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| COURT FILE NUMBER | 1301-06153 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANT | The Calgary Airport Authority |
| RESPONDENTS | Canadian Centre for Bio-Ethical Reform, Nicholas McLeod, John Does 1 - 10 and Jane Does 1 -10 |
| DOCUMENT | **BRIEF OF ARGUMENT** |
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**RESPONDENTS' BRIEF OF ARGUMENT**

**FOR A SPECIAL APPLICATION IN JUSTICE CHAMBERS**

**ON OCTOBER 30, 2013**

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FIAT: Let this Brief and Book of Authorities be filed in Court file number: 1301-06153

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The Honourable Justice_________________

____________________Calgary, Alberta

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## I. OVERVIEW

1. The Calgary Airport Authority (hereafter "CAA") seeks an interlocutory injunction against the Respondents, enjoining them from peaceful protest in the public areas of the Calgary International Airport.

2. The CAA has not demonstrated that there is a serious issue to be tried, or that it would suffer irreparable harm if the injunction is not granted, or that it would suffer more harm than the Respondents if this injunction is not granted.

3. While this Application is for an interlocutory injunction, it actually seeks a summary determination of one aspect of the Applicant's claim: does the *Charter* apply to the public areas of the Airport, such that peaceful protest can take place there?

4. Therefore, the Respondents urge this Court to fully consider and decide on whether the Respondents' peaceful expression is protected by section 2(b) of the *Charter*. On a practical level, the Court's decision in respect of this Application will likely amount to a final determination of this litigation in its entirety. This Court's decision on the application of the *Charter* will bring certainty to both the Applicant and the Respondents.

## II. STATEMENT OF FACTS

5. On August 9 and October 22, 2011, and on May 24, 2013, protesters from the Canadian Centre for Bio-Ethical Reform ("CCBR") attended the Calgary International Airport ("Airport") to conduct peaceful protests against abortion.

6. On August 9, 2011, the protesters met with the Airport's Director of Operations, Alan Lawn, who spoke with Stephanie Gray, who represented the protesters that day. Mr. Lawn agreed with the protesters that they had a right to be at the Airport, and he did not

ask them to leave.[1] The protesters complied with Mr. Lawn's request that they move to a different location, a short distance away from where they were.

7. On October 22, 2011, protesters from CCBR attended the Airport to conduct another peaceful protest. Within a short period of time, Alan Lawn approached the protesters and asked them to leave, serving them with trespass notices. The protesters responded by asserting that they had a right to protest at the Airport according to the Supreme Court of Canada's ruling in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139[2] (hereafter "*Commonwealth*").

8. The CCBR protesters were surprised by Mr. Lawn's reversal, but left the Airport after further discussing their *Charter* rights with the police, and after having been issued tickets for trespassing by police, who were acting on the Airport's instructions.

9. The trial of the trespassing charges took place on January 4, 2013, in the Provincial Court of Alberta. On July 15, 2013, Judge Fradsham acquitted the CCBR protesters of trespassing in *R. v. Booyink*, [2013] A.J. No 761[3] (hereafter "*Booyink*"). The individuals charged with trespassing on October 22, 2011, were members of CCBR, as noted by Judge Fradsham at paragraph 7 in *Booyink*. The Crown did not appeal the Court's decision in *Booyink*.

10. On May 24, 2013, CCBR protesters entered the Airport to conduct another peaceful protest, after having learned that the Calgary Police Service would not charge them with trespass if they held a peaceful protest at the Airport.

11. On the three dates that the protesters were present at the Airport, they were asked twice by Airport staff to move to different locations within the Airport, a short distance away from where they were. Both times, the protesters complied immediately and fully with these requests. On each of the three occasions that the protesters were at the Airport, the

[1] Affidavit of Lauren Kyfiuk, paragraphs 17-21
[2] Applicant's Book of Authorities, TAB 12
[3] Applicant's Book of Authorities, TAB 24

protesters stood in open areas. At no time did the protesters block, impede or obstruct pedestrian traffic at the airport. At no time did the protesters stand inside narrow passage-ways.[4]

12. In *Booyink*, Judge Fradsham conducted a very thorough analysis of the application of the *Charter* to protect the peaceful expression of opinions in the public areas of the Airport. Judge Fradsham reviewed the Airport's Ground Lease and amendments to this lease, which were entered as evidence by the Crown. Judge Fradsham also considered the testimony of the Airport's lawyer, Peter Hayvren, and Operations Manager Alan Lawn, both of whom were Crown witnesses at trial, providing evidence as to the Airport's operations, practices, finances and management structure. Judge Fradsham acquitted the CCBR Defendants of the trespass charges that were laid in regard to the same October 22, 2011, protest that is now under consideration in this Application.

13. Judge Fradsham's acquittal was first based on section 8 of the *Trespass To Premises Act*[5] which provides a defence for trespass if the individual charged has a "fair and reasonable supposition that the trespasser had a right to do the act complained of".

14. Judge Fradsham also acquitted the Defendants based on their section 2(b) *Charter* right to express their opinions in a public, government-owned place. Having considered the testimony of the Airport's Director of Operations and of three Calgary Police Service constables, Judge Fradsham found at paragraph 142: "The Defendants did not harass passers-by or otherwise obstruct the flow of traffic to and from the Arrivals level of the Airport. Consequently, the Respondents' expression was compatible with the purpose or function of the Airport. Thus, there was no reason for the CAA to use the trespass legislation to limit the Defendants' freedom of expression".

15. At paragraph 32 of its Brief, the Applicant submits that Judge Fradsham's holding on the *Charter* was "obiter" and that the record was incomplete, thereby making his conclusion

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[4] Affidavit of Lauren Kyfiuk, paragraphs 11 and 12
[5] Applicant's Book of Authorities, TAB 3

incorrect. This assertion is without basis: Judge Fradsham's lengthy and thorough holding on the *Charter* was germane to the issue of trespassing, and his conclusions were based on comprehensive evidence.

16. Judge Fradsham concluded the following on the application of the *Charter*, at paragraph 109:

> In my view, the Calgary Airport Authority is "government" as that term is used by the Supreme Court of Canada in paragraph 16 of *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, *supra*. I find that substantial control over the Authority is exercised by governments (Federal, Provincial, and Municipal). The Calgary Airport Authority is a product of the Federal Government's plan to "shift the cost of running Canada's airports from taxpayers to those who actually use the facilities". The actual control of airports in terms of safety and security standards remains with the Federal Government. The Federal Government's *National Airports Policy* is designed to "enable the federal government to structure an air transportation system that supports and promotes Canada's competitiveness...."

