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

WRITTEN ARGUMENT OF THE CITY OF KELOWNA

Counsel for the Petitioner;

Barry Williamson
Nick Falzon
1616-808 Nelson St.
Box 12147, Nelson Square
Vancouver, BC V6Z 2H2
Telephone: 604.689.7400
Email: anderson@younganderson.ca

The Respondents;

David Lindsay on his own behalf and on behalf of Common Law Education and Rights
P.O. Box 21 113 Cherry Lane Mall
Penticton, British Columbia V2A 8K8
Telephone: 250.809.2012
Email: clear2012@pm.me

I. 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.

Affidavit #1 of K. Mead, para. 9, 11-14, 29-32

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.

Affidavit #1 of K. Mead, paras. 4-5, 8, 15-16

II. LEGAL BASIS

Anti-SLAPP Legislation in BC

4. BC's *Protection of Public Participation Act* ("PPPA") is explicitly modeled on the Ontario legislation bearing the same name. The Supreme Court of Canada canvassed the purpose of this legislation in *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 ["*Pointes*"]:

> 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.

para. 2; see also, paras. 6-15

5. As the Court noted, the purpose of this legislation is to deter the use of SLAPPs as a means of quelling speech that is in the public interest. Rather than requiring the court to determine whether the purpose of the litigation is nefarious, as noted above, the PPPA creates a discrete legal test whereby proof of certain elements stops a proceeding in its tracks. As stated by the Honourable David Eby, then Attorney General of BC:

> 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. Lawsuits that are improperly motivated by the intent to silence expression are often referred to as strategic lawsuits against public participation, or by the acronym SLAPP.
>
> The act would not, however, require the difficult assessment of a plaintiff's motive. Rather, the 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.
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> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41st Parliament, 3rd Sess, Issue No. 137, 15 May 2018, Hon. D. Eby

6. A section 4 application under the 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

7. 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 (s. 4(2)(a)(ii)).

8. 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 it is likely to have suffered or is likely to suffer due to the applicant's expression outweighs the public interest in protecting that expression.

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

Step 1: Does the Proceeding "Arise From" an Expression?

The Legal Test

9. Section 4(1) of the PPPA states:

> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that:

> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.

10. While it is most often used in response to defamation claims, nothing in the text of the PPPA limits the application of that act to such claims. The PPPA has *prima facie* application to any court "proceeding" (defined to have the same meaning as in the *Supreme Court Act* and including petition proceedings) that arises from an expression that relates to a matter of public interest.

11. The PPPA defines "expression" as "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". This definition is narrower than the meaning of the term under section 2(b) of the *Charter.*

> *Reynolds v Deep Water Recovery,* 2024 BCSC 570 at para. 106 ["*Deep Water*"]

12. An example of such a proceeding that is not a defamation action is the breach of contract claim at issue in *Pointes.*

> *Pointes*, para. 24

13. In *Pointes,* a numbered company sought the approval of the City Council of Sault Ste. Marie and the Sault St. Marie Conservation Authority to build 91-lot subdivision. The numbered company received the approval of the Conservation Authority, after which the Pointes Protection Association – a community group convened for the purpose of opposing the subdivision – sought judicial review.

14. While the judicial review was in progress, the City Council denied the numbered company's application. The numbered company appealed to the Ontario Municipal Board (the "OMB"). While both the OMB proceeding and the judicial review were pending, the numbered company settled the judicial review with the Association. The agreement included the following terms:

> 4) The Pointes Protection Association (hereinafter the "PPA") and its executive committee members comprised of Peter Gagnon, Lou Sim[i]onetti, Pat Gratton and Gay Gartshore together with Rick Gartshore, and Glen Stortini (the named individuals hereinafter referred to collectively as the "PPA members") <u>undertake and agree not to</u>

> take any further court proceeding seeking the same or similar relief as set out in the within Notice of Application;
>
> …
>
> 6) The PPA and the PPA members undertake and agree that in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding that they will not advance the position that the Resolutions passed by the SSMRCA on December 13th 2012 in regards to the Pointe Estates Development under subsection 3(1) of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the Conservation Authorities Act R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses or that the SSMRCA exceeded its jurisdiction by passing the above noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of Ont. Reg. 176/06 . . . . [Emphasis added.]
>
> para. 88

15. At the OMB hearing, one of the members of the Association, who was a signatory of the agreement, testified that the subdivision would result in a loss of wetland and in environmental damage to the region.

16. On the basis of that testimony, the numbered company initiated a breach of contract claim against the Association, seeking $6 million in damages.

17. In this context, the Court considered "arise from" in *Pointes*:

> Second, 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.[1] 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. A good example of a type of proceeding that is not a defamation suit, but that nonetheless arises from an expression and falls within the ambit of s. 137.1(3), is the underlying proceeding here, which is a breach of contract

> claim premised on an expression made by the defendant (this is explored in further detail in Part IV of these reasons). Indeed, the APR explicitly discouraged the use of the term "SLAPP" in the final legislation in order to avoid narrowly confining the s. 137.1 procedure (at para. 22), and the legislature obliged.
>
> para. 24

18. The Court's footnote at paragraph 24 indicates that the inquiry as to whether a proceeding arises from an expression is context-specific and does not lend itself well to a bright line rule:

> [1] I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the "arising from" standard (*Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 1997 CanLII 2230 (ON CA), 33 O.R. (3d) 362 (C.A.); *New Brunswick v. O'Leary*, 1995 CanLII 109 (SCC), [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420).

The City's proceeding does not "arise from an expression"

(a) Summary of City Position

19. The City's enforcement proceeding in this circumstance does not "arise from an expression" in the manner contemplated by the PPPA.

20. The City's position is simple: for section 4 purposes, a proceeding arises from an expression only if the content of the expression is an element of the illegality alleged in the proceeding, as was the case in *Neufeld* and *Pointes*. It is not enough that the proceeding relates to harms caused by the communication at issue, or that are taken to facilitate it, such as excessive noise, nuisance or trespass. Where, as here, the content of a communication is irrelevant in the proceedings at issue, the proceedings cannot be said to "arise from" that communication for section 4 purposes.

