COURT FILE NUMBER	QB 312 OF 2017
COURT OF QUEEN'S BENCH FOR SASKATCHEWAN	
JUDICIAL CENTRE	PRINCE ALBERT
APPLICANT(S)	PRINCE ALBERT RIGHT TO LIFE ASSOCIATION AND VALERIE HETTRICK
RESPONDENT(S)	CITY OF PRINCE ALBERT

APPLICANTS' BRIEF OF LAW

This document was prepared and delivered by:

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I Outline

1. This is the Applicants' Brief of Law in support of an application for judicial review of a decision by the Mayor of the City of Prince Albert to refuse the Applicants access to a flag pole (the "Decision") used by community organizations. We say that:

    a. The reasons provided by the Mayor to the Applicants for the refusal to permit their flag were not the true reasons for that Decision;

    b. Instead, his refusal was based on the expressive content of the Applicants' flag, but they were not otherwise disclosed.

    c. The Decision restricts the Applicants' expression based on the content of the expression, and therefore impairs the Applicants' *Charter*-protected freedom of expression.

    d. The reasons given do not allow for meaningful review of the decision;

    e. Given the reasons provided, the Court should declare that the Mayor and the City impaired the Applicants' freedom of expression without justification and therefore the Decision is null.

II Argument: Inferences from the Facts

2. The City of Prince Albert maintains a set of five flagpoles at Memorial Square, which is directly outside City Hall. Historically, one of these flag poles has been used to fly flags or banners which promote certain groups, organizations or causes for one to seven days at a time (the "Courtesy Flag Pole").

3. The City has a Flag Protocol Policy[1] regarding use of the Courtesy Flag Pole. It reads in part:

> 6.05 Courtesy Flag Pole
>
> (a) The City of Prince Albert will maintain a courtesy flag pole to allow groups or organizations to fly the flag of:
>
> i. A charitable or non-profit organization to help increase public awareness of their programs and activities;
>
> ii. An organization that has achieved national or international distinction or made a significant contribution to the community; or
>
> iii. An organization that has helped to enhance the City of Prince Albert in a positive manner.
>
> (b) The courtesy flag pole will not be available to any individual, User Group, or organization that promotes views or ideas which are likely to promote hatred or support violence or discrimination for any person on the basis of race, national or ethnic origin, ancestry, colour, citizenship, religion, age, sex, marital status, sexual orientation, gender identity, disability, receipt of public assistance or level of literacy.
>
> (c) Requests to fly flags of commercial, political, or religious organizations require the approval of City Council.

4. In March 2017, two individuals made complaints to the City of Prince Albert Executive Council, demanding that it refuse requests to fly a pro-life flag on the Courtesy Flag Pole. During the meeting, the Mayor of Prince Albert, Greg Dionne, to his credit, challenged the validity of the complaints, citing the importance of freedom of expression. Ultimately, the Executive Council decided that the matter would be referred to the Mayor's Office.

5. On or about April 5, 2017, Valerie Hettrick of Prince Albert Right to Life Association applied to fly its flag on the Courtesy Flag Pole for the week of May 8 to 14, 2017 and to have that week declared "Celebrate Life Week," as it had done for the preceding 20 years. Prince Albert Right to Life Association has flown this same flag on the Courtesy Flag Pole

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[1] Affidavit of Valerie Herrick, Exhibit A.

since 2007. The flag depicts a cartoon fetus, “Umbert the Unborn” and displays the phrases “Please let me live” and “Celebrate Life Week”.[2]

6. On April 4 and 5, 2017, the Mayor sought to have Ms. Hettrick propose to fly a different flag.[3]

7. On May 4, 2017, the Mayor called Ms. Hettrick and informed her that the City of Prince Albert would not allow the Prince Albert Right to Life Association’s flag to be flown on the Courtesy Flag Pole because the flag was not “national” or “nationally recognized” .

8. On or about May 5, 2017, the Mayor also spoke to the media about the flag, saying that Prince Albert Right to Life Association’s present flag would never again fly at City Hall, but saying that he would in future be open to flying a different pro-life flag, one that did not display a cartoon image of a fully-developed fetus. The Prince Albert Daily Herald reported:

> Never again will a cartoon fetus fly above Memorial Square, says Mayor Greg Dionne.
>
> Dionne said he has deferred Prince Albert Right to Life Association’s application to fly an anti-abortion flag on the city’s courtesy flagpole. But he said he’d be open to a different flag that doesn’t portray a cartoon image of a fully developed fetus.
>
> “It hasn’t been denied. It’s been put on hold,” Dionne said. “Once they come up with a new flag, that flag will fly.”
>
> The mayor said there’s no chance that a new design will be approved in time for this year’s flag raising, which was scheduled for May 8. But he said he’ll see what they come up with for next year’s event.[4]

9. We ask the Court to conclude, first, that the Mayor’s ostensible reason for refusing the Prince Albert Right to Life Association’s request to fly its flag on the Courtesy Flag Pole – that the flag is not “national” in some sense – was not the true reason. Instead, second, the true reason has something to do with the content the flag expresses but is otherwise unspecified::

    a. The reason the Mayor are incredible. The Prince Albert Right to Life Association satisfies the prerequisites set out in section 6.05(a) of the Flag Protocol Policy

