - there are grounds to believe that (ii) the applicant has no valid defence in the proceeding

325. The Applicants, incorporate the submissions from the previous **s. 4(2)(a)(i)** above, herein as well, insofar as they may apply.

326. **Part 4(2)(a)(i)(ii)** are discretionarily determined on a "*grounds to believe*" standard.[212]

327. Once the Applicants have put in play 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 Petitioner 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.*"[213] (my emphasis)

328. If the Petitioner fails to meet its burden with respect to any of these last three steps in s. 4(2)(a)(i)(ii),(b), its case will fail.[214]

329. If the Petitioner fails to establish either **s. 4(2)(a)(i) or (ii)**, there is no requirement to discuss s. **4(2)(b)**.[215]

330. The Petitioner must satisfy the Court that there are "*reasonable grounds*" to believe that none of the Applicants' defences will succeed.[216]

331. If the Applicants are able to show even one defence that is legally tenable or supported by evidence that is reasonably capable of belief, he will be successful.[217]

332. The evidence of the Petitioner is not to be taken at face value. There is to be a limited weighing of the evidence and credibility. Bald allegations, unsubstantiated damage claims will not meet the "*grounds to believe*" requirement.[218]

333. Procedurally, hearings under **s. 4** cannot be bi-furcated between **s. 4(1) and 4(2).**[219]

334. The Applicants' defences are as follows:

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212 *Cheema v Young* 2021 BCSC 461 CanLII para. 15
213 *Hansman v. Neufeld* 2023 SCC 14 CanLII para. 94; *Galloway v A.B.* 2019 BCSC 1417 CanLII para. 25
214 *Todsen v Morse* 2022 BCSC 1341 CanLII para. 30
215 *Mawhinney v Stewart* 2022 BCSC 1243 CanLII para. 61-63, Quoting, *Lang v Neufeld* 2022 BCSC 130; *Durkin v Marlan* 2022 BCSC 193; *Simán v Eisenbrandt*, 2023 BCSC 379 CanLII para. 136
216 *Galloway v Rooney* 2019 BCSC 1417 CanLII para. 25
217 *Galloway v. Rooney* 2022 BCCA 2344 CanLII para. 54
218 *Galloway v A.B.* 2019 BCSC 1417 CanLII para. 82
219 *Reynolds v Deep Water Recovery Ltd.* 2023 BCSC 600 CanLII para. 63

i. the Applicants' correct Bylaw interpretation applied on any of the impugned Bylaws, including recognized principles of statutory interpretation, will form a legally tenable defence; and,

   a. the evidence of the Applicants is reasonably capable of belief especially as much of it consists of pictures and videos, and will support the Applicants' interpretation of these Bylaws;

   b. the Petitioner has failed to provide evidence on some of the essential elements of the Bylaws it is relying upon, while much other evidence consists of nothing more than bald faced statements only;

ii. estoppel, where the City represented to the Province that it would ensure that Stuart Park would be used for the very purposes being used by the Applicants, and is now attempting to claim that it doesn't have to so do;

iii. the SLAPP application itself, where once this test is met, the Petitioner again stands little chance of success;

iv. the Constitutional Challenge to the *Royal Canadian Mounted Police Act* (*RCMP Act*); and the impugned Bylaws on the following basis:

   a. the SCC and all Superior Courts have recognized our super-high Constitutional importance to freedom of assembly and expression;

   b. these Courts have further recognized the Applicants have a Constitutional freedom to protest;

   c. these Courts have further recognized that this freedom of protest includes parks and streets, at the choice of the Applicants, not the Petitioner;

   d. the Courts have further held that the Applicants have the freedom to have street protest marches;

   e. the Courts have further held that the Applicants have all reasonable methods of exercising their common law and **s.2** Charter freedoms, and limiting the mode or means is a limitation on the Constitutional guarantees;

   f. the use of the CLEAR Canopy, literature, signs, banners, and sound equipment are the mode or means of communication and are necessarily incidental to the exercise of the Applicants' Constitutional freedoms, and part of same;

   g. the *RCMP Act* is, in pith and substance, an *Act* for policing in the Provinces, which is *ultra vires* Parliament and only available pursuant to **s. 91, 92** of the *Constitution Act* 1867 to the Legislatures of the Provinces; then,

h. the Petitioner will fail to meet the test required for application of **s. 1** of the Charter, including but not restricted to legally recognized defences that the impugned Bylaws are overbroad, vague, unreasonable, grossly disproportionate, and/or arbitrary, and where the Petitioner's actions were done in bad faith.

335. All of these are solidly grounded in proper interpretation and application of the *Constitution Acts* 1867 and 1982, applicable and numerous SCC and Superior Court case law, common law and Constitutionally recognized rights and freedoms of the Applicants, and legally recognized principles of statutory interpretation, common law and equity. The defences are both legally tenable and the evidence is reasonably capable of belief in support of the Applicants, that it can be said there is a real prospect of success.

a. Applicable Defences

➢ *Correct Bylaw Interpretation*

336. The factual and legal basis showing that the Petition has no substantial merit above at para. 136-316, essentially apply herein as well to this requirement.

337. The Applicants' interpretation of the Bylaws provide a legally tenable defence to each allegation of a Bylaw offence or violation being alleged by the Petitioner.

338. The Applicants' evidence, and the lack of evidence from the Petitioner's Affiants otherwise, support the Applicants' position that the Petition has no substantial merit.

339. Much of the allegations in the Petition is based simply upon evidentially unsupported and bald-faced allegations by the Affiants, especially Bylaw Officer Short.

340. There is absolutely no evidence of the Applicants selling merchandise or having anything for sale. The Applicants have not been deputized to enforce City Bylaws, nor are they responsible for the actions of other people.

341. There is no evidence of the Applicants loitering, causing a nuisance, selling merchandise, that they had a tent or were participating in a procession or parade.

342. Even if there was evidence, none of these activities, individually or collectively, statutorily or otherwise, transform a protest into an event.

➢ *Estoppel*

343. The Applicant Lindsay evidences at **para. 16-21** of his Affidavit #1, the factual basis for the creation of Stuart Park, and the City's duties and obligations pursuant to same.

344. The City successfully applied to the Province for a $500 000.00 grant. The terms and conditions of the grant, compelled the City to construct a Town or Public Square or "*open space*", accessible

to the public as of right and with no restrictions to any single activity or use.

345. The Petitioner is now applying to the Court to prohibit the Applicants from exercising their common law and **s. 2** Charter freedoms, contrary to the terms and conditions of this grant, which the City promised the Province, and as trustee on behalf of the public, to so do.

346. Stuart Park was created for the very use that the Applicants are using it, for their Lawful Protests.

347. An estoppel arises when, in this case, the Petitioner made representations to both the Province and the public to get the Province to award a grant of $500 000.00; the Province did grant the money believing that the City would ensure that Stuart Park would be used as a Town or Public Square for the very purposes the Applicants are using it for; and the Province did lose $500 000.00, believing that the Park would be used as a Town or Public Square.[220] The City applying to the Court for an Order prohibiting the Applicants from so doing, is a violation of its promises to the Province and the public.

348. Estoppel is grounded in the law of evidence. The evidence clearly shows a promise from the Petitioner that it will maintain Stuart Park as a Town or Public Square open to the public as of right, with no single use restrictions, implying a wide ambit of activities consonant with the definition of a Town or Public Square.[221]

349. Stuart Park was designed, constructed and funded specifically for the purpose of freedom of expression as well as use of sound equipment, pursuant to its promises to the Province and public, to so do. The City contractually agreed to design and construct this Public or Town Square for the very reasons the Applicants are using this Park.

350. The nature of a Town or Public Square, is its use for common law and **s. 2** Charter freedoms of assembly, deliberation, political debate, all of which are forms of expression.[222]

351. There are two 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.[223]

352. 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

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220 *Canacemal Investment Inc. v PCI Reality Corp.* 1999 CanLII 6240 BCSC; *Royal Bank of Canada v Tyran Transport Ltd.* 2019 BCSC 2294 CanLII para. 40[63-65]

221 Affidavit #1 David Lindsay Aug. 1, 2023 para. 16-21

222 *Alberta v Health Services v Johnston* 2023 ABKB 209 CanLII para. 141; *Grabher v Nova Scotia (Registrar of Motor Vehicles)* 2021 NSCA 63 CanLII para. 50 [65]; *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 para. 54; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 CanLII para. 42;

223 Affidavit #1 David Lindsay Aug. 1, 2023 para. 22, 44, 45 Exhibit "A", "B"

expect Constitutional protection of their expression at this location.[224]

353. The Applicants 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 Applicants had full expectations of a freedom of use for their Lawful Protests.[225]

354. 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. The Park has two major stages used for the function of supporting **s. 2** of the Charter.[226]

355. 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, estoppel applies and the City cannot prevent others from so doing there due to content of their communication. By allowing access to some,[227] the Petitioner has made its property a public forum.[228] If the parks and streets of a town are open to some expression, they must be open to all.

