

AMENDED THIS 21 DAY OF May A.D. 20 20  
PURSUANT TO RULE 362 UNDER ORDER-CONSENT DATE  
31 DAY OF March A.D. 20 20

Clerk's stamp:



COURT FILE NUMBER 1903-20251  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE EDMONTON  
APPLICANTS ALBERTA MARCH FOR LIFE ASSOCIATION and  
JERRY PASTERNAK  
RESPONDENT CITY OF EDMONTON  
DOCUMENT **AMENDED ORIGINATING APPLICATION FOR  
JUDICIAL REVIEW**

ADDRESS FOR  
SERVICE AND  
CONTACT INFORMATION  
OF PARTY FILING  
THIS DOCUMENT

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*Counsel for the Respondent*

## **NOTICE TO THE RESPONDENT**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

|         |   |
|---------|---|
| Date:   | November 13, 2020   |
| Time:   | 10:00 AM  |
| Where:  | Law Courts Building<br>1A Sir Winston Churchill Square, Edmonton AB T5J 0R2 |
| Before: | Justice in Special Chambers   |

Go to the end of this document to see what you can do and when you must do it.

### **Grounds for Making this Application**

#### Background

1. The Applicant, the Alberta March for Life Association (“AMLA”) is a non-profit organization that promotes the sanctity of human life from conception to natural death and the dignity of disabled people. The primary purpose of the AMLA is to conduct an annual peaceful outdoor march in Alberta to promote awareness of issues pertaining to respect for human life (the “March for Life”).
2. The first March for Life occurred in 2008 in Edmonton and has occurred every year since. The 12<sup>th</sup> March for Life took place in 2019. Thousands attend the March for Life each year. Marchers typically listen to multiple speakers who discuss issues that are relevant to respect for human life.
3. The Applicant, Jerry Pasternak is a resident of Edmonton and Vice Chair of AMLA.
4. The Respondent, the City of Edmonton is the operator of the High Level Bridge, which was recently outfitted with 60,000 programable lights. The City has instituted a program by which non-state actors can apply to have the bridge lit in colours reflecting their events or favoured cause.

#### *Cancellation of Bridge Lighting*

5. On March 6, 2019, Mr. Pasternak submitted an application to the City for the High Level Bridge to be lit up on May 9, 2019 in the colours of pink, blue, and white in association with

the 2019 March for Life (the “Lighting”). The City approved the application for the Lighting the next day. On March 7, Jenny Baker, Civic Precinct Liaison of the Citizen Services Branch of the Community and Recreation Facilities stated in an email to Mr. Pasternak, “the date you've requested is available and the bridge will be lit for your event.”

6. The City subsequently reneged. On April 5, 2019 Mr. Pasternak received an email from Jenny Baker, in which she stated, in part:

Upon further review of your application, it came to our attention that lighting the bridge for this event can not be approved due to the polarizing nature of the subject matter. This is consistent with how we managed a similar request from your group in 2017 (the “Decision to Cancel”).

7. Mr. Pasternak sent an email in response on the same day, stating, in part:

I am deeply disappointed in your decision. Can you please provide evidence of this polarization?

8. No reply or further communication regarding the Decision to Cancel or the reasons therefore was received from the City. The Lighting did not occur. A nearly identical circumstance occurred in 2017, with the City approving a request to light the bridge in colours associated with the March for Life and then reneging without providing rationale or justification.

#### Legal Basis

##### *The Light the Bridge Program*

9. In 2014, the High Level Bridge was outfitted with 60,000 lights that run the length of the Bridge and can be programmed to light up in different configurations of various colours that essentially transform the Bridge into an elaborate lightshow. The lightning system is controlled by the City.
10. Since 2014, the City has had a program in place to manage the lighting of the Bridge called “Light the Bridge” (the “Program”). According to the City’s website, the Program “celebrates and builds community spirit in Edmonton” and is used “to help represent Edmonton and share our story with national and international audiences” and “help recognize major events and cultural celebrations”. The stated goal of the Program is “to reflect the diversity of people who call Edmonton home and our connection to the global community”.