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[2] An image of the flag appears at Affidavit of Valerie Herrick, Exhibit F.
[3] Affidavit of Valerie Herrick, para. 8.
[4] Prince Albert Daily Herald, May 5, 2018. Affidavit of Valerie Herrick, Exhibit F.

because it is a "a charitable or non-profit organization[,] to help increase public awareness of their programs and activities", and has been allowed to fly its current flag for many years. The Mayor's apparent requirement of a "national" flag is on its face specious, and suggests the only reason is the content of the expression of the flag itself.

b. The Mayor's insistence, both to Ms. Hettrick and more explicitly in the media, that a different flag "that doesn't portray a cartoon image of a fully developed fetus" might qualify in future, contradicts his claimed and irrelevant concern that the flag be national. Any new design would be no more "national" than Prince Albert Right to Life Association's current flag. It is what the flag portrays, rather than whether or not it is "national", that guided the decision.

10. In sum: The City provides a public place for community organizations' expression "to help increase public awareness of their programs and activities", but it refuses to fly Prince Albert Right to Life Association's flag and thereby restricts that organization's expression based on its content. Prince Albert Right to Life Association does not and cannot know why a flag that portrays a cartoon image of a fetus is unacceptable, as the Mayor and the City have given only misleading and irrelevant reasons for their conclusion.

11. The facts indicate no basis for the Mayor's refusal of the Applicants' flag, and may be based on the arbitrary dislikes, political or other irrelevant considerations. From the reasons provided, the Applicants have no way of knowing, and neither does the Court.

III Argument: Legal Consequences of these Factual Inferences

12. In *Montreal (City)* v. *2952-1366 Québec Inc.*[5] the Supreme Court of Canada considered the application of a municipal noise bylaw to music played into the street outside a strip club. The majority held[6]:

> 56 Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(b) of the Canadian Charter? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have expressive content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression

[5] 2005 SCC 62, 2005 CarswellQue 9633.

[6] For the Court's ease of reference, relevant portions of key cases are quoted within this Brief of Law.

remove that protection? Third, if the expression is protected by s. 2(b), does the By-law infringe that protection, either in purpose or effect? *See Irwin Toy Ltd.* c. *Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.).

57 The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(b). They are premised on the distinction made in Irwin Toy between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred (see, e.g. *Irwin Toy*, p. 968; *Ford* c. *Québec (Procureur général),* [1988] 2 S.C.R. 712 (S.C.C.), at p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

58 The first question is whether the noise emitted by a loudspeaker from inside the club had expressive content. The answer must be yes. The loudspeaker sent a message into the street about the show going on inside the club. The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(*b*) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(*b*): see *Irwin Toy*, at p. 969; *R. v. Keegstra*, [1990] 3 S.C.R. 697(S.C.C.), at p. 729.

59 It is clear that noise emitted by loudspeakers from buildings onto the street can have expressive content, and in this case it did. Therefore, the first part of the test in *Irwin Toy* is met and a *prima facie* case for s. 2(*b*) protection is established.

…

61 This case raises the question of whether the *location* of the expression at issue causes the expression to be excluded from the scope of s. 2(*b*): see *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) [hereinafter "*Committee for the Commonwealth of Canada*"], *per* Lamer C.J. Property may be private or public. Public property is government-owned. In this case, although the loudspeaker was located on the respondent's private property, the sound issued onto the street, a public space owned by the government. One aspect of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression. The question here is whether s. 2(*b*) of the *Canadian Charter* protects not only what the Appellants were doing, but their right to do it *in the place where they were doing it*, namely a public street.
…

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

> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression
>
> 75 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.

13. It is clear that the Applicants' flag is protected public expression. Concerning the public display of a graphic image of an aborted fetus,[7] this Court has previously stated: "The form and content of the appellant's expression are legitimate participation in an important political and social debate in Canada."[8] In that case, the Court held that "[t]he police action was arbitrary, discriminatory and not clearly authorized by law such as can be demonstrated in a free and democratic society, as required by s. 1 of the *Charter*."[9]

14. We therefore say that the City has impaired the free expression of the Prince Albert Right to Life Association by refusing it access to a public forum for expression (of the City's own creation) based on its content.[10] While the City may have no obligation to have a Courtesy Flag Pole at all, it is bound to make decisions about access to the Courtesy Flag Pole in a way that is considerate of community organizations' freedom of expression.[11]

15. In *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority* ("*Transportation Authority*")[12] the British Columbia Court of Appeal recently considered the Transportation Authority's refusal to accept an advertisement by a pro-life group on its buses. In that case, as here, the Transportation Authority did not give useful reasons why the advertisement had been refused:

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[7] *R v Whatcott*, 2004 SKQB 413 at para 1 ("a large photograph of a dead fetus, aborted in the third trimester").
[8] Ibid at para 5.
[9] Ibid.
[10] See also *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, 2009 CarswellBC 1767 35, 38, 41, 45-47, 76-77, 81-82.
[11] Ibid at paras 32, 34-35.
[12] 2018 BCCA 344, 2018 CarswellBC 2408.