356. Based on its promises to the Province and public, and crossing the threshold by permitting all other protestors to use the Park for their protests, the Petitioner cannot now apply to this Honourable Court for an order banning the Applicants from so doing.

357. If the Applicants are sought to be banned only for not obtaining a permit, why not an order sought simply banning them until a permit is applied for and granted? Why a permanent order to be banned for a specific location? This is highly illogical and belies an improper purpose to their Petition and relief sought. An Order prohibiting the Applicants from the entire City was not sought for because the City knew they would never get it. The issue is much more complex than any permit issue.

➢ *The Constitutional Challenge to the Impugned Bylaws and the Royal Canadian Mounted Police Act (RCMP Act)*

358. This Challenge to the Constitutionality of the impugned Bylaws is a further complete answer to the Petition. The principles, authorities and law fully support the Applicants.

359. Upon having a real prospect of striking any or all of the impugned Bylaw provisions, or the *RCMP Act*, the Applicant would be successful, thus requiring the Petition to be dismissed.

360. Underscoring the Constitutional Challenge against the Bylaws, are the Applicants' common law

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224 *Transportation Authority v Canadian Federation of Students* 2009 31 CanLII para. 41, 43
225 Affidavit #1 David Lindsay Aug. 1, 2023 para 226
226 *Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 41, 42
227 Affidavit #1 David Lindsay Aug. 1, 2023 para. 252-297
228 Access to Public and Private Property under Freedom of Expression Richard Moon 1988 CanLII Docs 3 339, 347

and **s. 2** Charter freedoms of assembly and expression.

361. The Constitutional Challenge to the impugned Bylaws are legally tenable and supported by evidence that is reasonably capable of belief, especially as there is a huge body of authorities recognizing the Applicants' freedoms and as much of the evidence is supported by videos and pictures. The "*grounds to believe*" test is certainly met in this Challenge.

362. The Applicants are challenging the following Kelowna Bylaws:

i.	**s. 7.3, 12.2**	Bylaw #11500	*Good Neighbour Bylaw*
xiv.	**s. 3.1, 3.8, 4.2, 6.1, 6.2**	Bylaw $10680	*Parks Bylaw*
xv.	**s.2.2, 8.2.4, 10.1.1**	Bylaw # 8120	*Traffic Bylaw*
xvi.	**s. 1.2.1(f), 2.1.2**	Bylaw #8358	*Outdoor Events Bylaw*

o *Nature and Importance of Freedom of Expression*

363. The Charter is required to be construed generously and purposively, to fulfil the purpose of the guarantees therein and securing for the Applicants the full benefit of the Charter's protection.[229]

364. Freedom of expression is so significant that it has been recognized as the fundamental underpinning of all other Constitutional rights and freedoms,[230] and as eloquently stated by Rand J., a "*...little less vital to man's mind and spirit than breathing is to his physical existence.*"[231] It is a "*...pillar of modern democracies.*", and is an inherently fundamental, "*original*"[232] freedom existing prior to the Charter.

365. The Applicants' 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,[233] yet that is what is happening in this Petition and other City actions.

366. 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.*"[234]

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229 *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

230 *Ontario (A.G.) v Dieleman* 1994 CanLII 7509 para. 597, 610-621; *R v Sharpe* 2001 SCC 2 para. 21; *Edmonton Journal v Alberta (A.G.)* 1989 CanLII 20 2 SCR 1326 Cory J

231 *Irwin Toys Ltd.* v Quebec (A.G.) 1989 CanLII 87 SCC p. 968-69, also McIntyre J. (dissent)

232 *R. v. Guignard* 2002 SCC 14 LeBel J. para. 19-21; *Saumur v City of Quebec (City)* 1953 CanLII 3 SCC 299, 329; *RWDSU v Dolphin Delivery Ltd.* 1986 CanLII 5 SCC para. 12

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

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

367. The degree of Constitutional protection varies depending on the nature of the expression. Here, where the nature of the Applicants' 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.[235]

368. This freedom of expression includes, of necessity, the right to absolute dissent.[236]

369. **Section 2(b)** of the Charter protects "*effective*" freedom of expression for both the speaker and all listeners[237] at the Lawful Protests, attending protestors and all passers-by who wish to listen. This is important in relation to the use of sound equipment utilized by the Applicants to effectively convey their messages.

○ *s. 2(b) Constitutional Right to Protest – Test for Freedom of Expression, Irwin Toy*

370. "*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.*"[238] (my emphasis)

371. *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 Applicants' expressions are encompassed within **s. 2(b)**. All three are examined in detail directly below.

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?[239] **Yes**

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

372. The Lawful Protests engage **s. 2(b)(c)**[240] of the Charter, and the common law upon which these

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235 *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

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

237 *R v Quintal* 2002 ABPC 79 CanLII para. 123; *Ruby v Canada (S.G.)* 2002 SCC 75 CanLII para. 52, 53; *Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 15-18, 20; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*1993 CanLII 153 SCC Part IV - 2.

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

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

240 *Berube v City of Quebec* 2019 QCCA 1764 CanLII para. 80

Charter freedoms were based upon. **S. 2(b)** has been interpreted broadly to include picketing,[241] 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.[242]

373. Expression includes tone, volume, demeanour, gestures and even facial expressions, of the Applicants.[243]

374. The form (method or type of expression) by the Applicants, including signs, banners, CLEAR Canopy, tables and brochures, are further protected by **s. 2(b)** of the Charter.[244]

375. The expressions, sounds and visuals made by the Applicants at their Lawful Activities and literature table, do have expressive content, almost all political, thus being encapsulated in **s. 2(b)**.

376. Political expression is the single most important and protected type of expression[245] and must be interpreted broadly.[246] Political expression "*...lies at the core of the Charter's guarantee of free expression.*"[247]

377. The Applicant'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.[248]

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

379. Evidence of expressive content at the Lawful Protests is evident in the Affidavit #1 of David Lindsay, the Applicants' supporting Affidavits, videos and even the Petitioner's supporting Affidavits.[249]

2nd If so, does the Method or Location of the Applicants' Expression Remove that Protection? No

- ***Section 2(c) - Charter***

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241 *RWDSU v Dolphin Delivery Ltd.* 1986 CanLII 5 SCC para. 12-20

242 *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

243 *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

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

245 *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; *Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 40, 68

246 *Libman v Quebec (A.G.)* 1997 CanLII 326 SCC

247 *R v Guignard* 2002 SCC 14 CanLII para. 20

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

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Affidavit #1	David Lindsay	Aug. 1, 2023	para. 27, 28, 42, 53, 84, 85, 88, 90, 94, 97, 101, 102, 107, 108, 111, 112, 114, 120-122, 125, 128, 159 and much more		
Affidavit #1	Jacqui Jones	Affidavit #1	Nadia Podmoroff	Affidavit #1	Leo Beauregard
Affidavit #1	Ted Kuntz	Affidavit #1	Bettina Engler	Affidavit #1	Tanya Gaw

380. Freedom of assembly inherently recognizes the freedom of the individual to connect with others.[250]

381. 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,[251] *a fortiori* where the Government orders MSM not to give anyone opposing their COVID-19 narrative a platform.[252]

382. The ability to protest must be protected because it is fundamental to the operation of democratic societies. Protests occur when people feel that social change cannot be achieved through discussion and debate. In many circumstances, protests remain the last viable option for under-represented groups to voice their dissent to the ruling majority.[253]

383. 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.[254] Both are exercised by the Applicants in their Lawful Activities.[255]

384. **Section 2(c)** of the Charter includes the freedom to participate in peaceful demonstrations, protests, meetings, picketing and other assemblies.[256] 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.

385. 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,[257] and their effects outweigh their adverse impact on protected freedoms. The same principle applies to the Petitioner.

386. The Applicants' **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…*"[258]

387. This includes, of necessity, the Applicants' 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

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250 *Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC 1 CanLII para. 64
251 *Garbeau v. Montreal (City of)*, 2015 QCCS 5246 para. 110, 112
252 Affidavit #1 David Lindsay Aug. 1, 2023 para. 31, 240-243
253 Stand Up for Your Rights: Protest Laws May Violate Charter Rights https://www.constitutionalstudies.ca/2013/09/stand-up-for-your-rights-protest-laws-may-violate-charter-rights/?print=print
254 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 40-43, 50-55
255 Affidavit #1 David Lindsay Aug. 1, 2023 para. 35, 191, 209, 362
256 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 40-44; *Roach v Canada (Min. of State for Multiculturalism and Citizenship)* 1994 CanLII 3453 FCA
257 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 67-75, 127, 158
258 *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. 42, 43

issues.[259]

388. 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.[260]

389. The Applicants' 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.[261]

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

390. 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.*"[262]

391. 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,[263] including effective communications, and are thus not excluded from Charter protection.