17. At paragraph 114, Judge Fradsham further held that the CAA is also "government" because the CAA performs governmental activities.

18. Last, at paragraph 135, Judge Fradsham held that the CCBR protesters' words and conduct were protected under the *Charter* as a result of their location. He explained that, under *Commonwealth* and *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 SCR 141[6] (hereafter "*Montreal"*), the *Charter* applies to public property where the historical or actual function of the place is compatible with free expression.

19. The CAA was created under the *Regional Airports Authorities Act* R.S.A. 2000, ch. R-9[7] (hereafter "*RAA Act*"). Section 3 of the *RAA Act* provides that "[r]egional airports authorities may be formed and created pursuant to this Act."

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[6] Respondents' Book of Authorities, TAB 1
[7] Applicant's Book of Authorities, TAB 1

20. The CAA is governed by statute and this statute implicates many of its operations. Government (Federal, Provincial and Municipal) exercises substantial control over the CAA. Using the process of devolution, the Federal Government transferred the cost of running airports from taxpayers to users. The National Airports Policy facilitates the plan of maintaining federal ownership of the Airport while delegating the management and operations of the property to the CAA, as noted by Judge Fradsham at paragraphs 108-109 of *Booyink*.

**III. ISSUE**

21. Should an interlocutory injunction issue against the Defendants to restrain them from peacefully expressing their opinions in the public areas of the Airport?

**IV. ARGUMENT**

**A. There is no serious issue to be tried**

22. The Respondents agree with the submission at paragraph 26 of the Applicant's Brief that *RJR MacDonald Inc. v. Canada* (Attorney General) sets out the appropriate test for interlocutory injunctions.

23. An injunction is an extraordinary remedy which can seriously affect a party's rights, in this case the Respondents' *Charter* rights.

24. The Applicant asserts at paragraph 31 of its Brief that there is a serious question to be tried, claiming that "there exists an overwhelming case that the Respondents committed a trespass upon The Authority's premises". However, the Court has already addressed that "question" decisively in *Booyink*, holding that the CCBR protesters did not trespass.

25. Further, the Court in *Booyink*, with detailed and extensive analysis, based on comprehensive evidence, found alternatively, that the Defendants' words and conduct in this situation were protected under s. 2(b) of the *Charter*, and that the CAA's violation of the Defendants' right to freedom of expression was not justified under Section 1 of the *Charter*. The Crown has not appealed the Court's decision in *Booyink*.

*Res Judicata* - Issue Estoppel

26. The doctrine of *res judicata* applies to prevent the CAA from re-litigating the issue of trespass. One of the aspects of *res judicata*, issue estoppel, applies to prevent a litigant from raising an issue that has already been decided in a previous proceeding.

27. The latest treatment of *res judicata* was articulated in *Cliffs Over Maple Bay* (Re), 2011 BCCA 180[8], where The Honourable Madam Justice Newbury, with a concurring Court, reviewed the principles of issue estoppel at paragraph 31 (from Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at 935, as quoted with approval in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254):

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ... [At 254; emphasis added.]

28. A party is considered to be in privity with a party in the original litigation if there is a sufficient degree of connection or identification between the two parties. In *Bank of Montreal v. Mitchell* 143 D.L.R. (4th) 697 (Ont.Gen.Div.) aff'd 151 D.L.R. (4th) 574 (C.A.)[9] the Court commented:

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold

[8] Respondents' Book of Authorities TAB 2
[9] Respondents' Book of Authorities TAB 3

> that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding, as discussed above, where that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have the battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-party litigant abide by that previous decision.

29. While the CAA did not intervene directly at trial in *Booyink*, the CAA's interests, evidence, witnesses and legal position were presented to the Court by the Crown in respect of the trespass charges, thereby creating the requisite privity between the CAA and the CCBR Defendants in this litigation. There is no need to re-litigate the question of trespassing under the doctrine of *res judicata* issue estoppel.

30. It is also open to this Court to apply the doctrine of abuse of process to prevent re-litigation of matters already decided in *Booyink*. This doctrine, found in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63,[10] has wider scope than issue estoppel and applies when it would be inappropriate to allow litigation on the same question, in order to preserve the court's integrity.

31. The Applicant relies upon *Perimeter Transportation Ltd. v. Vancouver International Airport* [2008] B.C.J. No. 2136[11]. This case concerns the commercial interests of a bus company, and is therefore irrelevant.

32. In summary, the "serious question" of trespassing has been decided in *Booyink*. Therefore, there is no serious question to be tried in this litigation now before this Court.

33. In the alternative, should this Court hold that the doctrine of *res judicata* does not apply to this Application, the Respondents submit that there is still no serious issue to be tried, because the Respondents enjoy a *Charter* right to protest peacefully in the public areas of the Airport. No trial is required to decide this *Charter* question, because it is a question

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[10] Respondents' Book of Authorities, TAB 4

[11] Applicant's Book of Authorities, TAB 7

of law, and the Court has an adequate evidentiary record on which to base its ruling on the application of the *Charter*.

**B. The Airport will not suffer irreparable harm**

The allegation of trespass does not prevent this Court from considering irreparable harm

34. Even if the Respondents had trespassed, or lacked a *Charter* right of freedom of expression at the Airport, the CAA's allegation of simple trespass should not preclude an inquiry into irreparable harm. The Applicant's argument that "trespass is actionable *per se* without proof of damages"[12] does not support an argument that trespass, in and of itself, necessarily constitutes irreparable harm.

35. The CAA relies on passages from Justice Sharpe's text "Injunctions and Specific Performance" in arguing that a finding of trespass precludes consideration of irreparable harm. However, Justice Sharpe offers this caution in applying such a rule:

> However, as always with equity, this must be understood to be a principle rather than a rule and, as will be seen, many factors are taken into account (Robert J. Sharpe, "Injunction and Specific Performance", 2nd Edition, Canada Law Book, 1999)[13]

36. The concept that irreparable harm need not be considered in certain types of cases applies to only those situations where they has been a clear breach of a negative covenant. Even then, courts have not discarded the factor, but had ruled that the factor may be of less importance (*Van Wagner Communications Van Wagner Communications Company, Canada v. Penex Metropolis Ltd.*, 2008 CanLII 1427 (ON SC)[14] at paragraph 35).