21. None of the bylaw prohibitions the City seeks to enforce either target or have a sufficient nexus with the content of speech. They are not, therefore, causally related to the content of the respondents' speech in the manner required by the PPPA.

22. This is borne out further by the relief sought by the City. The statutory injunctive relief sought in the Petition does not address or restrain the substantive content of any expression, or the activity of protesting. Rather, it 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.

23. There is, therefore, not the necessary level of causation required to engage the PPPA analysis.

24. 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.

25. 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.

26. 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 penalizing or restraining the communication of the CLEAR Parties' message on a topic by any and all channels or means.

(b) Relevant Jurisprudence

27. It is clear from all of the decisions dealing with the words "arise from an expression" that the causal link that Justice Cote identifies in *Pointes* deals not with a simple connection between "expressive behaviour" and a claim, but with a clear nexus between the *content* of an expression and a claim.

28. For example, this case is different than *Pointes* in which, although not a defamation claim, the matter arose from the actual content of the expression of the Association, who had agreed not to advance a certain position at any hearing of the OMB and were sued for an alleged breach of that agreement. There was a clear nexus between the content of the expressions by the Association and the commencement of a legal claim against them. There is no such nexus here, where the matter deals with the application of content-neutral bylaws.

29. This case is more akin to the decision in *Thatcher-Craig v. The Corporation of the Town of Clearview,* 2021 ONSC 7352 (reversed on other issues by 2023 ONCA 96), in which the Court found that a claim for breach of fiduciary duty did not "arise

from an expression". That claim was made by the applicants in relation to the Town's failure to remove from a public council agenda certain letters that they say defamed them. They argued that the refusal to take down the letters was used as a "bargaining chip" to induce them to discontinue their Local Planning and Appeal Tribunal appeal.

30. Despite the matter's root in alleged defamatory letters, and the Town's alleged actions in relation to those letters, the Court was not prepared to find that the matter "arose from an expression":

> While the refusal to take down the defamatory public letters is part of the narrative on this claim, I do not view the expression at issue, which is posting of the public letters online, as having the element of causality as discussed in *Pointes Protection* in relation to the claim of breach of fiduciary duty advanced. In other words, the claim for breach of fiduciary duty does not arise from the expression, it arises from the alleged high-handed, malicious, bad faith conduct of the Township in encouraging the plaintiffs to develop their business on the one hand while then engaging in various efforts to thwart their business. At best, the alleged use of public letters as "a bargaining chip" is some evidence of malice or bad faith, but it is not integrally linked to the claimed breach of fiduciary duty.
>
> at para. 52

31. The distinction between "expression" in the s. 2(b) context and "communication" in the context of the PPPA can be appreciated from the subject of the enforcement in *Zhang.* The City contended that the meditation hut was a structure that did not convey expression. The chambers judge rejected this argument, citing *Weisfeld v. R.* (1994), 116 D.L.R. (4th) 232 (F.C.A.), a case involving structures maintained on Parliament Hill by cruise missile testing opponents. In *Weisfeld,* Linden J.A. disagreed with the trial court judge that the physical shelter did not convey a message. However, his reasoning for finding the structure was a form of expression is insightful in articulating the distinction between expression *per se* and activities that are, not directly expressive, but supportive of the exercise of the free expression right (at para. 29-30):

> The act of private citizens building a very visible structure on the ground of Parliament Hill, as well as maintaining a vigil there for more than two years, certainly conveys some kind of meaning. Similar peace camp protests were used in other countries at that time. This camp was meant to link up with other similar protests. The structure itself, therefore, <u>helped to</u>

> dramatize the message the appellant was seeking to communicate. It also manifested the protestors' commitment to the cause.
>
> In my view, expression goes beyond words. People may choose to amplify or dramatize their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or assist one in conveying a message more effectively. These "props" are part and parcel of the manner in which one chooses to express oneself and are as deserving of protection as the words to convey the meaning. The Peace Camp structures and tables used are, therefore, included in the concept of expression.

32. It can be said, however, that unlike the structures and table at issue in *Weisfeld*, which could be said to support the conveying of a message, as by dramatizing it, several of the examples mentioned by Linden J.A. - a sandwich board, a flag, a banner, a placard, a picture and a petition – directly convey a message, through words or pictorially. Each of them would constitute a "communication" as defined by the PPPA. On the other hand, the structures in *Weisfeld* and *Zhang*, while perhaps of assistance to the persons engaging in conveying some expressive content, cannot be said to communicate a message.

33. More recently, in *Deep Water, supra*, Morley J. categorized the claims advanced in Deep Water's counterclaim for the purpose of determining whether each "arises from" from an expression made by the applicant. He concluded (at para. 124) that the applicant Reynolds had not met the burden of showing that the *content* of the "Physical Intrusion Claims" arose from her expression.

34. Further, the judge was satisfied that Deep Water Recovery (DWR) would probably still have filed a counterclaim including the Physical Intrusion Claims if Ms. Reynolds had not communicated video footage obtained as a result of the allegedly tortious Physical Intrusion, affirming the finding that the burden under s. 4(1) the PPPA had not been met. To the extent that Morely J. accepted that a claim could arise from an expression if, even though it did not target the content of an expression, the applicant could prove that the claim was motivated by the expression, those statements are obiter and not binding on this Court. They run counter not only to the purposes of the PPPA which, as noted above at paragraph 2, was intended not to require an assessment of the plaintiff's motive, but also are at odds with jurisprudence of the Ontario Court of Appeal:

> [10] The motion judge was correct in finding that Canadian Tire's fraud claim is neither grounded in nor targeting any expression made by the appellants. We agree there is nothing in the record that supports the

> assertion that a year after the appellants made their allegations against Canadian Tire, it decided to commence a fraud claim to silence them.
>
> [11] Regarding the issue of motive, the plaintiff's motivation in commencing an action is not a relevant factor at the first stage of the SLAPP analysis, nor are the criteria that are used in determining whether an action should be dismissed. Instead, the inquiry is restricted under the *CJA* to the determination of whether the moving party has shown on a balance of probabilities that the action arises from an expression made by it that related to a matter of public interest.
>
> [12] SLAPP motions were intended to be a relatively summary procedure, designed to weed out unmeritorious actions that target expressions on matters of public interest. However, they have proven to be an unwieldly, expensive, and time-consuming remedy. We decline to contribute further to that problem by expanding the threshold test to include an investigation of a plaintiff's motive in commencing litigation and consideration of factors that would apply had the motion passed the threshold stage.