392. Freedom of expression will be violated if the City imposes a limitation or precondition (or prohibition) that must be complied with in order to exercise freedom of expression.[264] 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.

393. **Section 2(b)** of the Charter protects not only the expressive activity, but also the right to so do in

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

260 *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

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

262 *Montréal (City) v. 2952-1366 Québec Inc.* 2005 SCC 62 CanLII para. 74-78; *Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 30, 35

263 *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 CanLII para. 37, 38; *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 CanLII para. 33

264 *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

many public places, including streets and parks.[265]

394. The Petitioner seeks an injunction prohibiting the Applicants 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 Applicants can go somewhere else for their Lawful Activities, same violating freedom of expression, including locus.[266]

395. Freedom is characterized by the absence of coercion or constraint. Where the Applicants 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.[267]

396. The location of the exercise of freedom of expression can be as important as the speech itself.[268] **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.

397. 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).*"[269]

398. 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...*"[270] 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.[271]

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265 *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

266 *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, 130

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

268 *Bracken v. Niagara Parks Police* 2018 ONCA 261 CanLII para. 44, 57

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

270 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47, 50, 51

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

399. Courthouses and City Halls are also Constitutionally protected areas available for protests,[272] that the Petitioner is also attempting to prohibit against the Applicants from protesting at.

400. The method or location of Stuart Park, Kerry Park, all parks and/or streets, do not remove that protection. The Parks and streets at issue are places where the Applicants' freedom of expression is expected, and facilitates the values of **s. 2(b)**.[273]

401. **Section 3.1, 3.8** of the *Parks Bylaw*, **s. 2.1.2** of the *Outdoor Events Bylaw* and **s. 8.2.2** and **s. 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 have the effect 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.

402. Alternatively, if the Bylaws are aimed at consequences of certain activities, which is denied, the Applicants 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.[274]

403. Those said values which the SCC recognizes as being served by **s.2(b)**, are: democratic discourse, truth finding, and self-fulfillment.[275]

404. These values will determine if one "*...would expect constitutional protection for free expression...*"[276]

405. As such, the Charter involves a focus on the values of **s. 2(b)** rather than the function of the location.[277]

406. The Applicants' Affidavits supportingly evidence the expressive content of these Lawful Protests and Marches 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.

❖ *Specifically, History, design and use of Stuart Park*

407. 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

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272 *R. v. Breeden*, 2009 BCCA 463 CanLII para. 15[41], 28
273 *Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 39
274 *Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 46, 47
275 *City of Montreal v 2952-1366 Quebec Inc.* 2005 SCC 62 CanLII para. 74
Affidavit #1 David Lindsay Aug. 1, 2023 para. 71, 74, 122, 125
276 *R. v. Breeden*, 2009 BCCA 463 CanLII para. 15[39], quoting; *Transportation Authority v Canadian Federation of Students* 2009 SCC 31 CanLII para. 39
277 *Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 34-37

expressive activities, even if not historically for that use, can still meet **s. 2** values.[278] Notwithstanding, Stuart Park and Kerry Park and other downtown locations meet the test for being open to the public for protests.

408. 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 Applicants. Equity regards the beneficiary as the true owner of equitable interest, which is the public.[279]

409. Being common property, the Applicants have the right and/or 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.[280]

410. 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 Applicants are using these Parks.

411. Two stages in Stuart Park, similar to the podium analogy referenced by the SCC, were both designed to accommodate hundreds or thousands of people depending upon which stage is being used, and were furth 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.[281].

412. The Applicants 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 Applicants had full expectations of a freedom of use for their Lawful Protests.

413. 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. This is a sign of being Constitutionally protected.[282]

414. 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 or method 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.[283]

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278 *Société Radio-Canada v Canada (A.G.)* 2011 SCC 2 CanLII para. 3

279 *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

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

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

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

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

415. 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).*"[284]

❖ *Constitutional freedom to Lawful Marches*
s. 3.1, 3.8 Kelowna Parks Bylaw
s. 8.2.2, 8.2.4 Kelowna Traffic Bylaw #8120

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

417. 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.

418. As part of the Lawful Protests, the Applicants 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, however the actual time where an inconvenience would result, was much less.[285]

419. The RCMP contacted the 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.

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

421. 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.[286] "*The constitutional right to demonstrate on a public road can be exercised by thousands of citizens.*" (***Garbeau* para. 482**)

422. 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.[287]

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

285 Affidavit #1 David Lindsay Aug. 1, 2023 para. 49, 100, 116, 164-168,

286 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 47, 50, 51; *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

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

423. 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.*"[288]

424. 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.[289] The Petitioner's literal interpretation of the Bylaws is unreasonable in that regard.

425. 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 and statutory definition of nuisance to allow for a degree of interference with the use even 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 Applicants' Lawful Protests and Marches.[290] Every protest in Canadian history affects to some degree, the rights or freedoms of others on a temporary basis.

426. 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.*"[291] 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.

427. 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.[292]

428. 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.[293] If convoys are lawful, street marches are lawful.

429. **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 Applicants' common law and **s. 2** Charter freedoms.

❖ *Constitutional Freedom to use Sound equipment*

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288 *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.

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

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

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

292 *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

293 *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

s. 7.3, 9.5 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.

9.5 Without limiting the generality of sections 7.1 to 8.1 and 9.1 to 9.4, 10.1 to 10.4 and 11.1 to 11.4 of this bylaw, the following noises or sounds are considered by Council of the City of Kelowna to be liable to disturb the quiet, peace, enjoyment, comfort or convenience of individuals or the public:

(a) any noise or sounds, the occurrence of which extends continuously or intermittently for fifteen (15) minutes or more, created by the following:

(i) a gathering of two or more persons, where at least one (1) human voice is raised beyond the level of ordinary conversation;
(ii) barking, howling or any other sound by a dog that is kept or harboured; and
(iii) yelling, shouting or screaming,

(b) any noises or sounds produced within or outside a motor vehicle and created by:

(i) the vehicle's engine or exhaust system when such noises or sounds are loud, roaring or explosive;
(ii) a motor vehicle horn, alarm or other warning device except when authorized by law; and
(iii) a motor vehicle operated in such a manner that the tires squeal, and

(c) noise or sound generated from the operation of a power lawn mower or power garden tool before 7:00 am or after 9:00 pm on any day.

430. This allegation, as with all Petitioner allegations, comes up to a brick wall called the Constitution. The Constitutional Challenge of the Applicants is a complete answer to this claim, where the use of sound equipment is necessarily incidental to their common law and **s. 2** Charter freedoms.

431. The first thing that can be said about these activities is that, individually and/or collectively, they are present at every protest, not just the Lawful Protests. You cannot have an effective protest without effective communications, or you simply have a bunch of people incomprehensibly yelling at each other. Effective communication is necessarily incidental to all common law and **s. 2** Charter freedoms.

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

433. **S. 2(b)** Charter freedoms encompass both form (method) and content, of all non-violent expression.[294]

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[294] *Canadian Broadcasting Corp. v. Canada (A.G.)*, 2011 SCC 2 CanLII para. 35, 36, quoting *R v Keegstra* 1990 CanLII 24

434. The Applicants 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).*"[295]

> "*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**

435. The NSCA was also correct in its findings that: "*...to limit a mode of expression is to limit freedom of expression as guaranteed by s. 2(b).*"[296]

436. 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 Applicants' **s. 2(b)** freedoms, and is also subsumed within this freedom.[297]

437. The Applicants' 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.[298] It is not enough to say that the Applicants 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.[299]

438. Freedom of expression includes the power or ability 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.*"[300]

439. Many people could not effectively or at all, hear or receive messages being conveyed by people speaking on the stage.[301] The Applicants 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.

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295 *R v Richards* 1992 CanLII 141 BCSC

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

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

298 *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, A 529 CanLII para. 120

299 Affidavit #1 David Lindsay Aug. 1, 2023 para. 58-62

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

301 Affidavit #1 David Lindsay Aug. 1, 2023 para. 66, 67, 195-204

440. 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.[302]

441. Using a megaphone is unreasonable and ineffective for Lawful Protests, though they are effective during the Lawful Marches. 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.[303] 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.