37. In *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*, (1985 CarswellAlta 15 36 Alta. L.R. (2d) 137)[15], at paragraph 20, Justice Kerans of the Alberta Court of Appeal

[12] Applicant's Brief, paragraph 20
[13] Applicant's Book of Authorities, TAB 9
[14] Respondents' Book of Authorities, TAB 5
[15] Respondents' Book of Authorities, TAB 6

examined claims the Band made concerning title to property, seeking an interim injunction against the defendant's activities on the property. Justice Kerans stated: "...we simply do not accept as a proposition of law that simple trespass without more is irreparable harm…"

38. Cases of trespass which create irreparable harm usually go beyond "simple trespass" and constitute a direct interference with the property owner's rights, as was the case in *Hamilton (City) v. Loucks ("Loucks")*[16] relied upon by the Applicant. There, the protestors were occupying and preventing access to a construction site owned by the city, which was closed to the public by a by-law. Judge Henderson, at paragraph 24 found: "There are three factors in the present case that justify that modification of the traditional test, namely, the allegations that the Respondents are interfering with the Applicant's property rights, that the Respondents are breaching a municipal by-law, and that the Respondents are engaging in civil disobedience". (*Hamilton (City) v. Loucks*, 2003 CanLII 64221 (ON SC)).

39. None of these three factors in *Loucks* are present in this Application, as the Respondents were peacefully demonstrating on property open to the public. The Defendants were not breaching any municipal by-law, engaging in civil disobedience, or interfering with the Airport's property rights. At paragraph 142 in *Booyink*, Judge Fradsham found that "[t]he Defendants did not harass passers-by or otherwise obstruct the flow of traffic to and from the Arrivals level of the Airport".

40. In its Statement of Claim, the Applicant alleges interference with the operations of the Airport. However, the Applicant has not adduced evidence to support this assertion. To the contrary, the Applicant's affiant Mr. Lawn expressly admits that the protesters did not interfere with the landing or departures of airplanes, the movement of luggage, the purchase and sale of goods and services, the issuing of boarding passes, or any other airport operations. Further, Ms. Kyfiuk avers that there were two occasions where the

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[16] Applicant's Book of Authorities, TAB 10

protesters were asked to move by Airport staff, and that the protesters immediately complied with these instructions on these two occasions[17].

41. In the Transcript of the Questioning on Alan Lawn on July 18, 2013[18], Mr. Lawn alleges that some individuals at the Airport were "disturbed" by the protests. Mr. Lawn eventually reveals the true nature of his concern about the protest at page 37, line 12, when asked: "So the content of the display is bothering or has bothered some of the staff?" He responds with "yes". Mr. Lawn and some other individuals simply did not like the content of the protesters' expression.

42. When Mr. Lawn was asked at page 26, line 25 of the Transcript about the various assertions he made in his affidavit as to interference, impeding and nuisance, he admits he did not go to the trouble to get any reports from security personnel in order to verify his allegations. He did not view or produce any video that would show that the protesters behaved inappropriately. At line 15 of page 27, he admits he did not follow up with security on the protesters' activities when they attended the Airport.

43. On page 21 of the Transcript of the Questioning, Mr. Lawn is questioned about his assertion in his affidavit that protesters stood "near" a baggage carousel. When he is asked what distance he sees as "near", he responds by saying that "15 feet" is near.

44. On page 28, line 12, Mr. Lawn is questioned about his assertion that the protesters stood in a narrow chute. This "chute" is 24 feet in width, as noted in the transcript on page 28 at line 21. This area, in fact, is the same area that Mr. Lawn told the protesters to move to and stand in when they attended the Airport on August 9, 2011.

45. Aside from anonymous hearsay allegations, Mr. Lawn has not provided any specific evidence that would support his allegations that the protesters impeded traffic, interfered with operations, or created a nuisance when they protested at the Airport. Since the May 24, 2013 protest five months ago, the CAA has not adduced any affidavit evidence from

[17] Affidavit of Lauren Kyfiuk, paragraphs 41-43
[18] Transcript of the questioning of Allan Lawn

witnesses testifying to inappropriate behaviour on the part of the Respondents at the Airport.

46. The CAA's Application for an injunction is not motivated to protect its property rights but rather, as Judge Fradsham stated at paragraph 143 in *Booyink*: "CAA's use of the trespass legislation was most likely connected to the objective of controlling the content of the Defendants' expression".

<u>The CAA has not proven irreparable harm</u>

47. In determining whether CAA has proven irreparable harm, paragraph 58 of *RJR* states that the issue to be decided is "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application." Further, courts have ruled that "evidence of irreparable harm must be clear and not speculative" (*Syntex Inc. v. Novopharm* Ltd.; 1991 CarswellNat 1113; 126 N.R. 114, paragraph 15)[19].

48. The Court in *RJR*, at paragraph 64, laid out examples of irreparable harm: "where one party will be put out of business by the court's decision"; or "where one party will suffer permanent market loss or irrevocable damage to its business reputation"; "or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined". The Applicant has not adduced any evidence that would suggest that it has lost revenues, nor had its reputation damaged, as a result of the Respondents' peaceful protests.

49. Courts routinely consider irreparable harm even in the context of allegations of trespass. Two such cases where the courts were satisfied that irreparable harm was shown are *Vancouver (City) v. O'Flynn-Mag*ee (Vancouver (City) v. O'Flynn-Magee, 2011 BCSC 1647[20]) and *Canadian Urban Equities Ltd. and Royal Alexandra Hospitals v. Direct*

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[19] Respondents' Book of Authorities, TAB 7
[20] Respondents' Book of Authorities, TAB 8

*Action for Life*[21]. *O'Flynn-Magee* involved the Occupy Vancouver protest, where the protestors occupied the public property surrounding the Art Gallery. Judge Mackenzie of the B.C. Supreme Court agreed with Vancouver's argument that "the public would suffer irreparable harm in terms of access to, and use of, public space." In *Canadian Urban Equities*, demonstrators trespassed in a private building that leased space to a hospital for a reproductive health clinic. The demonstrators staged multiple sit-ins, blocking entrance to the clinic, and causing the clinic to be shut down on those days. Judge Miller, at paragraph 62 found that the requirement of irreparable harm had been met because "if members of the public were denied such service due to the clinic's inability to operate as a result of sit-ins, or individuals were reluctant to attend at the clinic if they were to be subjected to harassment, then both the hospital, through the clinic, and the public could suffer irreparable harm".

50. *R. v. Lewis*, 1996 CanLII 3559 (BC SC)[22] and *Everywoman's Health Centre Society (1988) v. Bridges* 1990 5409 (BC CA)[23] hold that the right to freedom of speech is only limited on private property made available to the public when the protest results in a denial of services. Similarly, in *Macmillan Bloedel Ltd. v. Simpson*, 1994 1046 (BC SC)[24] and *R. v. Clark*, 2001 BCCA 706[25] the protesters indulged in a full blockade; they did not limit themselves to expressing their opinions in a peaceful manner.

