



No. KEL-S-S-136195
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CITY OF KELOWNA

PETITIONER

AND:

**UNKNOWN PERSONS OPERATING AS "COMMON LAW
EDUCATION AND RIGHTS", DAVID LINDSAY, JOHN DOE,
JANE DOE, AND PERSONS UNKNOWN**

RESPONDENTS

APPLICATION RESPONSE

Application Response of: City of Kelowna (the "City")

THIS IS A RESPONSE TO the Notice of Application of David Lindsay and CLEAR (the "CLEAR Parties") filed /Nov/2023.

Part 1: ORDERS CONSENTED TO

The Application Respondent to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms:

1. NONE.

Part 2: ORDERS OPPOSED

The Application Respondent the granting of the orders set out in paragraphs ALL of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent no position on the granting of the orders set out in paragraphs NONE of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. The City filed the within Petition seeking declaratory and injunctive relief to restrain the Petition Respondents' repeated breaches of the City's Parks and

Public Spaces Bylaw, No. 10680, 2017 (the “Parks Bylaw”), Good Neighbour Bylaw, No. 11500, 2018 (the “Good Neighbour Bylaw”), Traffic Bylaw No. 8120, 2002 (the “Traffic Bylaw”), and Outdoor Events Bylaw No. 8358, 1999 (the “Outdoor Events Bylaw”), in the City park known as Stuart Park and on surrounding roadways in the downtown Kelowna area, including by doing the following (the “Unlawful Events”):

- (a) Erecting temporary structures with stakes and a canvas roof and sides (the “Tents”) in the Park;
 - (b) Setting up and using amplified sound system equipment in the Park and a megaphone on public roadways to make speeches, in a manner that is liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals or the public (the “Noise”);
 - (c) Selling and displaying for sale merchandise related to the subject matter of their events (the “Sales”) in the Park;
 - (d) Standing and loitering on public roadways adjacent to the Park and Highway 97, and walking in group parades or processions through the Park and down roadways in the City’s downtown core between the Park and Harvey Avenue, also known as Highway 97 (the “Processions”); and
 - (e) Holding unpermitted events.
2. The Unlawful Events are carried on by the Petition Respondents in such a manner as to create a nuisance and interfere with the use and enjoyment of the Park by other persons. These activities take place frequently and are highly disruptive and detrimental to the community and to other persons who desire to use the Park and roadways.
 3. The combined frequency, number of violations, and degree of impact on the public that the Petition Respondents’ actions have had over the past 3 years far exceeds any similar breaches of the Bylaws which may have been committed by any other group of persons from time to time, such that progressive escalation of the City’s enforcement steps has led to the within injunctive proceeding to enforce the Bylaws against the Petition Respondents in this specific location, in the public interest.

Part 5: LEGAL BASIS

1. A section 4 application under the *Protection of Public Participation Act* (“PPPA”) requires the applicant to prove, on a balance of probabilities, that the proceeding arises from an expression made by the applicant that relates to a matter of public

interest.

s. 4(1), PPPA

2. If the first element of the test is met, the onus shifts to the respondent to satisfy the court there are grounds to believe that:
 - (1) the proceeding has substantial merit (s. 4(2)(a)(i)), and
 - (2) the defences raised by the defendant are not valid, in that they can be said to have no real prospect of success (s. 4(2)(a)(ii)).
3. Where this onus is met, the court must conduct a public interest weighing exercise under s. 4(2)(b), in which the respondent must satisfy the court that the harm they are likely to have suffered or are likely to suffer due to the applicant's expression outweighs the public interest in protecting that expression.