442. 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, especially compared to the importance of hearing and receiving expressions from others.[304]

443. **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.[305] Anything shorter and would frequently 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.[306]

444. Of note, the use of a generator is not listed as being deemed to be liable to disturb the quiet, peace, enjoyment, comfort or convenience of individuals or the public. There must be evidence of same, for which the Petitioner has provided no such evidence, or alternatively, woefully insufficient evidence.[307]

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

446. The alleged restrictions or prohibition against sound amplification equipment, coupled with the prohibition against yelling for over 15 minutes, effectively and unreasonably prohibit all effective expressions and/or communications.

❖ *Do other Aspects of the Place suggest that Expression within it would Undermine the Values Underlying Free Expression?* **No**

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302 Affidavit #1 David Lindsay Aug. 1, 2023 para. 197-199
303 Affidavit #1 David Lindsay Aug. 1, 2023 para. 202-204
304 Affidavit #1 David Lindsay Aug. 1, 2023 para. 45, 58, 179-181, 201, 335
305 Affidavit #1 David Lindsay Aug. 1, 2023 para. 70-73
306 *Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 44
307 Affidavit #1 David Lindsay Aug. 1, 2023 para. 66

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

448. 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.

449. The Lawful Protests are located on property that is expected to have, and does have Constitutional protection for free expression and assembly.[308] 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, as does Kerry Park.

450. 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 Applicants are using it for, specifically:

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

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

451. The interpretation and enforcement of **s. 3.1, 3.8, 6.1, 6.2** of the *Parks Bylaw*, **s. 8.2.4** of the *Traffic Bylaw*, **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 Applicant's common law and **s. 2** Charter freedoms,[309] as it deprives them of expressing themselves in the substance, mode, method and manner, date and location of their choice.

452. Upon being shown that the effects of the Bylaws infringe upon the common law or **s. 2** of the Charter freedoms of the Applicants, the issue then proceeds to a **s. 1** analysis.[310] 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 Applicants' freedoms and are thus unconstitutional.

453. 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 Applicants in the exercise of their common law and **s. 2** Charter freedoms.[311]

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308 *Vancouver (City) v. Zhang* 2010 BCCA 450 CanLII para. 32-37
309 *Vancouver (City) v. Zhang*, 2010 BCCA 450 CanLII para. 47
310 *Montréal (City) v. 2952-1366 Québec Inc.* 2005 SCC 62 CanLII para. 55
311 Affidavit #1 James Short Dec. 23, 2022 para. 7, 12

454. 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.[312] Such is not to be.

455. The Lawful Protests are being prohibited specifically to prevent the Applicants 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.

- ***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?***

456. 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.*"[313]

457. 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.*"[314]

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

459. Over 200+ tickets and $50 000.00 in fines have been issued against the Applicant Lindsay,[315] including for Lawful Protests where the Applicant Lindsay was not even present. These *Bylaws* provide for possible incarceration for any conviction thereunder. About 65 tickets have been issued to the Applicant, Applicant Lindsay for the Lawful Protests alone.

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

461. 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.[316]

462. 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

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

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

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

314 *Switzman v Elbling* 1957 CanLII 2 Rand J.

315 Affidavit #1 David Lindsay Aug. 1, 2023 para. 213

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

analysis,[317] so too here, where incarceration is possible for the Applicants' exercising their Constitutional freedoms.[318]

463. 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 Applicant Lindsay were based on this policy, and for the same reasons these sections of these *Bylaws* are unconstitutional.

464. The possibility of incarceration where the Applicants 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.

465. 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.

466. 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.

467. 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 Applicants do not have a permit for their Lawful Protests.

468. 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.[319] 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.

469. 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.

○ Are the Impugned Bylaws saved by *s. 1 of the Charter*? No

470. 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.**

471. Under a **s. 1** analysis, the Government or Petitioner, bears the onus of proof to "*demonstrably*"

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317 *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 CanLII para. 84
318 s. 6.2 *Parks Bylaw*
319 *Kew v. Konarski* 2020 ONSC 4677 CanLII para. 57, 59-62

limiting the Applicants' rights and freedoms.[320] This requirement places a high duty upon the Petitioner to provide a strong, cogent and persuasive evidentiary foundation to apply **s. 1**.

472. 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.[321] Nothing of substance will turn on this herein.

473. 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.[322]

474. 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.

475. **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.

476. 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 Applicants take the position that the Bylaws at issue, fail to meet these tests.

❖ s. 3.8 *Parks Bylaw* "*event*" is Overbroad

477. Overbreadth may be considered when any Charter right or freedom has been infringed, including under a **s. 1** analysis.[323] "*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.*"[324]

478. Laws that are overbroad, can intrude into being arbitrary or disproportionate, in whole or in part.[325]

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

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

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

323 *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

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

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

479. Overbreadth examines the Bylaws from the effects upon the individual Applicants, not the public.[326]

480. 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.[327]

- *Scope of the Impugned Bylaws*

481. **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 Applicants 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.

482. **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 Applicants their freedoms for the Lawful Marches, anywhere in the City. With so many people, it is simply not reasonable to be using a sidewalk.

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

484. "*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.*"[328] (my emphasis)

485. **Section 3.8** and **s. 6.1, 6.2** of the *Parks Bylaw*, **s. 7.3** and **s. 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 Applicants, large family or friendship picnics, sports, small weddings, solemn gatherings, etc., punishable by a fine and possible incarceration contrary to the Applicants' common law and **s. 2(b)(c)** Charter freedoms, and are not saved by **s. 1** of the Charter.

486. This said interpretation and enforcement of this Bylaw by the Petitioner further and unconstitutionally denies to the Applicants their important freedom of surprise protests.[329]

- *Purpose*

487. 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.

488. The mischief these Bylaws were directed to, was not intended to include the Applicants or anyone

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326 *Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 113-118
327 *R v Khawaja* 2012 SCC 69 para. 40
328 *Ref. re. ss. 193 and 195.1(1) of the Criminal Code (Man.)* 1990 CanLII 105 SCC Dickson J.
329 *Berube v City of Quebec* 2019 QCCA 1764 CanLII para. 60-75

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.[330]

489. 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 Applicants 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.[331]

- ***Comparison***

490. The Applicants 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.

491. "*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.*"[332] This cannot be saved by **s. 1** of the Charter.

492. 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.

493. 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.[333]

494. 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 Applicants every aspect of their freedoms.

b. *Void for Vagueness*

➢ s. 3.8 *Parks Bylaw – "event"*

495. "*Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally*

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330 *JH v Alberta Health Services*, 2019 ABQB 540 CanLII para. 161
331 *Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 113
332 *Reference re s. 94(2) of Motor Vehicle Act* 1985 CanLII 81 SCCC para. 2, 81
333 *Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 118

protected rights and freedoms.[334]

496. 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.*"[335]

497. 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.[336]

498. 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,[337] despite possible incarceration pursuant to **s. 6.1, 62** of the *Parks Bylaw*.

499. "*It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.*"[338]

500. 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...*"[339]

501. The Applicants' 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.*",[340] including **s. 2(b)** of the Charter.

502. 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...*"[341]

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

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

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

337 *Transportation Authority v Canadian Federation of Students* 2009 31 CanLII para. 50, quoting Prof. Hogg; *R. v. Glassman* 1986 CanLII 7326 ONCJ p. 181-182; *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.

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

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

340 *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

341 *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

503. 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.[342] 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.

504. Some, but invariably not all questions without answers from the Applicants 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 Applicants 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?

505. 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.[343] Because it was never communicated to the Applicants, neither did they.[344]

506. 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.[345]

507. 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.

508. 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 Applicants, 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.

509. 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.

510. 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.

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

343 *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

344 Affidavit #1 David Lindsay Aug. 1, 2023 para. 213, 214-222

345 *Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City)* 1993 CanLII 3114 ONCA para. 21; *Service Corporation International (Canada) Inc. v. Burnaby (City of)* 1999 CanLII 7012 BCSC para. 263

511. 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 Applicants 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.

512. 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 Applicants. "*A statutory provision conferring an imprecise discretion must therefore be interpreted as not allowing the rights guaranteed by the Charter to be violated*."[346]

- s. 7.3 *Good Neighbour Bylaw – "noise"*

513. 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 Applicants with nothing to base their decisions upon and leaves the Petitioner with completely unfettered discretion. One person's sound is another person's noise.

514. 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.

515. 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.

516. 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.*"[347] Making sound is not, *ipso facto* sufficient to be making "*noise*".

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

❖ *Unreasonable, Arbitrary, Discriminatory, Bad Faith*

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

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

519. Bylaws, in terms of process and content, can be struck as being unreasonable, including actions taken for improper purposes.[348] The impugned Bylaws and the Petitioner's relief are unreasonable.

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346 *Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 400, quoting, *Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* 1990 CanLII 105 SCC Lamer J.