51. The CAA has provided no evidence to support a finding of irreparable harm. While the Applicant lists various reasons for issuing the Respondents trespass notices in paragraph 16 of its Brief, those reasons are not based on credible or specific evidence. In fact, based on the testimony of Alan Lawn and three police officers, Judge Fradsham found that the Respondents did not harass passengers or obstruct traffic at the airport. Similar to the consideration of irreparable harm in response to a "general loss of goodwill", claims of irreparable harm caused by the Respondents in this situation amount to mere

[21] Applicant's Book of Authorities, TAB 11
[22] Respondents' Book of Authorities, TAB 8
[23] Respondents' Book of Authorities, TAB 10
[24] Respondents' Book of Authorities, TAB 11
[25] Respondents' Book of Authorities, TAB 12

speculation. CAA falls far short of showing evidence of irreparable harm that is “clear and not speculative.”

## C. Balance of Convenience

52. In *Provincial Rental Housing Corporation v. Hall,* 2005 BCCA 36[26], a case involving an injunction against protestors who trespassed on a building owned by the B.C. Provincial Rental Housing Corporation, Justice Rowles of the BC Court of Appeal addressed the “balance of convenience test” at paragraph 58:

> When injunctive relief is being sought in a case such as this, it seems to me to be essential that the potential for "harm" to our constitutionally entrenched right to freedom of expression must be taken into account as part of the familiar balance of convenience test referred to in the case authorities.

53. In *Daishowa Inc. v. Friends of the Lubicon*, 1998 CanLII 14828,[27] Judge MacPherson of the Ontario Court of Justice considered whether economic rights should trump protestors’ rights to freedom of speech. He stated, at paragraph 72, that “The fact that freedom of expression is protected in the *Charter of Rights and Freedoms*, coupled with the absence of any economic rights, except for mobility to pursue the gaining of a livelihood, in the same document, is a clear indication that free speech is near the top of the values that Canadians hold dear.”

54. The grave harm an interlocutory injunction would cause to the Respondents’ *Charter* right to freedom of expression outweighs the CAA’s bald assertion of interference with property rights which are not supported by evidence of harm.

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[26] Respondents’ Book of Authorities, TAB 13
[27] Respondents’ Book of Authorities, TAB 14

**D. The *Charter* protects the Respondents' freedom of expression**

The Respondents submit that:

(1) The *Charter* protects free expression rights in public, government-owned places

(2) The *Charter* applies to the CAA as government

(3) If the CAA is not government, the *Charter* still applies to the CAA

(1) The *Charter* protects free expression rights in public, government-owned places

The Court's ruling in *Commonwealth*

55. In *Commonwealth*, the Court unanimously held that the *Charter*'s section 2(b) freedom of expression guarantee applies to public spaces inside airports, thereby protecting the rights of individuals to express their opinions peacefully in those areas. The Court was unanimous in its conclusion, but arrived there via three different approaches, as reflected in three concurring judgments.

56. Lamer C.J. (Sopinka and Cory JJ. concurring) proposed a test based on whether the primary function of the space was compatible with free expression. If the form of expression used is compatible with the principal function of the place and does not deprive a citizen of government services, the individual's right to freedom of expression is protected under section 2(b). Distributing pamphlets and engaging members of the public in discussion in the non-secured, public areas of the airport is not incompatible with the airport's primary function, accommodating the needs of the traveling public.

57. McLachlin J. (La Forest and Gonthier JJ. concurring) proposed a test based on whether expression in the place at issue served the values underlying the section 2(b) free expression guarantee. If the expression promotes "the seeking and obtaining of truth; participation in social and political decision-making; and the encouragement of diversity in forms of individual self-fulfilment by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas" it will be protected under section 2(b). McLachlin J.

held at paragraph 256 that the “respondents in this case were seeking to present political views in a location frequented by many members of the community passing en route from one place to another, a location which can be considered to be a modern equivalent of the streets and by-ways of the past. This establishes a relationship between the respondents' use of the airport for expression and one of the purposes of the free expression guarantee”.

58. In a separate but concurring judgment, L’Heureux-Dubé J. held that the *Charter* applies to all government-owned property, and that any restriction on section 2(b) expression rights should be dealt with under section 1. She held that the restriction on free expression at airports was overbroad, and also failed to pass the proportionality test, and therefore could not be saved under Section 1 of the *Charter*.

The Court’s ruling in *Montreal*

59. In *Montréal*, Chief Justice McLachlin and Deschamps J., writing for the majority at paragraphs 73-74, affirmed the holding in *Commonwealth*. The Court took two judgments from *Commonwealth* and redefined the test for whether freedom of expression is applicable to a particular location. By failing to even address *Montreal* in its submissions, the Applicant fails to apply the current relevant test:

> We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada.* The onus of satisfying this test rests on the claimant.
>
> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which Section 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> > (a) the historical or actual function of the place; and
> > (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

a) Historical function:

> The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected" (para. 75, *Montreal*).

b) Actual function:

> Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance" (para. 76, *Montreal*).

60. While purely private property is not subject to the *Charter*, government-owned property that functions to meet the needs of the public is subject to the *Charter* (para. 71, *Montreal*). At paragraph 61, the Court in *Montreal* relied on *Commonwealth* to hold that "Property may be private or public. Public property is government-owned". The *Charter* applies to government-owned property, if that property is and has been recognized as a public space, rather than a private space which has "always and unquestionably been "off-limits" to public expression", such as courtrooms and the inside of government offices (para. 64, *Montreal*).

61. The Court in *Montreal* did not view as relevant the issue of who controls the property. The Applicant does not dispute that the Government of Canada owns the Airport. The Applicant is a tenant. As a tenant, the CAA does not have the right to do what the landlord, the Government of Canada, cannot do in law. Therefore, the CAA has no right in law to exclude peaceful protesters by injunction.

<u>The application of *Commonwealth* and *Montreal* to this case</u>

62. At paragraph 36 of its Brief, the Applicant states in regard to *Commonwealth*: "No issue was raised as to the application of the *Charter* and thus the decision is entirely distinguishable from the present case". In response, the Respondents submit that the *Commonwealth* case was not decided on the issue of government control, but on the *Charter*'s application to public spaces and government-owned property. *Commonwealth* concerns the compatibility of expression with the principal function of a government-owned public place. The nature and degree of government control are irrelevant. Therefore, the devolution of government control from the federal government to the CAA does not change the application of *Commonwealth* to the Airport.

63. The Applicant asserts that the facts in *Commonwealth* distinguish it from application to the CAA, after Transport Canada's process of devolution. However, the facts in *Montreal* simply concern a public street. The test from *Commonwealth* applies readily to analyze whether the place is a public place where one would expect protection for freedom of expression.