Canadian Tire Corporation, Limited v. Eaton Equipment Ltd., 2024 ONCA 25

See also *Schwartz et al. v. Collette,* 2021 ONSC 2138 at paras. 36-53

35. Returning to *Deep Water,* Justice Morley found that the "Surveillance Claim" did not "arise from" Ms. Reynold's expression, following the same analysis employed in respect of the "Physical Intrusion Claims".

36. However, in respect of the "Dissemination" aspects of DWR's counterclaim, Morley J. concluded they manifestly and obviously arose from the applicant Reynold's expression.

37. In examining each of the Physical Intrusion, Surveillance and Dissemination claims separately, the court found it appropriate to engage in the "pruning" exercise undertaken in *Rooney v. Galloway*, 2024 BCCA 8. A similar "pruning" exercise in this case in relation to the Unlawful Events supports the City's position that its petition proceeding does not "arise from" an expression by the applicants.

38. In his consideration of the various claims at issue in *Deep Water,* Morely J. addressed the decision of the Ontario Court of Appeal *Subway Franchise Systems of Canada Inc. v. Canadian Broadcasting Corporation,* 2021 ONCA 26. That case arose out of a CBC Marketplace program that claimed that only about half of the

chicken sold by Subway was actually chicken, based on certain forensic testing done by Trent University. In that case, the negligence claim against Trent for the alleged improper testing of the chicken "arose from an expression" both because it was connected to a defamation claim and because it claimed damages to Subway's reputation. In other words, there was sufficient nexus between the *content* of the expression and the claim at issue, because the claim would not have arisen but for the content of the CBC report.

39. In sum, the authorities show that in order for a proceeding to "arise from an expression" there must be a causal link between the content of the expression and the proceeding said to arise from it. The Court should dismiss the applicant's claim at the first stage of the inquiry because the City's claim does not fall within the "arises from" standard.

(c) "Expression"

40. Even if this Court does not adopt the City's submission that a proceeding must have a causal nexus with the *content* of expression in order for the PPPA to apply, then the claim still must fail at stage 1. This is because, when one looks at the nature of the City's claim, it is clear that it does not target expression at all, as that term is used by the PPPA.

41. Erection of tents – Section 3.8 of the Parks Bylaw does not target expressive behaviour. In any event, the "CLEAR" tents do not bear expressive content themselves. Accordingly, in respect of this component, the Petition targets non-expressive (physical) conduct or harms; Deep Water, at para. 87. Further, the CLEAR applicants have not met the burden of showing in the case of non-expressive conduct (as here respecting the tents) that the proceeding would not have been initiated if expression had not otherwise occurred; *Deep Water*, at para. 127-131.

42. Merchandise sales – Section 3.3 of the Parks Bylaw, which prohibits the sale of refreshments and merchandise, does not target the expressive behaviour. The purpose of section 3.3 is not aimed at the prohibition or regulation of any particular message through any of the articles of merchandise displayed for sale. For example, the City does not seek, either through the Bylaw itself or through the relief sought in the Petition, to prohibit the wearing of T-shirts that convey anti-vaccine or other messages. Rather, in seeking to enjoin merchandise sales the relief sought addresses the appropriation of a public space for a commercial activity. The City is targeting a non-expressive, physical harm.

43. Standing/loitering on public roadways and group parades and processions – The provisions of the City's Traffic Bylaw at issue (sections 8.2.2 and 8.2.4) here relate to persons' simple physical presence on a roadway and obstruction and interference with traffic as a consequence of the physical act of standing or loitering.

44. The City acknowledges that in some contexts the act of walking along a roadway or occupying a sidewalk may have expessive content, as in the case of the act of begging or the activity of squeegeeing; see *R. v. Banks*, 2007 ONCA 19, at para. 108-113. However, in *Banks* the court was dealing with a statute that proscribed the act of solicitation while physically present on a roadway. The appeal court noted that it was not dealing with just "the appellants' physical presence on the roadway."

45. Sound amplification – The City's submits that sound amplification itself is not an expressive behaviour in the manner contemplated by the PPPA, which deals specifically with "communications". The Good Neighbour Bylaw's prohibitions address deleterious impacts that, in the case of public spaces, will impair their use and enjoyment by the public, and not the content of expression.

46. The City acknowledges that the Supreme Court has held that the emission of amplified noise onto a public street is a form of expression protected by s. 2(b) of the *Charter*; *Montreal (City) v. 2952-1366 Quebec Inc.,* 2005 SCC 62 ("*Montreal*"), at para. 66. However, the court's conclusion was not a categorical, "anything goes" pronouncement for the purpose of determing the scope of the fundamental expression right. Adverting to the "primary function" test of Lamer C.J. from *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the majority in *Montreal* noted (at para. 67):

> Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, emitting noise by sound equipment onto public streets seems not in itself to interfere with it. If sound equipment were being used in a way that prevented people from using the street for passage or communication, the answer might be different.

47. The bylaw provision at issue in *Montreal* did not target intrusive or objectionable noise. Rather, it contained a blanket prohibition on noise produced by sound equipment, whether inside a building or installed or used outside; *Montreal*, at para. 3. While the Montreal bylaw provision was found to infringe s. 2(b), it was justified under s. 1, the majority noting (at para 91) that:

> People in urban neighbourhoods cannot expect to be free from the sounds of many activites that go around them. However, they can and do expect the level of this intrusion to be limited, so that they can enjoy a measure of peace and quiet. This was the City's objective. Presumptively prohibiting the emission of amplified noise was one of the means by which it sought to accomplish that objective.