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

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

520. Alternatively, this case involving Constitutional issues, the test may be that of correctness.[349]

521. 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.*"[350] (my insertion)

522. To be reasonable, there must be a rationale connection of the legislation to the purpose. The purpose in **s. 8.2.2** and **s. 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 Applicants' 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.[351]

523. **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 Applicants from exercising their common law and **s. 2** Charter freedoms coupled with up to $10 000.00 fines and 90 days in jail.

524. This is an unreasonable prohibition with possible jail time against the Applicants 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 Applicants 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.[352]

525. 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 Applicants. It is unreasonable to interpret the powers of the Petitioner to pass Bylaws that amount to same.[353]

526. Even ambiguous or discretionary Bylaws and powers emanating from same must be interpreted in a manner consonant with the Constitution.[354]

527. Multiple possible interpretations of the word "*event*" in **s. 3.8** of the *Parks Bylaw*, or of words in

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

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

351 *Jackson v Joyceville Penitentiary* 1990 CanLII 13005 p. 92 e-i MacKay J.

352 *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
Affidavit #1 David Lindsay Aug. 1, 2023 para.304, 366-371,

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

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

the other Bylaws at issue, where one infringes the Applicants' Constitutional freedoms and the other does not, require the latter is to be preferred.[355] The City has unreasonably chosen the former.

528. Reasonableness involves considerations of both the reasonableness of the decision outcome, and the process of so doing.[356]

- Arbitrary

529. Where a Bylaw (*Parks Bylaw*, def. "*event*") limits the rights or freedoms of the Applicants, but does not further the objectives of the Bylaw, it can be considered arbitrary, or where there is no rational connection between the law and the limits it imposes on the Applicants' common law and **s. 2** Charter freedoms.[357]

530. The allegation that the Applicants' must obtain a permit prior to exercising their Constitutional freedom to protest, has already been ruled to be unconstitutional as with requiring them to provide dates and times for so doing. There are only two options – the City refuses and thereby arbitrarily denies the Applicants their common law and **s. 2** Charter freedoms, or it is granted – in which case, the necessity for the permit is redundant and unnecessary.

531. With respect to the Arbitrary Decision, the Bylaw Officers did not have the statutory power to randomly deem the definition of words in a Bylaw ("*event*") upon which they would then enforce, *a fortiori* in the absence of public accessibility, Applicants' input and consultation, nor to make City policies, as they were not prescribed by law to so do, nor were these factors prescribed by law.[358]

532. 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 Applicant Lindsay were based upon and this Petition, are of no force and effect. So too was the outcome, when the Bylaw tickets were issued without jurisdiction to so do.[359]

a. 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 Applicants. Instead, they applied, via their Arbitrary Decision, an arbitrary, blanket prohibition upon the Applicants that was in no way proportionate or reasonable.[360]

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355 *R v Sharpe* 2001 SCC 1, para. 33; Sullivan on the Construction of Statutes 6th ed p. 260-262, 264-265, 267-268, 292-294, 299-300, 308, 311-312, 319-321, 328-330, 523-533, 535-539, 690-693; *Hills v Canada (A.G.)* 1988 Carswell 654 para. 92, 93; *Rizzo & Rizzo Shoes Ltd. (Re)* 1 SCR 27, para. 34, 35; *Garbeau v Montreal (City of)* 2015 QCCS 5246 para. 400, quoting *Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J,: *Reference re: ss. 193 and 195.1(1)© of the Criminal Code (Man)* 1990 CanLII 105 SCC Lamer J.; *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. 212, 223

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

357 *Canada (A.G.) v Bedford* 2013 SCC 72, para. 111

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

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

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

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

- *Bad Faith*

534. 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.[361]

535. 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.*"[362] (my emphasis)

536. 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.*"[363]

537. Unjust being defined as, "*...contrary to the enjoyment of his rights, by another...*",[364] the Petitioner's denial to the Applicants of their common law and Constitutional freedoms, fulfills this test.

538. As in *Ronvcarelli*, and as tacitly admitted at **para. 8** of the Petition, the Petitioner's actions are intended to punish the Applicants for exercising their Constitutional freedoms.

539. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.[365]

540. 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 and/or biased discretion of some unknown official with the Petitioner.[366] Said decision amounts being arbitrary and unconstitutional, and is demonstrably open to favoritism. A discretion is never absolute, regardless of the terms conferred in the Bylaws.[367]

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361 *Macmillan Bloedel Ltd. v. Galiano Island Trust Committee* 1995 CanLII 4585 BCCA para. 153, 154
362 *Roncarelli v. Duplessis* 1959 CanLII 50 SCC 121, 143
363 *References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11 CanLII para. 274; Rule of Law
364 Black's Dictionary of Law, 4th Revised Ed. p. 1705
365 *Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 98
366 Affidavit #1 David Lindsay Aug. 1, 2023 para. 366-371
367 *Vancouver (City) v. Zhang*, 2010 BCCA 450 (CanLII) para. 11, 12; *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

[79]

> "*Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute. This is a long established principle... discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.*"[368]

541. Said decision amounts being arbitrary and unconstitutional, and is demonstrably open to favoritism. A discretion is never absolute, regardless of the terms conferred in the Bylaws.

542. A discriminatory Bylaw will operate unfairly and is partial and unequal in their operation between people.[369] The impugned *Bylaws* and/or City policies associated therewith, are absent any standards or guidelines to issue permits or permission.

543. The City has applied these Bylaws and filed this Petition in a discriminatory, repressive, abusive and/or punitive manner against the Applicants, including the Applicant Lindsay. There is no rationale or legal purpose, it is strictly for the improper purpose of denying the Applicants their Constitutional freedoms, or improperly moving them to an area of the City where they will have little or no effectiveness.

544. 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.[370]

545. 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 Applicant Lindsay, when suddenly, tickets were arbitrarily issued weekly;

B. The Petitioner represented to the 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 high-ranking City official (The Source) informed the Applicant Lindsay that the City was

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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

368 *Slaight Communications Inc. v Davidson* 1989 CanLII 92 SCC Lamer J.

369 *Dhillon v. Richmond (Mun.)* 1987 CanLII 2623 BCSC para. 16, 22, 23

370 *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

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 Applicant Lindsay, and did not tell him only until after repeated questioning in a Bylaw adjudication hearing in January, 2022;[371]

E. This Arbitrary Decision is only being applied to the Applicant Lindsay, and not to any of the other 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 Applicant Lindsay since August, 2021;

G. The Petitioner has repeatedly ticketed 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 Applicant Lindsay gave to Bylaw Officer O'Hanlon;

I. 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 Applicants had the Constitutional freedom to have their Lawful Protest. The City knows the Applicants 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 Applicant, 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 Applicant, Applicant Lindsay from having these Lawful Protests;

M. Rob Gibson from Castanet, personally informed the 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 Applicants have the Constitutional freedom to so do.

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[371] Animus moninis est anima scripti.- the intention of the party is the soul of the instrument 3 Bulstr. 67.

Despite the Petition grounds that no permit was obtained, no such permit can or could be obtained anyway;[372]

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 Applicant, Applicant Lindsay;

P. This Petition is now taken with relief sought to ban the Applicants 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 Applicants have done nothing to support this relief, which is frivolous and vexatious;

R. The Applicants 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.

546. The Petitioner cannot deny the Applicants' Constitutional and common law freedoms under the colour of Bylaws (law). This is merely giving injustice the colour of justice.[373]

547. 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 Applicants 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 Applicants, is an abuse of process[374] and vexatious.

548. **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*[375] 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 Applicants for their Lawful Protests and Marches.

❖ *The Impugned Law (or State Action) must have a Pressing and Substantial Objective*

549. The objective of **s. 3.1, 3.17, 3.8, 6.2** of the *Parks Bylaw*, do not meet this requirement, and there is no evidence of same.

550. For the Bylaws to Constitutionally limit freedom of the Applicants' political expressions, the City

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372 A l'impossible nul n'est tenu - no one is bound to do what is impossible 1 Bouv. Inst. n. 601

373 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

374 *Behn v. Moulton Contracting Ltd.* 2013 SCC 26 CanLII paras. 39, 40

375 s. 1(1)(a), (2)(a)(b)(e), s. 2(1)(a),(2)(a)(b)(c)(ii)(g), 3(a) Community Charter

must support its claim with "*...clear and convincing demonstration that they are necessary, do not go too far and enhance more than harm the democratic process.*"[376] (my emphasis)

551. In consideration of the harms to the Applicants' freedoms, and that the location where the relief is sought to ban them from in the downtown Kelowna core is the most strategic location in the City for important locations to protest, it is clear that this relief does not enhance the democratic process by, minimally, forcing the Applicants into the boonies to meet where the effectiveness is much less than the downtown core and Stuart Park.