64. The Supreme Court of Canada applied *Montreal* in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295, (hereafter "*Greater Vancouver*").[28] At paragraphs 37-47 in *Greater Vancouver*, the Court finds that the sides of buses are public places where constitutional protection for free expression would be expected. Under this second path of analysis, it was not necessary to prove whether the entities in Greater Vancouver were government or under government control. It was enough to find that expression on the sides of buses was a location where constitutional protection for free expression was expected under *Montreal* and *Commonwealth*.

65. Further, although the CAA characterizes the process that airports have gone through as "privatization", Transport Canada's website consistently refers to the process as "devolution", not "privatization". Even if "privatization" were the correct term, this

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[28] Applicant's Book of Authorities, Tab 19

would not alter the substantive reality of the Airport, or the nature of its public spaces. Neither privatization nor devolution affects the legal analysis and determination of this case, because the *Charter's* application to the public areas of the Airport is based on two and only two criteria:

a) The "function" of the Airport
b) Whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

66. Under the management and control of a local airport authority rather than the federal government, the Airport is still government-owned, is still a public place, still functions to meet the needs of the public, and still implements government objectives. It is therefore not relevant to ask whether the purported "privatization" (properly termed "devolution") turns the public areas of the Airport into a *Charter*-free zone.

<u>The Historical Function test in *Montreal*</u>

67. In respect to the historical function of airports, the Respondents submit that the words of L'Heureux-Dube in *Commonwealth*, at paragraphs 153-155, are still applicable today:

> Airports also draw a tremendous number of travellers over the course of a day. The Dorval operations manager testified that about 20,000 passengers use the airport daily, often accompanied by other persons. Few locations can parallel this reliable concentration of people. Bus, train and airport terminals are [page206] indeed modern boulevards, extensions of Main Street. The list of sites traditionally associated with public expression is not static. As means of locomotion progress, people shall begin to gather in areas heretofore unknown. Hence the "traditional" component of the public arena analysis must appreciate the "type" of place historically associated with public discussion, and should not be restricted to the actual places themselves.
>
> This same reasoning applies when assessing the symbolic significance of the property. While the symbolism of a courthouse lawn or Parliament Hill is self-evident, streets and parks have also acquired special significance as places where one can have access to and address his or her fellow citizens on any number of matters. This distinctive attribute does not accrue to a street or a park merely because of its designation. A park has no intrinsic value as a public arena; it only obtains this characteristic because the public chooses to frequent parks. Whether a tree falling in an uninhabited park makes a sound is not a

> constitutional question. To what extent impediments may be placed upon a person addressing passers-by in a park is.
>
> The respondents did not select the airport in order to convey their message to planes, but rather chose the airport for the people who would be present within it. While airport terminals do not have a monopoly on high concentrations of passers-by, few locations offer similar opportunities to encounter such a wide cross-section of the community. For the aforementioned reasons, and upon consideration of the above factors, the non-security zones within airport terminals, in my view, are properly regarded as public arenas. Therefore, the government cannot simply assert property rights, or claim that expression is unrelated to an airport's function, in order to justify the restriction.

68. Pursuant to the Court's test in *Montreal*, freedom of speech has historically been protected at airports, and the *Charter*'s Section 2(b) applies to the public areas of airports.

The Actual Function test in *Montreal*

69. The devolution of management and control from the federal government to a local government authority does not change the *actual* function of the Airport. The Airport is still a public space, open not only to passengers, but anyone who chooses to be present. Neither signs nor rules restrict the airport's public space only to passengers, or only to the people present to pick up and drop off the passengers. Devolution to local government authority has not changed the nature of the Airport; the concourse has not become private in nature. Pursuant to the test in *Montreal*, actual function has not changed since the *Commonwealth* decision was rendered.

70. The Court in *Montreal* held that the *Charter* does not apply to private spaces. The Airport concourse is not a "private space" which has "always and unquestioningly been off-limits to public expression." Since 1990, the concourse has continued to function as a public space, as it did before devolution. The Applicant has not adduced any evidence that devolution (or even privatization) has changed the historical function or the actual function of the Airport.

71. In *Booyink*, Judge Fradsham found that the CAA's actions infringed the Defendants' right to freedom of expression under section 2(b) of the *Charter*. His finding was based on the following, found at paragraphs 135 and 136:

> Second, the Defendants' words and conduct were protected under section 2(b) as a result of their location. The Airport is public or government-owned property. *Montreal* states that the *Charter* will protect public property where the historical or actual function of the place is compatible with free expression. Based on *Commonwealth*, the Airport attracts *Charter* protection, because it is the type of place that has traditionally served as a public forum. Airports allow members of the community to meet, congregate, and travel to other destinations. The Airport is therefore the modern equivalent of a city street. In light of this characterization, the Airport is a place that is historically protected under the *Charter*.
>
> In addition to the Airport's historical function, the actual function of the Airport is compatible with the Defendants' right to free expression. The Defendants were not in a security zone that may require more privacy; rather, the Defendants were at the Arrivals level of the Airport which serves as a connecting hall, foyer, and waiting area. Such areas are open to the public and conducive to fulfilling the purposes underlying section 2(b): that is, democratic discourse, truth finding, and self-fulfillment. The location of the Defendants' expression was therefore protected under the *Charter*.

(2) The *Charter* applies to the CAA as government

The Court's ruling in *Greater Vancouver*

72. In *Greater Vancouver*, students were denied the right to purchase and display political advertising on public transit vehicles, as the transit authority (TransLink) had a policy of permitting only commercial but not political advertising. The Court held that the *Charter*'s Section 2(b) freedom of expression guarantee applies to entities that operate within the authority of government, not just to Parliament, legislature and government itself. The Court held that if an entity is a statutory body designated by legislation as an "agent of government," or if an entity is substantially controlled by government, the *Charter* will apply to that entity. Accordingly, the Court held that the *Charter* applies to both the Greater Vancouver Regional District (as a delegated government entity) and to TransLink (as an agent of government and as controlled by government).

73. The Court in *Greater Vancouver* held that:

1) The GVRD was "governmental in nature", described as "independent, responsible and accountable order[s] of government within their jurisdiction," and that a regional district is intended to provide "good government for its community" (paragraphs 18-19).

2) Translink was also government, due to the control the GVRD exercised over it. The Court used the "control" test to determine this (paragraphs 20-21).

74. At paragraph 16 in *Greater Vancouver*, the Court summarized the two ways an entity may fall within the ambit of the *Charter*:

> Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.