Hansman v. Neufeld, 2023 SCC 14 ["Neufeld"], para. 53

Proceeding Does Not "Arise From" an Expression

4. The statutory injunctive relief sought in the Petition does not address or restrain the substantive content of any expression, or the activity of protesting. The relief seeks to restrain only acts which breach the Bylaws, without relation to the content of any expressions which may or may not be made in the course of such acts.
5. This is emphasized by the fact that the City does not issue permits for "protests", *per se*. The City issues permits for events which consist of activities regulated under the Bylaws.
6. The orders sought in the Petition do not restrain the CLEAR Parties from gathering in parks and public spaces to protest. If the CLEAR Parties desire to undertake activities which are regulated under the Bylaws as part of or to expand the scope of their protests – e.g., utilizing amplified sound, marching on the roadway, and erecting temporary structures – they may do so by applying for and obtaining a permit.
7. The requirement to obtain a permit when a certain threshold of activity is reached, which threshold relates to the level of impact the subject activities are likely to have on other users of the public space, is a rational and reasonable way to balance the interests of all users and to allow all to exercise rights such as freedom of expression.

8. The CLEAR Parties remain free to express their views publicly on any topic, in any manner which does not constitute a breach of the Bylaws governing safe, respectful and orderly community use of public spaces.
9. Unlike, for example, a civil claim for damages on the basis of defamation or breach of contract, the Petition also does not seek to or have the effect of restraining the communication of the CLEAR Parties' message on a topic by any and all channels or means.
10. The CLEAR Parties have cited no authority for the proposition that the PPPA is applicable in bylaw enforcement proceedings. This would be an expansion of the existing case law in relation to similar statutes.
11. The CLEAR Parties' theory that the Petition is an element of some broad conspiracy by various government and other entities to silence them is based entirely upon speculation and vaguely articulated hearsay, and cannot meet the evidentiary burden to show, on a balance of probabilities, that this proceeding arises from those expressions within the meaning of the PPPA.
12. This application thus fails at the first stage of the test and should therefore be dismissed.

Reasonable Grounds to Believe: Substantial Merit and No Valid Defence

13. In the alternative, should the inquiry proceed to the second stage of the test, it is beyond question that Petition has substantial merit. A municipality is presumptively entitled to an injunction to enforce a valid bylaw upon proof of breach, absent exceptional circumstances.

Vancouver (City) v. Weeds Glass & Gifts Ltd., 2019 BCCA 190, para. 27

14. The "grounds to believe" standard means something more than mere suspicion, but less than proof on the balance of probabilities. To satisfy this burden, a plaintiff must show the defences advanced by the defendant "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".

Neufeld, para. 94

15. There is ample evidence in the CLEAR Parties' own material that they, and other participants in the Unlawful Events, are carrying on the enumerated activities.
16. For the most part, actual occurrence of the activities in question is not truly contested by the CLEAR applicants. Rather, they take issue with the interpretation in the Petition of how the terms of the Bylaws apply to their activities.

17. This type of application “...is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which [this type of] motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.”

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 [“*Pointes*”],
para 52

18. The CLEAR Parties’ PPPA application enumerates the following legal issues in response to the City’s injunction application:
- (a) Statutory interpretation of the Bylaws;
 - (b) Breach of contract with the Province regarding the terms of certain grant funding;
 - (c) A constitutional challenge to the Bylaws under sections 2(b), 2(c) and 7 of the Charter of Rights and Freedoms;
 - (d) A constitutional challenge to the federal RCMP Act and the BC Provincial Police Act; and
 - (e) Improper purpose for the Petition.

Statutory Interpretation of Bylaws

19. Municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and with a view to giving effect to the intention of the municipal council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose.

Society of Fort Langley Residents for Sustainable Development v. Langley (Township), 2014 BCCA 271

20. The meanings and dictionary definitions suggested by the CLEAR Parties do not account for or reflect the principles of municipal statutory interpretation or the purposes of the Bylaws, and are untenable.

Parks Bylaw

21. The CLEAR Parties take issue with the City’s interpretation of the Unlawful Events as an “event” within the meaning of section 3.8 of the Parks Bylaw, apparently on the basis that they believe the City exempts protests from being considered

“events” on the basis of their subject matter, and thus classifying the Unlawful Events as “events” requiring a permit would be inconsistent.