552. The preamble of the *Parks Bylaw* clearly sets out its application to "*...nuisances, disturbances and other objectionable situations.*"[377]

553. 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.

554. 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.

555. That no tickets were issued to anyone other than 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.[378]

556. **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 Applicants' 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.

557. **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.

558. There is an obligation upon the City to ensure that parks and streets are available to be used by the Applicants, *a fortiori* for Constitutional purposes, and the Bylaw respects that. It is presumed

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376 *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)* 2017 SCC 6 (CanLII), [2017] 1 SCR 93 para. 16

377 Preamble, *Parks Bylaw*

378 *R v Zundel* 1992 CanLI 75

despite that there were no pressing concerns or objective sufficient to deny the common law and **s. 2** Charter freedoms of people.

559. 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 Applicants, ie: denying the Applicants their Constitutional freedoms.[379] If there was a pressing and substantial problem, it would exist for everyone, not just the Applicants.

560. 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 and an improper use of legal fictions – as is any use of them.

561. Similar factors apply to **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*.

562. 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.

❖ *The Impugned Law or State Action) must be Proportional in Terms of its Objectives and its Effects*

- *The Measure Chosen must be Rationally Connected to its Objective*

563. 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, though not required to be on an evidentiary basis.[380]

564. This requirement is directed toward arbitrary limits being enforced upon the Applicants, where the causal connection between the infringement must be on the basis of reason or logic.[381] Both the Arbitrary Decision and the relief sought by the Petitioner in banning the Applicants from their Lawful Protests just in the downtown area of the city, fail to meet this test on this basis.

565. 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 Applicants' common law and

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379 *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. 25-28

380 *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, 154

381 *R. v Coban* 2022 BCSC 14 CanLII para. 49

Constitutional freedoms, must be shown by direct evidence.[382] No such evidence exists or alternatively, is minimal, *di minimus* and/or trifling in nature, and more akin to an incidental inconvenience. Where the dangers are either minimal or illusory without substantive evidence, it cannot be said that the infringement of the Applicants' freedoms is justified.[383]

566. 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*".[384]

567. That the relief sought is only against the Applicants, it is discriminatory. City Bylaws cannot result in inequality, where one person's freedom to protest is recognized but denied to the Applicants.

568. 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 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 Neighbour Bylaw* anymore than having distinctions between mothers and fathers as to who may be more dangerous.[385]

569. The objective of the Arbitrary Decision and Petitioner's interpretation of these Bylaws, is nothing short of banning the Applicants, 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.

570. Banning the Applicants' 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.

571. That the Petitioner seeks relief to ban the Applicants 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.

572. The Constitutionality of **s. 3.1, 3.8** of the *Parks Bylaw*, **s. 8.2.2, 8.2.4** of the *Traffic Bylaw*, **s. 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.[386]

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382 *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 CanLII para. 132
383 *Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 41
384 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34 para. 34
385 *Benner v Canada (Secretary of State)* 97 CanLII 376 SCC para. 95
386 *Garbeau v. Montreal (City of)* 2015 QCCS 5246 para. 467

❖ *The Measure must Impair the Guaranteed Right or Freedom as Little as Reasonably Possible*

573. The next section below shares the same attributes and considerations herein, and apply to this section.

574. The starting point is the oft repeated "*... highest degree of constitutional protection...*"[387] 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 Applicants.

575. **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.[388]

576. "*... 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.*"[389] (original emphasis)

577. That the City alleges a permit is required for the Lawful Protests, sound equipment, signage, marches etc. herein, can only exist if there was a pre-existing prohibition on doing these activities. However, the SCC has repeatedly held that all these activities are Constitutionally recognized. This is not minimal impairment, it starts off as a complete prohibition or ban on these activities.

578. **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.

579. **S. 8.2.2** of the *Traffic Bylaw*, interpreted to the facts herein, permits the Applicants 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 Applicants' freedoms.

580. **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.

581. **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.

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387 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 121
388 *Ontario (A.G.) v. Dieleman* 1994 20 O.R. (3d) 229 Ont. Court G.D. p. 329-330
389 *RJR-MacDonald Inc v Canada (Attorney General)* 1995 CanLII 64 SCC para. 160

582. A blanket prohibition on expression is an intentional interference with the Applicants' common law and **s. 2(b)(c)** Charter freedoms, as it does not target a particular activity or content.[390] Alternatively, even if it did, these sections remain contrary to the Applicants' said freedoms, as outlined above.

583. 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 Applicants, and falling outside a range of reasonable options to achieve whatever the objective may have been.[391]

584. 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.

585. 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*".[392]

586. The relief sought has the effect of banning the Applicants 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.

587. The Applicant Lindsay incorporates **para. 618-622** below as to the deleterious effects from interpreting and enforcing the Bylaws in the manner sought by the Petitioner, including in its relief.

588. These provisions, being not minimally impairing and unconstitutional, cannot sustain the Petitioner's relief sought. "*It denies the* [Applicants] *the right of effective political communication...*"[393]

589. 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...*"[394] This cannot be done.

590. The Petitioner, via the Arbitrary Decision took no consideration of the Applicants' Constitutional and common law freedoms. In so doing, their said freedoms were not minimally restricted as possible.

591. Notwithstanding the Bylaws, the Petitioner appears to proceed on the assumption that all protests

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390 Toronto's 2018 Municipal Election, Rights of Democratic Participation, and Section 2(b) of the Charter 2021 CanLII Docs 814 p. 12, footnote: 94

391 *Garbeau v. Montreal (City of)*, 2015 QCCS 5246 para. 168-173

392 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 111

393 *Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 41

394 *R v Ndhlovu* 2022 SCC 38 CanLII para. 126

are acceptable, just not the Applicants'. Fundamentally, this is simply pure bias and likely vengeance.

592. Reasonableness and proportionality are synonymous.[395] 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; and where the Lawful Marches, lasting 25-40 minutes or so several times/year, are also perfectly reasonable.[396] The RCMP publicly admits of no violence.[397] Restricting the Lawful Protests any more would be unreasonable and seriously defeat the Applicants' common law and **s. 2** Charter freedoms.[398]

593. 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.

594. 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 offence coupled with incarceration, which in turn is prohibited in our law.[399]

595. This applies with similar vigour to **s. 6.1** and **s. 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, s. 3.1** and **s. 3.8** create an absolute liability offence coupled with incarceration.

596. This further applies to **s. 8.2.2, 8.2.4, 10.1.1** of the *Traffic Bylaw*.

597. 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**.[400]

598. This case applies herein, where these impugned Bylaw sections further provide for incarceration in addition to fines, applied to the Lawful Activities.[401]

599. Strict liability offences require the Applicants, 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.

600. That in over 150 Lawful Protests over three years, there have been no registered complaints over volume of sound, clearly shows that the Applicants have exercised due diligence in this regard by maintaining the volume at a minimum level and direction required for protestors to hear.

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395 *Law Society of British Columbia v Trinity Western University* 2018 SCC 32 CanLII para. 80
396 Affidavit #1 David Lindsay Aug. 1, 2023 para. 69, 164,
397 Affidavit #1 David Lindsay Aug. 1, 2023 para. 176-189
398 Affidavit #1 David Lindsay Aug. 1, 2023 para. 69-73
399 *Regina v. Sault Ste. Marie (City)* 1978 CanLII 11 SCC
400 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 158
401 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 10

601. *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**.[402]

❖ *There must be Overall Proportionality between the Deleterious and Salutary Effects of the Measure*

602. 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.[403]

603. See **para. 363-379** above, in support of the Constitutional Challenge, for consideration of the importance of the common law and **s. 2** Charter freedoms.

604. If the Petitioner intends to deny the common law and **s. 2** freedoms of the Applicants, it must "*...offer good and sufficient justification for the infringement and its ambit. This has not been done.*"[404]

605. 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.

a. Governments, including the Petitioner, are required to adduce evidence as to why less intrusive and equally effective measures were not chosen here.[405]

606. 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.[406] This is reasonable lest the results be exactly as here, where the Government attempts to ban all protests.

607. 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)**.[407] 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 Applicants their **s. 2** Charter freedoms.

608. Succinctly, there are very few if any practical benefits to the Petitioner and much to lose to the Applicants and the public. The public accept inconveniences in public property use for lawful and

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402 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 117, 157, 158
403 *R. v. Sharpe* 1999 CanLII 6380 BCSC para. 32, Quoting; *Dagenais v. Canadian Broadcasting Corp.* 1994 CanLII 39 SCC p. 888-889
404 *RJR-MacDonald Inc. v. Canada (Attorney General)* 1995 CanLii 64 SCC
405 *Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 para. 118-119
406 *Bérubé v City of Quebec* 2019 QCCA 1764 CanLII para. 163-165
407 *Thomson Newspapers Co. v Canada (A.G.)* 1998 CanLII 829 SCC para. 94

Constitutionally protected, protests and marches.