11. The City regularly lights the Bridge on its own initiative and in colours chosen by City staff, such as when the Bridge is lit orange, or orange and blue, in connection with the Edmonton Oilers.
12. The City has adopted criteria for processing citizen requests to light the Bridge. The criteria are posted on the City's website and included in the relevant application form. The requirements include, *inter alia*:
  - a. That the Lighting reflect an event of national or international significance or be supportive of a local festival; or
  - b. Be supportive of a local, national or international awareness issue that builds community (the "Criteria").

*Examples of Past Bridge Lightings*

13. The Bridge has been lit in the past for the following causes:
  - the promotion of sexual and gender diversity;
  - LGBT Pride;
  - various Islamic holidays and commemorations;
  - Jewish and Buddhist religious holidays;
  - days recognizing political events in foreign countries such as Chilean Independence Day and the anniversary of the founding of Azerbaijan; and
  - awareness days such as National Day of Remembrance for Victims of Terrorism and Wrongful Conviction Day.
14. The Bridge has also, ironically, been lit in association with International Pregnancy and Infant Loss Awareness Day and various disability awareness campaigns.

*The Decision to Cancel is Tainted with Bias*

15. Canada is a pluralistic society and the City of Edmonton is home to a diverse ethnic, cultural, religious and ideological populace, including persons who express their belief in the sanctity of human life at all stages. As a neutral entity, the government has no proper role in elevating or promoting the favoured ideological causes of some citizens to the exclusion of other causes favoured by other citizens.

16. The expression of pro-life opinions is part of the diversity of expression found in a free society, and protected by the *Canadian Charter of Rights and Freedoms*. As the BC Court of Appeal has found, “the importance of communicating [pro-life] ideas and beliefs lies at the “very heart of freedom of expression””. It is not unlawful to publicly express pro-life views.
17. In denying permission to the Applicants to also light the Bridge, the City of Edmonton has demonstrated bias, partiality and prejudice on political or ideological grounds. In doing so, the City of Edmonton has lent its weight and favour to some lawful causes that it favours or supports, while denying another equally lawful cause the same opportunity. This taints the Decision to Cancel with bias, breaches the government’s duty of neutrality as required by the *Charter*, and also politicizes the Bridge.
18. The City of Edmonton’s conduct evidences that it has thus far been incapable of managing the Bridge in a lawful and responsible fashion, free of politicization, state censorship and partiality.
19. A reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the City’s conduct in making the Decision to Cancel gives rise to a reasonable apprehension of bias.

*Procedural Fairness*

20. The Decision to Cancel was procedurally unfair and is consequently void. The Applicants were not informed that a decision to cancel the Lighting was being considered. They were not informed of what the City’s concerns were and were not provided an opportunity to respond to those concerns. Further, the Applicants were not provided with meaningful and intelligible reasons; they were not told why or how the Lighting was “polarizing”, nor how the City defines “polarizing”.
21. In light of the fact that the City had approved the application, and that the Applicants’ freedom of expression was engaged, the Applicants had a legitimate expectation that if the City was going to renege and cancel the Lighting, the City would adhere to a fair process. The Applicants legitimately expected that the City would inform them about the City’s concerns regarding the Lighting, provide the Applicants with a fair opportunity to respond to

those concerns and provide the Applicants with intelligible reasons for the Decision to Cancel.

*The Decision to Cancel is Unreasonable*

22. Freedom of expression as protected by section 2(b) of the *Charter* is a “fundamental freedom” in Canada’s liberal democracy and cannot be infringed absent demonstrable justification by the City. Exclusion of lawful expression from forums created by government for the purpose of citizen expression is not justified by reference to undefined terms like “polarizing” or to merely avoid controversy.
23. The City implemented the Program to permit the High Level Bridge lighting system to be used for expressive purposes, and to invite the diverse public to participate by expressing themselves through choosing what colours the Bridge will be lit up with. By granting some applications for lighting and permitting those members of the public to choose colours appropriate to their message, while denying others that opportunity because of the content of their respective messages, the City impairs the freedom of expression of those denied. When conferring a public benefit of this kind, the City is precluded from preferring some messages over others based on their content, absent clear and demonstrable justification.
24. By choosing the colours that were supposed to appear on the Bridge on May 9, 2019, the Applicants engaged in two of the core values underlying freedom of expression, namely, self-fulfilment and democratic discourse.
25. The limiting of the Applicants’ expression occasioned by the Decision to Cancel unjustifiably infringes the Applicants’ *Charter* rights and evidences an arbitrariness and capriciousness that is incompatible with the rule of law. The City provided no basis for its assertion that lighting the Bridge in association with the March for Life is “polarizing” or that it is more “polarizing” than other causes, nor has the City explained its rationale or criteria for determining what qualifies as “polarizing.”
26. Administrative decisions, such as the Decision to Cancel, that impair *Charter* rights and freedoms will only be upheld by reviewing courts if the government can, first, identify a relevant statutory objective that is fulfilled by the decision and, second, demonstrate that the