22. In actuality, whether a given occurrence constitutes an “event” which requires a permit is dependent upon the actual activities which are planned and do occur, regardless of the underlying subject matter. The City does not issue permits to protests, *per se*. It issues permits for events, which may or may not be considered by their attendees to be a “protest”.
23. The CLEAR Parties argue that:
 - (a) The Unlawful Events cannot be defined as an “event” under the Parks Bylaw because they are a protest.
 - (b) The general prohibition on conducting unpermitted events in section 3.8 of Parks Bylaw does not apply in a park because that section does not specifically refer to a park.
 - (c) The Bylaw is arbitrary because it does not specify the procedure or conditions for obtaining a permit to use a park.
 - (d) The Tents do not meet the definition of a “tent” under section 3.17 because they do not have 4 sides and are not suitable for sleeping.
24. The above arguments, respectively, are untenable because:
 - (a) The purpose and intent of the Parks Bylaw is to regulate, prohibit and impose requirements in relation to the management of services, public places, nuisances, disturbances and other objectionable situations in City parks, recreation facilities, highways, and other public places. The term “event” is to be broadly interpreted in accordance with these goals and there is nothing in the Parks Bylaw or the City’s related policies to suggest that protests should be excluded from the meaning of “event” on the basis of their subject matter.
 - (b) Section 3.1 provides that no person shall use any land in a park in contravention of this Bylaw. The prohibition in section 3.8 constitutes such a contravention under 3.1.
 - (c) The permitting procedure and requirements for various categories of events, classified on the basis of their level of public impact and resource demands, is set out in detail in a number of official City policy and procedure documents, including the Kelowna Event Strategy.
 - (d) The balance of this section provides that 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.” The temporary structure called the “CLEAR Canopy” by the CLEAR Parties falls within the meaning and intent of this broad definition.

Good Neighbor Bylaw

25. The purpose of the Good Neighbour Bylaw is to regulate, prohibit and impose requirements in relation to nuisances, disturbances and other objectionable situations in the City. It must be broadly interpreted to give effect to these goals in the context of municipal concerns.
26. The CLEAR Parties argue that the sound they make is not regulated “noise” under section 7.3 of the Bylaw because a “park” is not “public space”.
27. Stuart Park is owned by the City and thus falls within the Bylaw definition of public space. The CLEAR Parties’ own affidavit material speaks to their choice of this location for their events on the basis that it is City-owned property open to the public for access and use. It is beyond doubt that Stuart Park is “public space”.
28. Section 7.3 also applies to private property and streets, in any event.

Traffic Bylaw

29. The CLEAR Parties openly admit to using and occupying the roadway for marches by hundreds or thousands of people, which posed a barrier and inconvenience to traffic. They argue that these actions do not constitute “loitering” because they have a purpose.
30. In the context of interpretation of municipal traffic bylaws, a prohibition on loitering in such a way as to obstruct or interfere with traffic includes activities associated with protesting: *The British Columbia Housing Management Commission v Doe*, 2017 BCSC 2387.

Outdoor Events Bylaw

31. The CLEAR Parties argue that the marches in the City roadways do not fall within the meaning of a “parade” or “procession” in the Bylaw because they were protesting and not celebrating.
32. The purposes of the Outdoor Events Bylaw include “to require organizers of outdoor events using city property or streets provide adequate health, sanitation, vehicle control, crowd control, and dog control, for public safety and the protection of public and private property”.

33. There is nothing in the meaning or purpose of the Outdoor Events Bylaw that would limit the regulated types of parades and processions to those involving celebration. Rather, the purpose of this Bylaw, and the City's related policies and procedures for outdoor event permits, is to ensure that all types of outdoor events include the above types of measures for public safety and property protection.