609. The relief sought by the Petitioner would defeat all SCC and other superior court cases recognizing the freedom of the Applicants to use these parks and streets in their political expressions.

610. "*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.*"[408] The importance of any objective, does not warrant overriding the extreme importance of freedom of expression.

a. The relief sought is either only against the Applicants, 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 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 Applicants. 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 of Relief Sought*

611. 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.

612. 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.

613. 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.

614. Other than bald, unsupported 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.

615. 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.

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[408] *R. v. Oakes* CanLII 46 SCC at para. 71

616. There are three stages, the Applicants use one of them. The Applicants 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 Applicants' presence has not deterred any such activities, and this allows the Applicants to talk to these people and hand out brochures.

617. The salutary benefits to the public or City are minimal, and certainly not proportionate to the serious harms done to the Applicant's and public's **s. 2** Charter freedoms, including date, time and locus.

- *Deleterious Effects on Freedom of Expression and Assembly*

618. The factors herein apply to the minimal impairment branch above.[409]

619. A denial to the Applicants of their freedom of expression, *a fortiori* in the manner of their choosing, *ipso facto*, constitutes harm to the Applicants, without further proof,[410] similar to *Frank*.

620. 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 Applicants 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; Lawful Protests;

D. it is within walking distance of the downtown major bus loop connecting to all parts of the City;

E. 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;

F. it has excellent access to parking on Water St., for further visibility of our vehicles and their signs;

G. it has excellent visibility for our signs in the actual Park;

H. it has many benches for seniors and others to sit;

I. we can have many protestors without using the entire Park;

J. it has an excellent stage with places for people to speak, including the Applicant, Applicant Lindsay;

K. there is a large area, so at most of the Lawful Protests people are not jammed into each other;

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409 *Harper v. Canada (Attorney General)* 2004 SCC 33 CanLII para. 40

410 *Frank v Canada* 2019 SCC 1 CanLII para. 82

L. 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 Applicants' common law and s. 2 Charter freedoms;

M. with the speaker system they have excellent and reasonable sound communications;

N. it has excellent esthetics and beauty;

O. there is an excellent otherwise unused grass area for literature tables and our CLEAR Canopy;

P. 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;

Q. it is close to other political venues that we protest against, including City Hall, RCMP, the local media, and Interior Health;

R. it is in a commercial area, not residential, so there is no impact on residential communities;

S. it is an excellent starting base for Lawful Protests at other downtown areas;

T. it is within walking distance to Hwy 97 which has been used for maximum public visibility from vehicular traffic;

U. there is excellent visibility from Water St. and which has been used to maximize public visibility from vehicular traffic in that area;

V. the Park provides an excellent starting and ending point for short Lawful Marches in the downtown area, without the loss of protestors;

W. 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;

X. it was the Applicants' choice to make in the exercise of their common law and **s. 2** Charter freedoms;

Y. 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,

Z. is generally the best and most effective place in the City for our Lawful Protests to occur.[411]

621. 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 Applicants do not have to justify their reasons for using this Park nor the downtown area);

A. it denies to the Applicants all of these aforementioned benefits and Constitutional freedoms;

B. the importance of the Applicants' messages, *a fortiori* where the B.C. Government has ordered all media not to publish anything by protestors opposing the Government narrative. Locating the Applicants 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;

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411 Affidavit #2 David Lindsay Nov. 6, 2023

C. it puts a wall between the Applicants 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 Applicants 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 Applicants 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 Applicants 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 Applicants 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 Applicants' 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 Applicants 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 Applicants getting information out to the public and for the public to obtain accurate, alternative information as well;

R. it removes the presence of the Applicants 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 Applicants' 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 Applicants' 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 Applicants 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;

a. 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.[412]

622. 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.

- *Gross Disproportionality*

623. Issues that are grossly disproportionate to the results, will not satisfy this test either.[413]

624. 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.[414]

625. **S. 3.1, 3.8, 6.2** of the *Parks Bylaw*, **s. 8.2** and s. **10.1.1** of the *Traffic Bylaw*, and **s. 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

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413 *R v M-M* 2022 ABQB 197 CanLII para. 8

414 *Carter v. Canada (Attorney General)* 2015 SCC 5 CanLII para. 89

626. The relief sought in the Petition is also subsumed in this principle, effectively prohibiting the Applicants from having their Lawful Protests anywhere in the downtown core, where all the major Government and political institutions are located.

627. The negative effects on the Applicants 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.

628. 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 Applicants.[415]

629. Considering the Applicants 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*

630. If any link in the chain of jurisdiction is missing, jurisdiction will fail.[416] Once shown that the RCMP do not have jurisdiction to exist, enforce court orders or statutes, the Petitioner's relief at **para.** 7, will fail.

631. 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.

632. The Court should respectfully, issue an Order that all tickets are void for want of jurisdiction *ab initio*.[417]

❖ *RCMP Act*

633. The Petitioner seeks an Order at **Part 1, para. 7(a)-(i)** of its Petition, relief in the form of authorizations to the Royal Canadian Mounted Police (RCMP) to take certain specified actions, including but not restricted to arresting and removing people who the RCMP believe know of the Orders the Petitioner seeks to ban people from protesting in the downtown core, to detain and/or bring them to court on charges. In short, to criminally enforce the Orders.

634. In response, the Applicants have filed their Constitutional Challenge to the *Royal Canadian Mounted Police Act* (*RCMP Act*), as being *ultra vires* Parliament.

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415 *Canada (Attorney General) v. Bedford* 2013 SCC 72 CanLII para. 120-122
416 *R v Sproule* 1886 SCR
417 *Regina v Van Wezel* 1972 6 WWR BCCA 197, 199

635. The *Constitution Act* 1867, formerly the *British North America Act*, was passed by the English Parliament in 1867.

636. The *Constitution Act* 1867 was based on Resolutions from the London Conference, 1866-1867, not the Quebec Conference 1864.

637. This English statute did not federate the provinces into one country called Canada, nor is it a Confederation document, as it is erroneously called.

638. Canada was, and remains a Dominion, a union of Provinces under the Crown or King of England.

639. The *Conada Act* 1982 of England, did not alter this status.

640. 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.

641. 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**.

642. The remaining, residual powers of Parliament were in **s. 91**, based upon London Resolution 28, with examples set out therein.

643. 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...*".

644. Provincial legislative powers were exclusive and enumerated, while Federal powers were residuum and illustrative, only.

645. The whole range of legislative powers were exhausted.

646. 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.

647. The concurrent powers of legislation extend over three separate subjects--immigration, agriculture and public works.

648. The class of subject of the administration of justice, inclusive of the matter of policing, was/is an exclusive Provincial head of power.

649. The "*matter*", or pith and substance in this Challenge, is policing within the Provinces.

650. 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.

651. Once established that policing falls as a matter under **s. 92(14)**, that ends the debate and the Petitioner's relief cannot be granted.

652. 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.

653. 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.

654. 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).

655. The enabling legislation for the RCMP was passed by Parliament on **May 23, 1873**, for use exclusively in the North West Territories only.

656. 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.

657. Then Prime Minister Sir John Macdonald defined its purpose as: "*The preservation of peace and the prevention of crime*" in the NWT.

658. 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.

659. 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.

660. This was temporarily ended during WWI.

661. 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.

662. **January 1, 1917:** The RNWMP was relieved of provincial policing duties in Manitoba and Saskatchewan, with the creation of their own Provincial Police forces.

663. 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.

664. The Royal Canadian Mounted Police were formed in 1920, absorbing the Dominion Police and Royal North-West Mounted Police.

665. **June 1, 1928:** The RCMP took over provincial policing duties for Saskatchewan again.

666. **April 1, 1932:** The RCMP absorbed the provincial police organizations for Alberta, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island.

667. 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)

668. 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.

669. This Agreement remains in full force and effect to the present date.

670. 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.[418]

671. 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.

672. This was incorporated into the *Constitution Act* 1867, aka the *British North America Act* 1867.

673. 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.

674. 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.

675. 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.

676. 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.

677. 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.

678. 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.

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418 2012 RCMP Provincial and Territorial Police Service Agreements – Companion Document 2014

679. 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.

680. This Agreement, as with previous similar agreements in British Columbia and other Provinces, was entered into primarily for economic expediency, and political reasons.

681. 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.

682. Applicable principles of Constitutional and statutory interpretation do not permit any interpretation of **s. 91** and **s. 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.

683. 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.

684. 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.*

685. *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.[419]

686. 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 **s. 92 (14)** of the *British North America Act* 1867, *Constitution Act* 1867, the administration of justice in the Province.