48. This is the same objective behind section 7.3 of Kelowna's Good Neighbour Bylaw. It is important to recognize that the *Charter* analysis undertaken in *Montreal* differs from the analysis required under s. 4(1) of the PPPA as to whether a proceeding arises from "expression"; the scope of the PPPA being narrower, dealing specifically with acts of communication.

Deep Water, at para. 106.

49. However, the Supreme Court's suggestion that a provision would not offend s. 2(b) if it was directed to conduct that prevented (or by extension, impaired) the use and enjoyment of public spaces, parallels the PPPA analysis as to whether a proceeding arises from "expression". Noise or sound which is "liable to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of individuals or the public". The Good Neighbour Bylaw provision does not target "expression". Instead, it is directed to non-expressive harms.

50. Further, the CLEAR applicants cannot maintain that the use of sound amplification is necessary for them to engage in "expression". Again, adverting to the s. 2(b) jurisprudence, the applicants are unable to show that s. 7.3 of the Good Neighbour Bylaw "effectively precludes" the exercise of their expressive rights.

Deep Water, at para. 107-111

<u>Exercises of statutory authority not the target of the PPPA</u>

51. Leaving aside that, as a matter of plain language, the PPPA does not apply in this proceeding, the City also submits that the Court's analysis ought to be informed by the fact that the PPPA is not targeted at litigation that can (and in this case does) engage the *Charter* and other public law remedies.

52. First, the CLEAR Parties have cited no authority for the proposition that the PPPA is applicable in bylaw enforcement proceedings, or to government action more generally. To the knowledge of counsel, there are no such reported cases. The Court's acceptance that the PPPA is applicable in these circumstances would be an expansion of the existing case law in relation to similar statutes.

53. Second, government action to enforce the law is not the mischief at which the PPPA was aimed. As noted by the Honourable David Eby:

> …So you say: "Well, with a constitution that has section 2(b), with a constitution with all these judgments that say all these wonderful things about truth and democracy and expressing yourself, why do we need this bill? Why would we ever need it? This is already here."
>
> Well, the issue is that section 2(b) in the constitution only applies directly to government action. There's a case called *The Dolphin Delivery* — the earliest days of the *Charter*. You learn it in first-year law school. It talks about the fact that the *Charter* applies to government action only. Now, as soon as lawyers are involved, of course, it's not immediately obvious what government action is. But it's clear that the majority of defamation cases do not involve the government actually. They involve two private actors.
>
> The courts have tried to reconcile the fact that there's this very high value on free expression in our constitution, yet that part of the constitution does not apply directly to a dispute between two private parties. So the way the court has tried to square that circle and say that we've got this historic, archaic tort of defamation that protects the royals from comments from the plebes and we've got this *Charter* that says free expression of everyone is incredibly valued and we've got to protect it from government interference is to say that section 2(b)'s values, or the values that underlie the constitution, apply to the common law or the law that applies to disputes between two parties.
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> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41st Parliament, 4th Sess, Issue No. 198, 14 Feb 2019, Hon. D. Eby

54. It is clear that the legislature, when enacting the PPPA, was explicitly concerned with addressing the gap in protection of free speech which exists in litigation to which the *Charter* does not apply. As is evident from the face of their application, the CLEAR Parties rely primarily on the *Charter,* as well as other public law principles such as bad faith, to oppose the relief sought by the City – thus demonstrating that the present circumstances are not those that legislature has targeted with the PPPA.

55. However, the City acknowledges that the text of the PPPA does not specifically limit its application to tort claims. The City does not say, therefore, that a proceeding for injunctive relief could never fall within the ambit of the protection provided by the PPPA.

56. One such example would be a proceeding commenced under the *Access to Abortion Services Act,* which creates a "bubble zone" around facilities at which abortion services are provided. The prohibitions in that act are specifically targeted at the content of expressive behaviour. For example, the *AASA* defines one prohibited behaviour – "side walk interference" – as including "(a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, (b) or informing or attempting to inform a person concerning issues related to abortion services by any means, including, without limitation, graphic, verbal or written means."

57. A proceeding brought by the government under the *AASA,* and met with a responsive application under the PPPA, would very likely pass the initial hurdle at section 4(1) of the PPPA and need to be decided pursuant to the second stage of the test (section 4(2)). This is because the rules the government would be seeking to enforce in our hypotetical example are inherently targeted at the content of expressive behaviour.

58. However, that is not the case in relation to this matter, where the rules at issue are content-neutral. The City urges the Court to take apply an interpretation of section 4 that accounts for its purposes.

Conclusion

59. In sum, expression is broadly defined and should be broadly interpreted. However, the core purpose of the PPPA is the protection of the content of the subject expression, however that expression may be conveyed.

60. This is clear from the reported cases dealing with section 4 applications, all of which protect an applicant's right to say something specific without the threat of liability in damages or the legal costs of defending unmeritorious claims – not to occupy public space in a manner which constitutes a nuisance simply because they are also expressing themselves.

61. Finally, the City says that the CLEAR Parties' theory that the Petition is an element of some broad conspiracy by various government and other entities to silence them due to the content of their expression is based entirely upon speculation and vaguely articulated hearsay. This bare submission does not meet the evidentiary burden to show, on a balance of probabilties, that this proceeding arises from those expressions within the meaning of the PPPA as a causal matter (see also, *Thatcher-Craig* at para. 52).

62. This application thus fails at the first stage of the test, and should therefore be dismissed.

Step 2: Reasonable Grounds to Believe: Substantial Merit and No Valid Defence

63. 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

64. 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

65. 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.

Affidavit #1 of D. Lindsay, paras. 42, 49-50, 64, 66, 68-69, 112, 164-167, 193-195, 309-310, 313-314, 320
Affidavit #2 of D. Lindsay, paras. 20, 25, Exhibit D

66. 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 City's interpretations of its own Bylaws in relation to their activities.

67. 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."