75. Madam Justice Paperny's decision at the Alberta Court of Appeal in *Pridgen v. University of Calgary* (2012) 524 A.R. 251[29] assists in elucidating when an entity may fall under the scrutiny of the *Charter*. At paragraphs 78-98, Her Ladyship noted five categories of cases that may lead a court to classify an entity as "governmental", either in and of itself or in some of its activities, for the purposes of section 32 of the *Charter*. These categories are as follows:

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of legislative control;
4. Bodies exercising statutory authority; and
5. Non-governmental bodies implementing government objectives.

76. These categories are not airtight compartments, and an entity may have elements of one or more of them.

[29] Applicant's Book of Authorities, TAB 21

77. The *Greater Vancouver* reasoning readily applies to this case, because the CAA (like the Greater Vancouver Regional District) functions as a delegated government entity, and then further delegates its governmental responsibilities to the Airport (like TransLink). At paragraphs 18- 22 in *Greater Vancouver*, the Court held:

> As for TransLink, it argues that the trial judge and the majority of the Court of Appeal erred in finding that it is "government" within the meaning of s. 32 of the *Charter*. Prowse J.A. found that because TransLink is controlled by the GVRD, which itself is "government" within the meaning of s. 32, it is an apparatus of government. She based her finding that the GVRD was governmental in nature on s. 5 of the *Local Government Act*, R.S.B.C. 1996, c. 323 ("LGA"), which defines "local government" as "the council of a municipality" and "the board of a regional district". She added that regional districts are corporations (s. 173), that they are governed by boards (s. 174) and that the boards consist of municipal directors and electoral area directors (s. 783(1)). Furthermore, the LGA describes regional districts as "independent, responsible and accountable order[s] of government within their jurisdiction" and states that a regional district is intended to provide "good government for its community" (s. 2(a)). The GVRD therefore clearly falls within the definition of "local government".
>
> One might add to the criteria upon which Prowse J.A. based her conclusion the facts that, subject to specific limitations established in the LGA, a regional district may operate any service that the board considers necessary or desirable for its geographic area (s. 796(1)), and that it may recover the costs of its services (s. 803(1)). Moreover, the board of a regional district has the power to make bylaws which are enforceable by fine or by imprisonment (s. 266(1)). Consequently, not only is the GVRD designated as "government" in the LGA, but the legislature has granted it powers consistent with that status.

> Having established that the GVRD is "government", Prowse J.A. went on to conclude that the GVRD exercises substantial control over TransLink:
>
> > . . . the GVRD has substantial control over the day-to-day operations of TransLink which, when combined with the GVRD's powers to appoint the vast majority of the members of TransLink's board of directors, satisfies the control test posited by the authorities. To the extent that the GVRD does not have complete control over TransLink, control is shared by the provincial government. In either case, I conclude that <u>TransLink cannot be viewed to be operating independently or autonomously in a manner similar to either universities or hospitals. It has no independent agenda other than that provided in its constituent *Act* and no history of being an entity independent of government</u>. [para. 93] [emphasis added]
> >
> > Prowse J.A. came to this conclusion after reviewing the Greater Vancouver Transportation Authority Act, S.B.C. 1998, c. 30, and remarking that the GVRD must appoint 12 of the 15 directors on TransLink's board (s. 8(1) and (2)) and must ratify TransLink's strategic transportation plan (s. 14(4)), that TransLink

> must "prepare all its capital and service plans and policies and carry out all its activities and services in a manner that is consistent with its strategic transportation plan" (s. 14(3)), and that the GVRD must ratify bylaws relating to a variety of taxes and levies (ss. 25(3),29(5), 29.1(5) and 133(5)). Although TransLink is not an agent of the government, Prowse J.A. concluded that it is substantially controlled by a local government entity — the GVRD — and is therefore itself a government entity. The control mechanisms are substantial, and I agree with Prowse J.A.'s analysis and conclusion on this issue.
>
> The conclusion that TransLink is a government entity is also supported by the principle enunciated by La Forest J. in *Eldridge* (at para. 42) and *Godbout* (at para. 48) that a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity. The creation of TransLink by statute in 1998 and the partial vesting by the province of control over the region's public transit system in the GVRD was not a move towards the privatization of transit services, but an administrative restructuring designed to place more power in the hands of local governments (B.C.C.A. reasons, at paras. 75-79). The devolution of provincial responsibilities for public transit to the GVRD cannot therefore be viewed as having created a "Charter-free" zone for the public transit system in Greater Vancouver".

78. The Applicant confuses the holding in *Greater Vancouver*, by failing to note that the Court sought to determine the status of both the GVRD and Translink, not Translink alone. First, the Court held that the Greater Vancouver Regional District (GVRD) was government, because its legislated characteristics made the GVRD's nature "governmental". Second, the Court held that Translink was government because it is substantially controlled by the GVRD, another government entity.

79. The Respondents submit that the CAA (like the GVRD) is government because the legislative framework makes its very nature "governmental", and the Airport (like TransLink) is government because it is substantially controlled by the CAA.

<u>The Court's analysis of the CAA in *Booyink*</u>

80. In its Brief at paragraph 48, the Applicant asserts that the facts in *Greater Vancouver* are distinguishable in that "the creation of Translink was not a move towards privatization of transit services, but simply an administrative restructuring". In *Booyink* Judge Fradsham expressly rejected this argument at paragraph 109:

> In my view, the Calgary Airport Authority is "government" as that term is used by the Supreme Court of Canada in paragraph 16 of *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, *supra*. I find that substantial control over the Authority is exercised by governments (Federal, Provincial, and Municipal). The Calgary Airport Authority is a product of the Federal Government's plan to "shift the cost of running Canada's airports from taxpayers to those who actually use the facilities".

81. In *Booyink*, Judge Fradsham at paragraphs 90-117 examined the question of whether the CAA was government in nature or in its actions. At paragraph 90, he stated that the CAA was created under the *Regional Airports Authorities Act* R.S.A. 2000, ch. R-9 (hereafter "*RAA Act*"). He proceeded to comprehensively outline the provisions in the *Act* that govern the CAA. His analysis was based on the large body of evidence adduced at trial, including the Airport's Ground Lease, amendments to this lease, and *viva voce* evidence of the Airport's lawyer, Peter Hayvren.

82. On the issue of government control, Judge Fradsham in *Booyink* concluded the following at paragraph 116:

> The Federal Government owns the Calgary International Airport, and one of its governmental functions is to operate that property. The Federal Government has chosen a new way of operating that property, that is, through the Calgary Airport Authority. The Calgary Airport Authority in operating the Calgary International Airport for the Federal Government is performing, on behalf of the Federal Government, the governmental activity of operating the airport.