687. 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 **s. 92**.

688. 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 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*

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[419] *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

Atkin in The Labour Conventions Reference (1), 'watertight compartments which are an essential part of the original structure.'"[420] Neither level of Government, independently or cooperatively can do indirectly what it cannot do directly.

689. 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.

690. Such further and other particulars and grounds as may be put forth by the Applicants, 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.

iv. *the harm likely to have been or to be suffered by the Applicants 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.*

691. Without prejudice, even if any or some Bylaws may have been broken, which is strongly denied, this does not transform the Lawful Protest into an event requiring a licence from the City, lest, absurdly, everyone who sells Kool-aid be also charged with having an event in the Park.

692. The Petitioner's only evidence of any alleged harm, consists of a letter attached to **Exhibit "A"** of the affidavit of Ken Hunter from Mark Burley of the Kelowna Downtown Association. This letter cannot be accepted into evidence as there is a caveat at the bottom of the letter that no one other than the recipients thereof, who are listed at the top of the page, are permitted to review or read it, "*...without the sender's consent.*". There is no included or attached permission from Mr. Burley giving the City the power to release this document on the public record, and who likely is unaware of what the City has done.

693. This letter is further rife with hearsay, bald unsupported allegations, speculation, opinions, and mischaracterizations. Impermissible words include, *inter alia*:

> "*Once again, the businesses of Downtown Kelowna will experience a large disruption and compromised access to their businesses by the public at large.*"
>
> "*In the meantime, our businesses must accept that the traffic interruption will happen, that the horns will no doubt be blaring, and parked cars will not be able to move until the 'parade' passes by.*"
>
> "*The continued allowance of these events continues to tarnish the reputation of not only our*

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420 *Attorney General of Nova Scotia v. Attorney General of Canada* 1950 CanLII 26 (SCC)

> *Downtown, but our city. The citizenry at large avoids Downtown Kelowna on weekends because of the continued disruption being allowed.*"
>
> "*I understand the protests are a right of the individual. I don't understand why the organizers seem to have carte blanche on where they go, when they go there and are allowed to continually interrupt business without any repercussions whatsoever.*"
> "*In my opinion, there must be a better way to manage these situations than what we have experienced to date.*"

694. Mr. Hunt's use of the words "*unpermitted events*" at **para. 3** of his Affidavit, is a conclusion of law or mixed fact and law.

695. There is no evidence that the Applicants themselves, made or permitted to be made any noise in this regard.

696. This Affidavit and attachment, should not be accepted and if so, weight should be minimal to none.

697. In the alternative, should this letter be accepted, this letter is in relation to complaints about vehicles parking on a street far removed from the Lawful Protests, and actions by drivers of said vehicles while somewhere on Bernard St. This is not a direct fault of the Applicants, and there is no evidence that any of the Applicants had any direct control over who came to the Lawful Protests and where they parked, nor in relation to any actions that they may have taken. There is no evidence that any Applicant told protesters to park on Bernard Ave or anywhere else.

698. There is no level of degree of harm, ie: how many cars parked on Bernard St., for how long, complaints from irate drivers, how many drivers were directly from the Lawful Protests as opposed to a busy commercial shopping day, how many businesses complained and the nature of their complaints, why no businesses who protestors supported were contacted and why no input from them, no records kept of any complaints nor times and dates of complaints and names of complainants, no incident reports filed, no Bylaw Officer notes, etc.

699. Mr. Hunt evidences at **para. 3** of his Affidavit, that, "*The concerns expressed by Mr. Burley in this email have been repeated to the City by many other business owners and community members who are negatively impacted by the unpermitted events carried on by the Applicants on a weekly basis.*"

700. It can and should be logically and reasonable inferred that if any complaints were made by other business owners and community members, the City would have at least one such complaint in writing. None were provided and no reason is provided by Mr. Hunt as to why this is so.

701. In the absence of this letter, there is no documentary evidence at all before the Court that the quiet, peace, rest, enjoyment, comfort, or convenience of individuals or the public was disturbed as a direct result of the Lawful Protests.

702. Alternatively, any complaints that may have been registered constitute part of the public inconvenience that is required to be sacrificed for all public protests.

703. The Applicant Lindsay and others have evidenced the harms that will flow from the granting of the relief sought,[421] considering at all times, that the political nature of the common law and **s. 2** Charter freedoms at play, are the highest and most important form of speech the SCC has recognized.

704. Notwithstanding the harms evidenced, the damage is the harm, ie: the relief sought is the harm unto itself, by denying to the Applicants their freedom to choose where and when they will protest.

705. Further, the Petitioner makes no claim or reference, nor provide any evidence to any temporal urgency in its Petition, nor any past, present or future harm from the Lawful Protests and Activities.

706. s. 16-1(5), Form 67 (Part 5, Legal Basis), *Civil Rules of Court*

707. s. 2(1), 7(3), 12.2 Kelowna *Good Neighbour Bylaw* #11500

708. s. 1.2.1(f), 2.1.2 Kelowna *Outdoor Events Bylaw* #8358

709. s. 8.2.2, 8.2.4, 10.1.1 Kelowna *Traffic Bylaw* #8120

710. 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

711. 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

712. s. 523(1)(2) *Local Government Act* RSBC 2015 CHAPTER 1

713. s. 4, 5, 6, 7, 8, 9 *Protection of Public Participation Act* SBC 2019 CHAPTER 3 SLAPP

714. s. 8(1)(2)(4) *Constitutional Question Act* RSBC 1996 CHAPTER 68

715. s. 18(a)(b)(c)(d), 20 (1)-(5) *Royal Canadian Mounted Police Act* (*RCMP Act*) R.S.C. 1985, c. R-10

716. s. 3, 14(l), (2)(a)(b)(c)(d), (3) *Provincial Police Act* RSBC 1996 ch. 367

717. Memorandum of Agreement, Government of Canada and Government of British Columbia April 1, 2012, Order in Council P.C. 2011-1344

718. s. 2, 7, 15, 24(1)(2) Charter of Rights and Freedoms

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[421]

Affidavit #1	David Lindsay	Aug. 1, 2023	para. 58
Affidavit #2	David Lindsay	Nov. 6, 2023	
Affidavit #1	Jacqui Rose Jones	Aug. 3, 2023	para 3-5, 9-14, 17, 19, 21, 22, 25
Affidavit #1	Bettina Engler	June 26, 2023	para. 13, 29, 30, 31
Affidavit #1	Leo Beauregard	Aug. 1, 2023	para. 51-56
Affidavit #1	Nadia Podmoroff	July 13, 2023	para. 17-21
Affidavit #1	Ted Kuntz	June 30, 2023	para. 12, 17, 19, 20, 22-26, 38, 39, 31, 44-48
Affidavit #1	Tanya Gaw	June 27, 2023	para. 5-9, 12-14

719. s. 52 *Constitution Act* 1982

720. Inherent jurisdiction of this Honourable Court

Material to be Relied Upon

721.	Affidavit #1 of Ted Kuntz	June 30, 2023
722.	Affidavit #1 of Tanya Gaw	June 27, 2023
723.	Affidavit #1 of David Lindsay	July 32, 2023
724.	Affidavit #1 of Bettina Engler	June 26, 2023
725.	Affidavit #1 of Jacquelyn Rose	August 1, 2023
726.	Affidavit #1 of Leo Beauregard	July 31, 2023
727.	Affidavit #1 of Nadia Podmoroff	July 13, 2023
728.	Affidavit #1 of James Short	Dec. 23, 2022
729.	Affidavit #1 of Ken Hunter	Jan. 9, 2023
730.	Affidavit #1 of Shawn O'Hanlon	Dec. 20, 2022
731.	Affidavit #1 of Daniel Hogan	Jan. 4, 2023
732.	Affidavit #1 of Kenneth Black	Dec. 20, 2022

The Applicant estimates that the Application will take 3-4 days.

This matter is not within the jurisdiction of a master.

TO THE PERSON RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated this ~~30th~~ 6th day of ~~October, 2023~~ November DL

David Lindsay
CLEAR

David Lindsay
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To: Lloyd Manchester
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Phone: 604 666-2760
Fax: 604 666-1599

To be completed by the court only:

Order made

[] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[] with the following variations and additional terms:

.....

.....

.....

Date: .....*[dd/mmm/yyyy]*.....

.....
Signature of [ ] Judge [ ] Master

Appendix

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts
[✓] none of the above

The City of Kelowna v David Lindsay, *et al*
Applicants

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

Kelowna, B.C. Registry

Proceedings commenced at Kelowna, B.C.

Notice of Application of David Lindsay, CLEAR

David Lindsay