Stuart Park Grant Conditions

34. The CLEAR Parties argue that because the City received a Provincial grant in 2007 which required the creation of a publicly accessible town square or open space not restricted to a single activity, use, or group, the City may not regulate in relation to the Park in such a way as to impose any limits upon the CLEAR Events.
35. The terms of the grant do not require the City to permit the CLEAR Parties, or any party, to use Stuart Park without a permit or in a manner which violates the Bylaws. Insofar as the Bylaws have been enacted to ensure the fair and safe use of public spaces by all community members, they support the goal of preventing the monopolization of publicly funded space by a single interest group.
36. In addition to their interpretation being plainly incorrect, any actual violation of the terms of this grant would be enforceable only at the behest of the Province, not the CLEAR Parties, and would sound in damages, not estoppel of injunctive relief against third parties.

Constitutional Challenges to the Bylaws

Section 2(b): Freedom of Expression and 2(c): Freedom of Peaceful Assembly

37. Although public property is held in trust for the public, the right to access and use public spaces is not absolute. Governments may manage and regulate public spaces, provided that such regulation is reasonable and accords with constitutional requirements. Reasonableness must be assessed in light of the public purpose described.

Abbotsford (City) v. Shantz, 2015 BCSC 1909, para. 197

38. To the extent that the Bylaws may limit the section 2(b) and 2(c) freedoms, which is by no means a foregone conclusion, they would nonetheless do so in a reasonable manner which is demonstrably justified in a free and democratic society.
39. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1, Charter of Rights and Freedoms

40. To determine whether an impugned law is justified under section 1 of the Charter:
- (a) First, the court must be satisfied that the objective of the law is of sufficient importance to warrant the overriding of the constitutionally protected right in issue. The objective must be pressing and substantial.
 - (b) Second, the court must be satisfied that the means chosen are “reasonable and demonstrably justified”. This involves a form of “proportionality test” with the following three important components, all three of which must be satisfied:
 - (i) There must be a rational connection between means chosen by the legislature and the legislative objective.
 - (ii) The means must impair the right as little as possible in order to achieve the legislative objective.
 - (iii) There must be proportionality between the legislative objective and the effect of the legislation on the Charter-protected interests that it limits.

R. v. Oakes, [1986] 1 SCR 103

Prescribed By Law

41. This threshold inquiry asks whether the impugned sections of the Bylaws are authorized by statute, are binding rules of general application, and are sufficiently accessible and precise to those to whom they apply as to provide an intelligible standard according to which the judiciary can do its work.
42. The Bylaws, which are binding rules of general application in the City, are authorized by the following sections of the *Community Charter*:
- (a) Parks Bylaw: section 8(3)(b) and (h), 62 and 64
 - (b) Good Neighbor Bylaw: section 8(3)(h) and 64
 - (c) Outdoor Events Bylaw: section 8(3)(b), (g) and (h), 62 and 64
 - (d) Traffic Bylaw: Part 3, Division 5, as well as the *Local Government Act* and the *Motor Vehicle Act*.
43. The CLEAR Parties also refer at intervals to an allegedly unconstitutional “Arbitrary Decision”. The within proceeding is not a judicial review of any administrative decision, and the content of the alleged Arbitrary Decision appears to be merely the City’s interpretation and application of the terms in the Bylaws in bringing the

Petition. To the extent that the Arbitrary Decision may refer to the issuance of municipal ticket informations, a challenge to those informations must be made in the context of the offence proceedings, and would be a collateral attack and abuse of process in the within Petition.

44. The Bylaws are capable of interpretation; they leave the reader without doubt as to what conduct is prohibited. The Petition Respondents may not do the following except as authorized by a City permit:
- (a) use public property for an outdoor event, including land in a park;
 - (b) use a microphone and speakers to make sound that that disturbs other individuals or the public;
 - (c) remain in an area in such a way that they obstruct traffic or interfere with the use of the street;
45. This standard is not an onerous one, and unless the impugned law ‘is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools’, it will be deemed to have met the ‘prescribed by law’ requirement.