83. As the Court in *Greater Vancouver* held at paragraph 22: "The devolution of provincial responsibilities for public transit to the GVRD cannot therefore be viewed as having created a "*Charter*-free" zone for the public transit system in Greater Vancouver". In

similar fashion, the devolution of federal responsibility over air transportation to the CAA does not render the Airport a "*Charter*-free" zone.

Governments cannot shirk their *Charter* obligations through delegation

84. Of great significance to the Application now before this Court, the Supreme Court of Canada in *Greater Vancouver* explains at paragraph 14 that government cannot, by delegation, remove the *Charter's* application from the delegated authority:

> On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. In *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, La Forest J. explained the rationale for the broad reach of s. 32 as follows (at para. 48):
>
>> Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

85. The Respondents submit that the Court's reasoning in *Greater Vancouver* (and other cases cited in *Greater Vancouver*) applies such that the federal government cannot shirk its *Charter* obligations by devolving airport management to local airport authorities. The Respondents submit that the CAA, like the GVRD, is a government entity that substantially exercises control over the Calgary Airport (paragraph 22, *Greater Vancouver*).

86. Contrary to a private corporation, the CAA was created by statute to function with a clear public mandate and purpose, as required by section 21 of the *RAA Act.*

87. Unlike a private corporation, the CAA is expressly required by section 21 of the *Act* to carry out its activities "for the general benefit of the public in its region." Unlike a private corporation, the CAA cannot change its purposes apart from the government amending the legislation. Unlike a private corporation, the CAA has no shareholders and it not permitted to earn a profit.

88. Under section 4, the *RAA Act* provides for one or more bodies to petition the Lieutenant Governor in Council, through the Minister, for the formation of a regional airports authority (like the CAA). Under section 5, the Lieutenant Governor and the Minister control this formation, with responsibilities to ensure the arrangements meet the purposes of the CAA "and will be generally beneficial to the public in the region." The Minister and Lieutenant Governor have the power to determine whether or not the CAA's appointers are appropriate, and to determine the board's composition such that it consists of persons who collectively "have experience of and have shown capacity in air transportation, industry, commerce, finance, administration, law, engineering, the organization of workers and the representation of the interests of consumers." Section 11 of the *Act* states that any amendment to the CAA's articles has no effect until the Lieutenant Governor, on the recommendation of the Minister, gives effect to it.

89. No private corporation is subjected to this level or degree of government control. A private corporation's only responsibility is to comply with laws that apply generally to all corporations (e.g. taxation, environmental legislation, employment standards, etc.) but without further involvement by the Minister and Lieutenant Governor.

90. In contrast to the governance of private corporations, the governance structure of the CAA provides for the establishment of a unique "Appointers" group who are named in the Articles of Incorporation of the CAA, which needs to have been approved by the Provincial Government.

91. Pursuant to section 26 of the *Act*, the CAA operates as a non-profit entity and, unlike private corporations, is required to hold a *public* meeting at least once per year. The CAA is also required to present the Annual Financial Statements and Annual Report for the previous fiscal year at this public meeting, and the public are entitled to ask questions of management and the Board at such meetings. Private corporations – even those which are publicly traded – may be required to hold annual directors meetings and annual shareholders meetings, but they are not required by legislation to hold *public* meetings.

92. Contrary to the governance of private corporations, Board appointments are made under sections 3-5 the *RAA Act*. The Board operates in accordance with principles of governance and accountability enshrined in their leases; they give a mandate, detail board composition, require forums for community consultation, and direct transparency mechanisms for the reporting of financial and operating information to the public. These requirements for the CAA Board differ radically from those of a private corporation. The Respondents submit that the CAA is "government" not because of the degree of government control over it, but because governmental responsibilities have been delegated to the CAA through legislation. This delegation necessarily creates another entity that is "governmental" in nature. The independence of the CAA does not remove the CAA's governmental nature.

93. Judge Fradsham noted in *Booyink* that the CAA exists under the *National Airport Policy* ("*NAP*"), noting information found on the Federal Government's Transport Canada website.

(3) If the CAA is not government, the *Charter* still applies to the CAA

94. In the alternative, if this Court accepts the Applicant's argument that the CAA is a purely private entity, the Respondents submit that the *Charter* still applies because the CAA delivers a government program or service: that of providing air transportation to the public. Section 21 of the *RAA Act* establishes that the CAA's purposes are to manage and

operate the airport, and to advance economic and community development, for the general benefit of the public in its region [emphasis added]. If the CAA and Airport were "privatized" (as alleged by the Applicant), this legislation would still apply to the CAA and to the Airport as private entities.

95. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624[30] (hereafter "*Eldridge*") at paragraph 44, LaForest J. held that the *Charter* can apply to a private entity as follows:

> Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

96. Legislatures cannot avoid constitutional obligations by delegating their authority or the implementation of their policies and programs to non-governmental entities. As LaForest J. explains at paragraph 42 in *Eldridge*:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[30] Applicant's Book of Authorities, TAB 18

97. In *Pridgen v. University of Calgary*, 2010 ABQB 644 (upheld upon appeal)[31] Madame Justice Strekaf, noted how the *Eldridge* interprets both *McKinney* and *Stoffman*. At paragraphs 46 and 47, Her Ladyship stated the following:

> The Court concluded that private entities may be subject to *Charter* scrutiny in respect of certain actions where such actions are inherently governmental or are in furtherance of a specific government policy or program (at paras. 42 - 44) [emphasis in original]:
>
> It seems clear, then, that a private entity may be subject to the Charter in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any a priori elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney*, I pointed to *Slaight*, supra, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute". "It would be strange", I wrote, "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute"; see idem. Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor; see A. Anne McLellan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 Alta. L. Rev. 361, at p. 371.
>
> Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be

[31] Respondents' Book of Authorities, TAB 16

> termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. Thus, with specific reference to the distinction between the applicability of the *Charter,* on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:
>
> It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]
>
> In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney*, at p. 269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".

…..

> The Court found that while *Stoffman* established that the Vancouver General Hospital was not a part of the government even though it engaged in the public function of providing healthcare, the hospital in *Eldridge* was implementing a governmental policy which brought it under the *Charter* with respect to that action alone, as opposed to its other private activities.

98. The hospitals in *Eldridge* fell under the scrutiny of the *Charter* due to their implementation of a government policy via legislation. In contrast, the hospital in *Stoffman* was implementing an internal regulation: “Pursuant to what I have said above, I would think it clear that Reg. 5.04, concerned as it is with the retirement of medical staff, is not delegated legislation, but is quintessentially a "rule or directive of internal management” (paragraph 96 of *Stoffman*).[32] In *McKinney*, the University was implementing an internal policy regarding retirement. In both cases, the Court has ruled that internal policies do not constitute government programs.