51 … Mr. Beaudoin's decision, in light of the record, provides no basis upon which this Court can understand why he made the decision he did or determine whether it is within the range of acceptable outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, [2011] 3 S.C.R. 708.

…

53 Mr. Beaudoin did provide reasons, scant as they were. On this point, it is noteworthy that in *Delta Airlines Inc.* at para. 28, McLachlin C.J. cited para. 11 of *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 26, with approval. In that case, an immigration official decided Mr. Komolafe was not eligible for permanent resident status. That decision was communicated in a form letter. In response to Mr. Komolafe's application for judicial review, the official swore an affidavit setting out the reasons for her decision. Justice Rennie, then of the Federal Court, granted that application and remitted the matter for reconsideration by another official. In doing so, he said:

> [9] The decision provides no insight into the agent's reasoning process. The agent merely stated her conclusion, without explanation. It is entirely unclear why the decision was reached.
>
> [10] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 does not save the decision. *Newfoundland Nurses* ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary *lacunae* may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.
>
> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.
>
> [Emphasis added.] **[Emphasis added in *Transportation Authority*]**

54 In the case at bar, there are no dots for a court to connect. In denying the CCRB's advertisement request, Mr. Beaudoin did not acknowledge the CCRB's right to freedom of expression, let alone explain how the denial represents a proportionate balance with TransLink's objectives. Accordingly, I would not

> endorse the view, expressed in *Grande Prairie (City)* (Alta. C.A.) at para. 40, that in a case such as this one it is open to the decision-maker to ask the court to consider "all possible objections to an advertisement, and all justifications for its rejections." Doing so would subvert the deferential role of a reviewing court and, in the words of Rennie J., amount to "speculat[ion] as to what the tribunal might have been thinking".
>
> 55 I am not suggesting a decision-maker such as Mr. Beaudoin is obligated to provide reasons comparable to those a judge might provide. However, the decision must allow an advertiser to understand why its advertisement has been rejected. "[A] handful of well-chosen words can suffice": *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158at para. 17(b), [2011] 4 F.C.R. 425 (*per* Stratas J.A.).

16. In the result, the B.C. Court of Appeal held:

> 60 In conclusion, as Mr. Beaudoin did not provide any meaningfully reviewable reasons for his decision, that decision cannot stand. In the circumstances, the matter should be remitted to TransLink for reconsideration.…

IV Relief Sought

17. The City's refusal to allow Prince Albert Right to Life Association to fly its flag on the dates requested should be quashed.

18. When a statutory decision-maker makes a discretionary decision that restricts someone's *Charter*-protected freedom of expression, it must give "meaningfully reviewable reasons", which enable the person to know why its rights have been reasonably restricted, and to either adjust the proposed expression or seek judicial review if the person disagrees. Here, the absence of "meaningfully reviewable reasons" is exacerbated by the fact that the reason given by the Mayor to the Applicants for refusing access to the Courtesy Flag Pole is not the true reason.

19. Further, there is no apparent reason why the Prince Albert Right to Life Association's flag might properly be considered unacceptable under the City's policy, which might render the City's refusal a reasonable restriction of the Applicants' freedom of expression. On the record before this Court, it is simply a restriction on expression based on its content, a bald infringement of the Applicants' freedom of expression. The Court should therefore declare

that the Applicants' *Charter*-protected freedom of expression has been unjustifiably infringed and the Decision null.[13]

20. There are serious implications arising from a statutory decision-maker's decision to impair *Charter*-protected rights and freedoms. If *Charter*-protected rights and freedoms may be limited without true reasons, or if they may be impaired without reasons that show *why* they are being limited (and a "handful of well-chosen words can suffice"), then limits on our rights and freedoms by statutory decision-makers can go underground, beyond supervision by our courts.

DATED at the City of Prince Albert, in the Province of Saskatchewan, this 21st day of September, 2018.

Counsel for the Applicants

Per:___________________________
Marty Moore and Philip Fourie

[13] Since the "Celebrate Life Week" held annually in May has passed, the Appellants submit that a declaration that the Mayor's decision violating their *Charter* rights is "null" is appropriate: see *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 81-82:

> Section 24(1) of the *Canadian Charter* reads as follows:
>
> > Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> Given that Gurbaj Singh no longer attends Sainte-Catherine-Labouré school, it would not be appropriate to restore the judgment of the Superior Court, as requested by the appellants. **The Court accordingly considers that the appropriate and just remedy is to declare the decision prohibiting Gurbaj Singh from wearing his kirpan to be null.** [Emphasis added]

LIST OF AUTHORITIES

1. *Montreal (City)* v. *2952-1366 Québec Inc.,* 2005 SCC 62, 2005 CarswellQue 9633
2. *R v Whatcott*, 2004 SKQB 413
3. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, 2009 CarswellBC 1767
4. *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344, 2018 CarswellBC 2408
5. *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, 2006 CarswellQue 1368