Pointes, para 52

68. To the extent that many of the CLEAR Parties' defences are predicated on the invalidity (constitutional or otherwise) of the City's bylaws, they invite the Court to treat this application as an even more intense review than a summary judgment

motion. That is contrary to the Court's direction in *Pointes.* Similarly, it cannot have been the intention of the legislature, in passing the PPPA, to allow for the argument of an entire constitutional case, on the merits, within the context of such an application.

69. 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) Estoppel;

d) A consitutional challenge to the Bylaws under sections 2(b), 2(c) and 7 of the *Charter of Rights and Freedoms*;

e) A constitutional challenge to the federal *RCMP Act* and the BC *Provincial Police Act*; and

f) Improper purpose for the Petition.

Statutory Interpretation of Bylaws

70. Chief Justice Bauman (as he then was) observed that "it is always salutary to remind oneself of the basic principles of statutory interpretation applicable in construing this species of delegated legislative authority."

Society of Fort Langley Residents for Sustainable Development v. Langley (Township), 2014 BCCA 271 ["*Fort Langley*"], para. 11

71. The words of an enactment are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the enactment, the object of the enactment, and the intention of the legislative body that passed the enactment.

Fort Langley, para. 12

72. Section 4(1) of the *Community Charter* expressly directs that the powers it confers on municipalities must be interpreted broadly in accordance with its purposes and in accordance with municipal purposes.

Fort Langley, para. 17

73. Ultimately, 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.

Fort Langley, para. 18

74. In global response to the CLEAR Parties' interpretive arguments, the City says that they do not comport with the modern principle of statutory intepretation and the approach above to the interpretation of municipal bylaws. The attempts to narrowly constrain the City's bylaws through dictionary defintions or isolated readings of individual provisions or clauses in the bylaws, with respect, invite the court to "miss the forest for the trees" when reading the bylaws.

<u>Parks Bylaw</u>

75. 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, saying that protests should not be considered "events" due to their subject matter, and thus the Unlawful Events are not "events" requiring a permit under this Bylaw.

76. Whether a particular gathering 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".

77. The CLEAR Parties argue that:

(a) The Unlawful Events cannot be defined as an "event" under the Parks Bylaw because they are a protest, appearing to further allege that a protest *cannot* be an "event".

(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.

78. 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. There is nothing in the Parks Bylaw or the City's related policies to suggest that protests which feature the activities directly regulated by the bylaw in order to minimize and prevent nuisances should be excluded from the meaning of "event" on the basis of their subject matter.

Parks Bylaw, pg. 1

(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 constitues such a contravention under 3.1.

Parks Bylaw, pg. 4

(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.

Affidavit #1 of K. Mead, paras. 17-25

79. The CLEAR parties argue that the City's case is not likely to succeed in part through an interpretation of the words 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." They say that the "CLEAR Canopy" is not a "tent" and therefore the section cannot apply.

80. This argument focuses too narrowly on the word "tent", within the broad definition above. The City says that the temporary structure called the CLEAR Canopy falls within the meaning and intent of this broad definition, which is aimed

at the construction of temporary structures in a general sense, as evidenced by the words “or other construction whatsoever” at the end of the clause. It is clear that Council did not intend to create watertight categories of different structures. Rather, the obvious intent was to empower bylaw enforcement officers to ensure that parks are kept orderly through the limitation of temporary structures of many types.

Parks Bylaw, pg. 5

Good Neighbor Bylaw

81. 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.

Good Neighbor Bylaw, pg. 1

82. 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”.

83. Stuart Park is owned by the City and thus falls within the Bylaw’s 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”.

Good Neighbor Bylaw, pg. 2

84. Section 7.3 also applies to private property and streets, in any event.

Traffic Bylaw

85. The petition alleges that the CLEAR Parties are in breach of sections 8.2.2 and 8.2.4 of the Traffic Bylaw, which are as follows:

> 8.2.2 Walk on **sidewalk**. **Pedestrians** shall not walk on the **roadway** where there is a **sidewalk** that is reasonably passable on either or both sides of the **roadway**.
>
> 8.2.4 Obstructing **traffic**. No person shall stand or loiter in such a manner as to obstruct or impede or interfere with **traffic** on a **roadway**.

86. 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.

Affidavit #1 of D. Lindsay, paras. 49, 69, 164-167

87. They argue that these actions do not constitute "loitering" because they have a purpose. In the context of interpretation of muncipal 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, paras. 43-38

88. The admitted actions of the CLEAR Parties and associates fall squarely within the legal definition of loitering, and create issues which are intended to be addressed by the regulations in the Traffic Bylaw.

Outdoor Events Bylaw

89. 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.

90. The purposes of the Outdoor Events Bylaw include "to require organizers of outdoor events using city property or streets to provide adequate health, sanitation, vehicle control, crowd control, and dog control, for public safety and the protection of public and private property".

Outdoor Events Bylaw, pg. 1

91. 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

92. The CLEAR Parties argue that because the City received a Provincial grant in 2007 which required the creation of a publicly acessible 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.

Affidavit #1 of D. Lindsay, paras. 18-20

93. This argument bears the hallmarks of what the courts have referred to as "Organized Pseudolegal Commercial Arguments" (OPCA). The Respondent Lindsay in particular has an extensive history of advancing such arguments, some of which were summarized by Associate Chief Justice Rooke (as he then was) as follows:

> [101] OPCA concepts that Lindsay has promoted include:
>
> 1. various deficiencies in judicial oaths prohibit court action: *R. v. Lindsay*, 2006 BCSC 188 at paras. 30-38, affirmed 2007 BCCA 214;
>
> 2. that the relationship between the state and a person is a contract, and one can opt out of that contract: *R. v. Lindsay*, 2011 BCCA 99 at para. 32, leave refused [2011] SCCA No. 265;
>
> 3. that the obligation to pay income tax is one such agreement: *R. v. Lindsay*, 2011 BCCA 99 at para. 31, leave refused [2011] SCCA No. 265;
>
> 4. legislation, the common-law, and court principles and procedures are trumped by "God's Law" and other divinely ordained rules and principles: *R. v. Lindsay*, 2011 BCCA 99 at para. 31, leave refused [2011] SCCA No. 265;
>
> 5. the same natural person argument advanced by Porisky: *R. v. Lindsay*, 2011 BCCA 99 at para. 27, leave refused [2011] SCCA No. 265;
>
> 6. that an aspect of the 1931 Statute of Westminster meant all post-1931 government legislation and action is unauthorized: *R. v. Lindsay*, 2004 MBCA 147 at para. 32; and
>
> 7. that the Magna Carta has super-constitutional status and restricts state and court action: *R. v. Lindsay*, 2008 BCCA 30 at paras. 19-21.
>
> *Meads v. Meads*, 2012 ABQB 571 ["*Meads*"], at para. 101
> [parallel citations omitted]

94. The argument regarding the Stuart Park grant draws upon elements of what have been characterized as "Defective State Authority" and "Everything is a Contract" OPCA motifs. By characterizing the funding arrangements as a contract between the Province and the City, of which the CLEAR Parties deem themselves beneficiaries and allege they are entitled to enforce, they attempt to impose limits

upon the ability of the City to regulate in relation to this area in furtherance of municipal statutory authority.

95. In this case, the City is not required by virtue of any provincial grant 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 in fact support the goal of preventing the monopolization of publicly funded space by a single interest group.

96. 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.

Estoppel/Discrimination

97. The CLEAR Parties argue that the City is estopped from enforcing its bylaws, in part as a result of the Province's grant of $500,000 to the City in relation to the construction of Stuart Park, and because they allege they have been subject to enforcement while others have not.

98. Local government are not estopped from the enforcement of bylaws.

Langley (Township of) v. Wood, 1999 BCCA 260 at para. 11-17;

Sooke (District) v. Driver, 2023 BCSC 63 at para. 26-27

99. In any event, none of the bylaws the petitioner seeks to enforce in this matter limit the use of Stuart Park to anything other than a public park. Even if the CLEAR Parties were correct that the City's application for and receipt of a grant from the Province could ground an estoppel argument, which the City denies as a matter of law, nothing in the City's conduct could be reasonably taken as a promise not to enforce bylaws that are generally applicable to public space.

100. As with claims of estoppel, claims of unequal enforcement have been uniformly dismissed by the Courts.

T.S.G. Sales Ltd. v. Vancouver (City), 2012 BCSC 1177

101. Finally, while the legal principles above are dispositive of this portion of the CLEAR Parties' argument, the facts also do not support it. The evidence led by the CLEAR Parties on this application appears to show individual instances of protest activiy,

which the CLEAR Parties say proves that the City has engaged in differential enforcement of their bylaws. The evidence led does not establish that as a matter of fact.

102. Rather, the evidence shows that the City's policy of progressive enforcement has been consistently applied. In particular:

(a) The City did not begin to escalate enforcement against the CLEAR Parties for approximately 17 months.

Affidavit #1 of D. Lindsay at para. 224

Affidavit #1 of K. Mead at para. 4, 15

(b) The City only began to escalate its enforcement measures after Mr. Lindsay and others indicated that they would refuse to comply with City bylaws.

Affidavit #1 of D. Lindsay at para. 77-78

Cross-Examination of K. Mead at p. 54

(c) The CLEAR Parties have not established that any individual protest continued for the same duration as their Freedom Rallies. In relation to certain protests that did go on for some time, such as the protests against the Iranian Government, the only evidence before the Court is that those protestors began to comply with City Bylaws.

Cross-Examination of K. Mead at pp. 148-149

Constitutional Challenges to the Bylaws

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

103. By way of general overview, the overall trend of the caselaw is that even where an infringement of the s. 2(b) freedom of expression right has been found, municipal bylaw infringements relating to streets and public spaces have been justified under s. 1 of the *Charter.*

Montreal (City) v. 2952-1366 Quebec Inc. et al, 2005 SCC 62;

R. v. Pawlowski, 2011 ABQB 93, aff'd 2014 ABCA 135;

R. v. Banks, 2007 ONCA 19

104. 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

105. 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.

Non-Constitutional Vagueness

106. To the extent that the Clear Parties application can be taken as raising a challenge to the various Bylaws on the basis of vagueness, the Bylaws satisfy the test set out in *Kelowna Mountain Development Services*, 2014 BCCA 369, cited in *Saanich v. Miller*, at para. 57:

- Laws need not achieve absolute precision in order to survive a vagueness challenge. However, a law will be found to be unconstitutionally vague if it so lacks in precision as not to provide an adequate basis for legal debate – that is for reaching a conclusion as to its meaning by reasoned legal analysis applying legal criteria: *Nova Scotia Pharmaceutical Society,* [1992] 2 SCR 606.

- In the context of municipal bylaws, the test for assessing vagueness asks whether a reasonably intelligent person would be able to determine the meaning of the bylaw and govern his or her actions accordingly. Mere difficulty in the interpretation of the bylaw is not sufficient. [citations omitted]

- A municipal bylaw is not necessarily void for uncertainty merely because its terms may be susceptible to more than one interpretation: *The City of Montreal v. Morgan,* (1920), 60 SCR 393, at 404.

- Municipal bylaws are to be interpreted benevolently and supported if possible: *The City of Montreal* at 404: *Okanagan Land Development*, at para. 50

107. 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*

108. 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 *Charte*r-protected interests that it limits.