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[32] Applicant’s Book of Authorities, TAB 15

99. In its Brief at paragraphs 41, 48, 50, and 53, the Applicant relies on *McKinney*[33] to assert that the *Charter* does not apply to an entity if it has its own governing body, and, in the ordinary course, makes its own autonomous operating decisions. The Applicant's extrapolation was expressly rejected by the Alberta Court of Appeal in *Pridgen v. University of Calgary*, 2012 ABCA 139, at paragraph 14. In *Pridgen*, Madame Justice Paperny held that there are five ways for the *Charter* to apply to a university. Her Ladyship upheld the Court of Queen's Bench ruling that a university is not a "*Charter*-free zone," and that the Pridgen brothers enjoy freedom of expression rights. By continuing to rely exclusively on the *McKinney* framework, the Applicant refuses to acknowledge that entities that are not controlled by government can be under *Charter* scrutiny. Such is the evolution of jurisprudence seen by the University of Calgary.

100. The CAA implements the government program of providing air transport to Albertans on behalf of the federal government via the *RAA Act*. The litigation now before this Court does not concern an internal program concerning employees, as in *McKinney* and *Stoffman*. Rather, the CAA provides a service on behalf of the government, like the University of Calgary in *Pridgen* through the *Post-Secondary Learning Act*, and the Government of BC via health care legislation, as in *Eldridge*.

101. In *Blencoe v. British Columbia (Human Rights Commission*), [2000] 2 S.C.R. 307[34] (hereafter "*Blencoe*"), the Court held that two such paths were applicable to find that the Human Rights Commission was subject to *Charter* scrutiny. Justice Bastarache, writing for the majority, stated at paragraph 34 that "The mere fact that a body is independent of government is not determinative of the Charter's application". Instead, the Court said that bodies that exercise statutory authority are bound by the *Charter* even though they may be independent of government. Justice Bastarache applied this concept to the Human Rights Commission, finding at paragraph 35 that the "Commission is created by statute and that all of its actions are taken pursuant to statutory authority".

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[33] Applicant's Book of Authorities, TAB 14

[34] Respondents' Book of Authorities, TAB 17

102. At paragraph 37 in *Blencoe*, the Court also applied the *Eldridge* analysis to the Commission, finding the following:

> The Commission in this case cannot therefore escape Charter scrutiny merely because it is not part of government or controlled by government. In Eldridge, a unanimous court concluded that a hospital was bound by the Charter since it was implementing a specific government policy or program. The Commission in this case is both implementing a government program and exercising powers of statutory compulsion.

103. This holding in *Blencoe* directly contradicts the Applicant's argument at paragraph 45 of its Brief, where the Applicant asserts that the issue of control was reiterated in *Eldridge*. The point of *Eldridge* was quite the opposite, holding that an entity cannot escape *Charter* scrutiny by virtue of it not being part of government or controlled by government. *Eldridge* provided no escape for government entities such as the CAA to neglect the fulfillment of their *Charter* responsibilities.

104. The Respondents submit that even if the Airport was fully privatized, the *Charter* would still apply to the Airport based on *Eldridge*, *Pridgen*, and *Blencoe*. Even as a private entity, the CAA, according to the purposes stipulated in the *RAA Act*, would have an underlying foundational mandate to fulfill its objectives "for the general benefit of the public in its region". Like the hospitals in *Eldridge* and the University of Calgary in *Pridgen*, the CAA functions to fulfill a specific governmental objective and is indeed subject to *Charter* scrutiny in the manner in which it carries out this objective.

Respondents' conclusion on the *Charter*

105. The *Charter* applies to protect the Respondents' peaceful expression of opinion in the public areas of the Airport, due to the fact that the Airport is public, government-owned property where the historical or actual function of the place is compatible with free expression, under *Commonwealth* and *Montreal*.

106. Further, pursuant to *Greater Vancouver*, *Eldridge* and *Pridgen*, the *Charter* also applies to the CAA's operation of the Airport because the CAA operates the Airport on behalf of the Federal Government. The CAA performs the governmental activity of operating the airport, to administer the government program of providing air transit services to the public on behalf of Transport Canada.

107. In its Statement of Claim and in the submissions in its Brief, the Applicant does not dispute that its actions, in seeking to ban peaceful protests from the public areas of the Airport, would violate the Respondents' *Charter* section 2(b) free expression rights.

108. The Applicant has not provided any evidence or arguments that would justify its infringements of section 2(b) under section 1 of the *Charter*. The Respondents submit that the violation of their *Charter* section 2(b) expression rights is not justified under section 1, as the Applicant has not presented any pressing or substantial objective to justify its actions. In the absence of a pressing and substantial objective, the remaining section 1 tests of rational connection, minimal impairment and proportionality cannot be applied.

## V. RELIEF SOUGHT

The Respondents ask that this Application be dismissed, with costs awarded to the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE CANADIAN CENTRE FOR BIO-ETHICAL REFORM THIS 22 DAY OF OCTOBER, 2013.

**Anticipated time for argument is 45 minutes.**

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John V. Carpay
Counsel for the Respondents

## VI. TABLE OF AUTHORITIES

**TAB**

1. *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62
2. *Cliffs Over Maple Bay (Re),* 2011 BCCA 180
3. *Bank of Montreal v. Mitchell* 143 D.L.R. (4th) 697
4. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
5. *Van Wagner Communications Company, Canada v. Penex Metropolis Ltd.*, 2008CarswellOnt 218, 163 A.C.W.S (3d) 625
6. *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd*., 1985 CarswellAlta 15, [1985] 3 W.W.R. 193
7. *Syntex Inc. v. Novopharm* Ltd.; 1991 CarswellNat 1113; 126 N.R. 114
8. *Vancouver (City) v. O'Flynn-Magee* 2011 CarswellBC 3205, 2011 BCSC 1647
9. *R. v. Lewis*, 1996 3559 (BC SC)
10. *Everywoman's Health Centre Society (1988) v. Bridges* 54 B.C.L.R. (2d) 273 (C.A.)
11. *Macmillan Bloedel Ltd. v. Simpson*, 1996 CarswellBC2301, [1996] 8 W.W.R. 305
12. *R. v. Clark*, 2001 BCCA 706
13. *Provincial Rental Housing Corporation v. Hall,* 2005 BCCA 36
14. *Daishowa Inc. v. Friends of the Lubicon*, 1998 CarswellOnt1401, 39 O.R. (3d) 620
15. *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2010 BCCA 396
16. *Pridgen v. University of Calgary*, 2010 ABQB 644
17. *Blencoe v. British Columbia* (Human Rights Commission), [2000] 2 S.C.R. 307