*Greater Vancouver Transportation Authority v. Canadian Federation of Students
— British Columbia Component, 2009 SCC 31, para. 54*

Objective of the Bylaws is Pressing and Substantial

46. When assessing the objective of the Bylaws, it is important to recognize tht they are “not traditional prohibitory legislation which pitches the state against the individual. Rather, it is part of a regulatory scheme by which the City endeavours to administer public space for the benefit of the public at large and balance the competing individual interests that exist with respect to such space.”

Vancouver (City) v. Zhang, 2009 BCSC 84 [“Zhang BCSC #1”], para. 63

47. The balancing of the numerous claims of the users of public property and streets in the City is done by way of bylaw. The regulation of events and activities which both physically impede, and create a deterrence with the nuisances caused by their impacts, is an essential part of this balancing function, including because they may effectively preclude competing uses and impose dangers to other users. These are pressing and substantial objectives.
48. “I doubt anyone would disagree that the streets are a finite public resource, whose use must be regulated, and that, as civic matters are currently allocated, the appropriate manager is the municipal government. It is self-evident that the right and freedom to use public streets cannot be absolute and that they have a multitude of competing uses. This is a case, then, where it has become necessary

to limit rights and freedoms because their exercise “would be inimical to the realization of collective goals of fundamental importance”: Oakes at 136”

Vancouver (City) v. Zhang, 2010 BCCA 450 [“*Zhang BCCA*”], para. 50

Rational Connection to the City’s Objectives

49. The limitations and restrictions in the Bylaws on the occupation of public space in a manner which excludes and inconveniences other prospective users is rationally connected to the City’s objective of balancing the interests of all users of this space in a safe and inclusive way.
50. The ability to obtain a permit to do otherwise restricted things, such as generating amplified sounds, erecting temporary structures, and occupying the roadway to the exclusion of traffic, allows for exceptions to these foundational limitations in a manner which respects the rights and freedoms of prospective users while also protecting the space for equal access.

Minimal Impairment

51. This element of the analysis asks whether whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit.
52. Where a bylaw regulating many competing uses of public space must address complex social issues, it is appropriate to give some deference to the elected City council on the basis that the Council, together with its advisors, is likely better positioned than the courts to choose among a range of alternatives to achieve its objectives.

Zhang BCSC #1, para. 58

53. The standard is not one of perfection. Even if a scheme would accomplish the same objective with lesser impairment of s. 2(b), the law will not be struck down if it falls within a range of “reasonable alternatives”

RJR- Macdonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, para. 160

54. The City has developed a comprehensive Event Strategy to guide approvals for use of public land for this purpose, and publishes detailed resources and guidance regarding the required elements for a successful permit application. These criteria are largely concerned with safety, liability, and accessibility; as such, they are reasonably tailored to meet the objectives of the Bylaws and well within a range of reasonable alternatives that minimally impair the rights of the Petition Respondents.

55. The CLEAR Parties take issue with the fact that the orders sought in the Petition cover only a small area, while the Parks Bylaw applies across the City. This reflects an attempt to confine the effect of the injunction order to areas where the Bylaws are being actively breached by the Petition Respondents, and thus prevent any collateral or overbroad impact on other parties.

Proportionality of Effects

56. At this stage, the salutary effects of the law for the public and the deleterious effects on individuals or groups will be weighed against each other to determine whether the overall effects of the law on the claimants are disproportionate to the government's objective.

Zhang BCCA, para. 70

57. The Bylaws regulate the use of public space through a sensitively tailored regulatory scheme. The salutary effects of the scheme for the public include the reduction of the risk of harm to other users and the balancing of interests of those competing for the use of the street. These outweigh the deleterious effects on individuals or groups affected by the reasonable and important limitations on the use of the space.

58. The CLEAR Parties and others remain free to convey their message at any location they choose and in a manner that does not involve breaches of the subject Bylaws. As such, the inconvenience to the CLEAR Parties resulting from the requirement to obtain a permit before they may carry on events, use amplified sound, and occupy roadways as part of their expressive activity, is outweighed by the benefits to the public resulting from these requirements.