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

Section 1 Analysis and the Objective of S. 4 of the PPPA

109. In light of the extensive argument that has been presented by the CLEAR Parties on this application, and especially as it relates to the s. 2(b) and s. 1 *Charter of Rights* issues, it is worth bearing in mind the observations of the Ontario Court of Appeal in a recent decision regarding practical effect of the anti-SLAPP legislation straying from its objectives:

> The practical effect of the legislation appears to be rather different from what was originally anticipated. As Pepall J.A. observed in *Park Lawn Corporation v. Kahu Capital Partners Ltd.* [citations omitted], s. 137.1 has spawned a plethora of complex and protracted procedural litigation that is "expensive, time consuming and open to abuse." The mandatory 60-day time limit for resolving s. 137.1 motions is routinely ignored and, rather

> than screening out obviously unmeritorious claims at any early stage, the proceedings typically involve "the entire trial being played out in advance." [citations omitted] While the Legislature's intention in enacting s. 137.1 was to create a preliminary hurdle, "the process advanced in practice is more like a marathon."
> …
> Commentators on anti-SLAPP litigation have increasingly drawn attention to the fact that anti-SLAPP motions are often complex, lengthy and expensive. Because of the high stakes involved, particularly for plaintiffs who risk having their action dismissed at a preliminary stage and having to pay full indemnity costs, most anti-SLAPP motions typically devolve into a detailed examination of the merits, including evidentiary disputes over proof of harm and causation.
>
> *Burjoski v. Waterloo Regional District School Board*, 2024 ONCA 811 ["*Burjoski*"], at para. 42, 44

110. In *Burjoski*, the Court went on to summarize the principles that should govern anti-SLAPP motions, at para. 47. Amongst the factors relevant to the "weighing exercise" (under s. 4(2)(b) of the BC PPPA), the Court references whether the plaintiff has a history of using litigation or the threat of litigation to silence critics (not present here) and a punitive or retributory purpose animating the action (again not present here). Other factors include the relative resources of the parties and the importance of the expression. On the latter point, the City has previously noted that the rules it is seeking to enforce are content-neutral.

Section 1 Analysis: Prescribed By Law

111. 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.

112. 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*.

113. 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.

114. 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;

115. 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

<u>*Section 1 Analysis: Objective of the Bylaws is Pressing and Substantial*</u>

116. When assessing the objective of the Bylaws, it is important to recognize that 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

117. 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.

118. "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

119. With respect to the main cases that have been referenced in the parties' arguments regarding section 1 of the *Charter*, it is noteworthy that they are unanimous in finding that the challenged measures had a pressing and substantial objective:

Montreal (SCC)– see para. 89;
R. v. Banks, 2007 ONCA 19 – see para. 129;
Batty v. Toronto (City), 2011 ONSC 6862 – see para. 91 to 96;
Zhang, BCCA – see also para. 59;
R. v. Pawlowski, 2011 ABQB 93 – see para. 94;
R. v. Pawlowski, 2014 ABCA 135 – see para. 13;
Berube v. City of Quebec, 2019 QCCA 1764 – see para. 82 to 85;
Garbeau v. Montreal (City), 2015 QCCS 5246 – see para. 217 to 220.

Section 1 Analysis: Rational Connection to the City's Objectives

120. 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.

121. 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.

122. Again, of the main authorities cited by the parties that are relevant to the rational connection test, they are unanimous in finding that the challenged measures had a rational connection to the municipality's or province's objective:

Montreal (SCC)– see para. 91;
R. v. Banks, 2007 ONCA 19 – see para. 130;
Batty v. Toronto (City), 2011 ONSC 6862 – see para. 97 to 98;
Zhang, BCCA – see also para. 60-61;
R. v. Pawlowski, 2011 ABQB 93 – see para. 95;
R. v. Pawlowski, 2014 ABCA 135 – see para. 14;
Berube v. City of Quebec, 2019 QCCA 1764 – see para. 88 to 106;
Garbeau v. Montreal (City), 2015 QCCS 5246 – see para. 221 to 225.

Section 1 Analysis: Minimal Impairment

123. This element of the analysis asks whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit.

124. 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

125. 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". Elected officials should be accorded a measure of latitude in attempting to find an appropriate balance where interests and rights conflict.

RJR- Macdonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, para. 160;
Montreal, at para. 94

126. 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.

Affidavit #1 of K. Mead, paras. 17-25, Exhibits A, B, C

127. 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.

128. The CLEAR Parties erroneously characterize the various bylaw provisions as prohibitory, and thus incapable of being "minimally impairing". With respect to each of the bylaw provisions at issue, provision is made either in the bylaw itself or through the Events Policy for permission to be sought and obtained for the impugned conduct:

(a) Tent/gazebo erection – S. 3.17 Parks Bylaw proscribing erection, construction except "without prior written approval of the City";

(b) Sound amplification – S. 7.3 Good Neighbour Bylaw – permissible under the framework of an authorization under the Event Policy;

(c) Merchandise sales in the park – S. 3.3 Parks Bylaw – no sale or display for sale of merchandise, etc. "without a permit issued by the City or written permission obtained from the City."

(d) Parade/procession – S. 8.2.2 Traffic Bylaw – must stay on sidewalk
- "Outdoor Event" including parade, procession – permit for obtainable under s. 2.1.2 of Bylaw.

129. The presence of a licence-granting provision in a bylaw scheme was significant to the Supreme Court's conclusion in *Montreal* that the provision at issue did not work an absolute ban, thus satisfied the proportionality standard.

Montreal, at para. 90

130. In *Zhang*, the City's argument that s. 71 of the Street and Traffic Bylaw on the minimal impairment test failed due to the lack of a policy for approval of political expression on City streets comparable to the policies governing commercial or artistic expression.