Section 7: Life, Liberty and Security of the Person

59. The only provisions of the Bylaws identified by the CLEAR Parties which could have conceivably any potential impact on their Section 7 rights are those which create offences for breaches of the respective Bylaws, which may be prosecuted by way of ticket or long-form information.
60. The Petition does not engage these provisions of the Bylaws; as such, the CLEAR Parties' submissions on this point are not relevant to this proceeding.
61. To the extent that the CLEAR Applicants seek to challenge any tickets which have been issued in other proceedings, this is an impermissible collateral attack and abuse of process.

Constitutional Challenge to the RCMP Act and Provincial Police Act

62. The constitutionality of these federal and provincial statutes is not genuinely at issue on this Petition. To the extent that the City seeks an enforcement order as part of the injunction, this would be enforceable by any peace officer.

Improper Purpose for Petition

63. The CLEAR Parties allege that the City has brought the Petition to enforce its Bylaws for the purpose of “punishing the Respondents for exercising their Constitutional freedoms” and due to pressure or threats from the Provincial and Federal governments. There is simply no evidentiary basis for this submission.
64. The City employs a progressive enforcement approach to breaches of its Bylaws. There is nothing to suggest that the City’s conduct in relation to the Petition Respondents has been either inconsistent with its usual practice or motivated by an improper purpose.
65. There are thus clear grounds to believe that the CLEAR Parties’ legal arguments in response to the Petition have no merit and are unlikely to succeed.

Public Interest Weighing Exercise

66. Section 4(2)(b) requires the plaintiff to prove on a balance of probabilities that — due to “the harm likely to have been or to be suffered” by the plaintiff as a result of the defendant’s expression — the public interest in allowing the proceeding to continue outweighs the proceeding’s “deleterious effects on expression and public participation”.
67. The Supreme Court of Canada has described this weighing exercise as “the core of the analysis, as it allows the court to strike an appropriate balance between the protection of individual reputation and freedom of expression, the competing values at the heart of anti-SLAPP legislation.”

Neufeld, para. 58

68. In this case, individual reputation is not at issue – highlighting why this application should be dismissed at the first stage of the test. The goal of protection of freedom of expression lies on both sides of the equation.
69. The interests to be balanced are those of the CLEAR Parties, as a single group, and those of the rest of the public, who may also wish to use the public space that the CLEAR Parties have appropriated to themselves without respect for the limits put in place by the City to ensure fair and safe use of this limited public resource.

- 70. There is a strong public interest ensuring the enforceability of validly enacted law, especially where the nature and declared purpose of the legislation is to promote the public interest, such as the Bylaws.

North Pender Island Local Trust Committee v. Conconi, 2009 BCCA 17

The CLEAR Parties' breaches of the bylaws negatively impact the rights of other members of the community, including the right of others to use public space to express themselves – the very right upon which the CLEAR Parties themselves rely.

- 71. The CLEAR Parties have not demonstrated that dismissing the Petition will itself provide a public benefit sufficient to overcome the Bylaws' benefit to the public interest.

- 72. The public interest thus overwhelmingly favors continuing the proceeding.

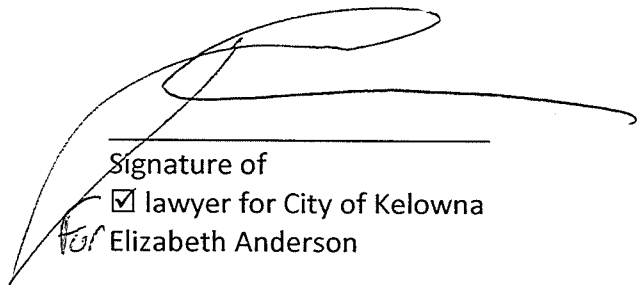
Part 6: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Kevin Mead made 22/Nov/2023.

The Application Respondent that the application will take 1 day.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Date: 22/Nov/2023



Signature of
 lawyer for City of Kelowna
Elizabeth Anderson