Zhang BCCA, at para. 69

131. In *Batty v. Toronto*, 2011 ONSC 6862, D.M. Brown J. distinguished *Zhang* on the basis that the Toronto bylaw at issue contained a provision for applications for exemptions without reference to any underlying policies which might differentiate with respect to the activities for which an exemption might be sought. Justice Brown also considered the failure of the applicants to have sought an exemption:

> However, the applicants were further to argue that the absence of a policy providing more details about the circumstances in which an exemption would be issued constitutes a constitutionally fatal defect in the Parks By-law. I disagree. First, the applicants and Protestors did not apply for a permit. It strikes me that for a litigant to argue that the exemption provisions of a municipal by-law are constitutionally inadequate when it did not try to obtain an available exemption is simply setting up a "straw man" argument. It would be one thing if the applicants had applied for a permit exempting their occupation of the Park from the two by-law restrictions identified in the Trespass Notice and had been turned down. They then could ask a court to review whether the exercise of the delegated authority or discretion in denying the permit met the legal reuirements of reasonableness, reaonableness, good faith, relevant considerations, and consideration of any engaged *Charter* rights or freedoms. That did not happen in this case. I find this argument by the applicants as hypothetical.
>
> Moreover, it strikes me as going beyond the bounds of constitutional reasonableness to require, as a matter of general principle, that a municipality should have to turn its mind to and craft detailed exemption policies for every possible contingency. There is a reason why at a certain level in the legislative pecking order the only practical course of action is to delegate authority so that discretion can be applied to the multitude of scenarios which inevitably present themselves when applications for such things as permits are made. The way to police such delegated power is by imposing general requirements on the proper exercise of discretion, not a constitutional obligation to draft policies to cover every possible contingency. The B.C. Court of Appeal accepted that in *Zhang*: "[T]he By-law must be looked at as part of an entire regulatory scheme in which a general prohibition is necessary because the City could not foresee every encroachment or obstruction. While the B.C. Court of Appeal said to the municipality, "if you can craft two exemption policies, then you can craft a third", that is not this case.

Batty, at para. 119-120

132. Were the CLEAR Parties to make an application to the City, the City would need to appropriately weigh and consider Charter rights and values as part of that process. In determining whether to grant a discretionary permit or exemption, the City, as an administrative decision-maker, must apply the Charter balancing framework set out in *Doré v Barreau du Quebec,* 2012 SCC 12. Failure to adequately do so renders a decision unreasonable.

Section 1 Analysis: Proportionality of Effects

133. 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

134. 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.

135. 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

136. The only provisions of the Bylaws identified by the CLEAR Parties which could have 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.

137. 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.

138. 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.

Regional District of Central Okanagan v. Sisett, 2023 BCPC 47, para. 8

139. The CLEAR Parties erroneously assert that the s. 7 *Charter* right includes freedom of expression. Section 7 has been held not to encompass the fundamental freedoms found in s. 2.

R.B v. Children's aid Society of Metropolitan Toronto, [1995] 1 SCR 315

140. The Petition does not engage any s. 7 rights of the CLEAR Parties.

Saanich (Disrict) v. Miller, 2015 BCSC 2053;
Coquitlam (City) v. Crawford (c.o.b. Glenavon Kennels), 2007 BCSC 147, para. 15-21

Constitutional Challenge to the RCMP Act and Provincial Police Act

141. 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.

142. This line of argument is a species of organized pseudolegal commercial argument, which focuses on an alleged defect that purportedly negates state authority. Associate Chief Justice Rooke explained in *Meads* that "OPCA litigants have often focused on some arcane flaw that collapses state authority, for example the alleged defect in Queen Elizabeth II's coronation oath (*R. v. Lindsay*, 2011 BCCA 99 at paras. 31-32, leave refused [2011] SCCA No. 265), or a flaw in the appointment of Governor Generals after passage of the 1931 Statute of Westminster (*R. v. Dick*, 2001 BCPC 275; *R. v. Lindsay*, 2004 MBCA 147 at para. 32)."

Meads, para. 387 [parallel citations omitted]; see also paras. 297-298

143. The Respondent Lindsay is presently incapable of commencing standalone proceedings to advance such challenges as a result of his vexatious litigant status. As a result, it appears that the Respondent Lindsay is using proceedings in which he has been named as a defendant or respondent in order to make such submissions without regard to their genuine relevance.

Attorney General of B.C. v. Lindsay, 2007 BCCA 165,

leave refused [2007] SCCA No. 359

Improper Purpose for Petition

144. 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 (see paragraph 545 of the SLAPP application for particulars of the improper purpose claim).

145. 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.

Affidavit #1 of K. Mead, paras. 3-5, 8, 15-16

146. The Respondent Lindsay also has a lengthy history of advancing unmeritorious allegations against government actors on similar grounds. These include but are not limited to actions against the RCMP; Ministers of Justice for British Columbia; the Attorney General of Canada; various named and unnamed sheriffs in instances where he attempted to commence criminal proceedings to avoid the cost of civil proceedings and to lay private informations; and the laying of private informations alleging perjury, obstruction or perversion of justice by an investigator employed by Canada Customs and Revenue Agency.

Attorney General of B.C. v. Lindsay, 2007 BCCA 165, paras. 11-14
leave refused [2007] SCCA No. 359

147. The allegations of government wrongdoing in this case strike similar notes and should be equally disregarded as meritless and without reasonable grounds.

148. In summary, there are thus clear grounds to believe that all of the CLEAR Parties' legal arguments in response to the Petition have no merit and are unlikely to suceed.

Public Interest Weighing Exercise

149. 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".

150. 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

151. 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.

152. 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.

153. 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 174, para. 12

154. There is a clear public interest in ensuring the safety of municipal citizens and that all citizens obey the law. Unlawful violations of bylaws prohibiting events without permits, which result in the involuntary dedication of significant municipal resources which are needed elsewhere, constitute irreparable harm to the public.

The Corporation of the Town of Wasaga Beach v. Persons Unknown ["*Wasaga Beach*"], 2023 ONSC 4929, paras. 25-26

155. Even where *Charter* rights are engaged, "…it is worth remembering that those rights are not absolute. *Charter* rights do not give a person the right to simply trample on the rights of others. There must be a balancing of those rights. In this case on the evidence before me I can see no basis upon which the persons unknown who have published their intentions on social media have the right to violate the Town by law and trample on the rights of others."

Wasaga Beach, para. 27

156. 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.

Affidavit #1 of K. Mead, paras. 29-32, Exhibits D, E

157. The CLEAR Parties have not demonstrated that dismisssing the Petition will itself provide a public benefit suffient to overcome the Bylaws' benefit to the public interest.

158. The public interest thus overwhelmingly favors continuing the proceeding.

All of which is respectfully submitted,

Date: 3/Dec/2024

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Signature of
☑ lawyers for City of Kelowna
Nick Falzon and Barry Williamson