decision gives effect, as fully as possible to the *Charter* protections at stake—including freedom of expression—given the particular statutory mandate.

27. The Decision to Cancel is unreasonable. First, because there was no consideration of the applicable *Charter* rights or of any relevant statutory mandate, if there is one. No effort to balance freedom of expression was attempted, or could have been properly attempted in light of a complete lack of consideration given to freedom of expression. Second, the Decision to Cancel is further unreasonable because the outcome disproportionately limits the *Charter* protections for freedom of expression that are engaged.

*The Light the Bridge Criteria are Unconstitutional*

28. The Light the Bridge Criteria serves as the sole, publicly accessible policy document that delineates what expression the City considers permissible through the High Level Bridge Lighting system. No other statutory provision, regulation or publicly accessible policy addresses the Light the Bridge Program or the scope of the City’s authority and discretion regarding the expressive content to be permitted or prohibited.
29. The Light the Bridge Criteria prohibit the Bridge being lit up in association with expression regarding events or causes that “do not merit public support” or that are “political” or “polarizing”. These categories are so vague and unnecessarily broad that they lack any defined parameters. The Light the Bridge Criteria therefore improperly grant unlimited discretion to the City to arbitrarily and unjustifiably censor lawful expression and therefore unjustifiably infringe section 2(b) *Charter* rights.
30. The case herein is an example of the Light the Bridge Criteria being used to limit constitutionally protected, lawful speech by arbitrarily and conveniently labelling the Lighting as “polarizing.” Almost any expressive content will be considered “polarizing” by at least some people. Such a broad and vague restriction on expressive content is neither intelligible nor constitutional and cannot form the basis of a non-arbitrary restriction.

*Conclusion*

31. The expression associated with the March for Life is lawful expression, protected by the *Charter*, and not contrary to any federal or provincial law. The City is under a *Charter* obligation to uphold the Applicants’ freedom of expression. The Decision to Cancel is



biased, arbitrary, unreasonable and disproportionately limits freedom of expression. The Applicants apply to this Honourable Court to remedy the infringement of their constitutional rights.

**Remedy Sought**

32. An order abridging the time for service of this Originating Application and supporting materials, if necessary;
33. Judicial Review of the Decision to Cancel;
34. Orders pursuant to Rule 3.15 of the Alberta Rules of Court and section 24(1) of the *Charter*:
  - a. In the nature of *certiorari*, quashing the Decision to Cancel;
  - b. In the nature of *mandamus*, requiring the City to light the Bridge in neutral colours only, such as red and white (Canada), or blue and gold (the official colours of the province of Alberta);
  - c. In the alternative, in the nature of *mandamus*, requiring the Respondent to administrate the Bridge in a fair and equal manner without political or ideological favouritism;
  - d. In the nature of *mandamus*, to light the Bridge in the colours of pink, blue and white on an available date chosen by the Applicants in 2020 in association with the 2020 March for Life;
  - e. A Declaration that the Decision to Cancel disproportionately and therefore unreasonably limited the Applicants' *Charter* section 2(b) right to freedom of expression;
35. A Declaration that the Decision to Cancel was affected in a procedurally unfair manner and is therefore invalid;
36. A Declaration that the Decision to Cancel is tainted by bias and is therefore invalid;
37. A Declaration pursuant to Rule 3.15 of the Alberta Rules of Court and section 24(1) of the *Charter* that the Respondent unreasonably determined the Lighting to be "polarizing";

38. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* or, in the alternative, pursuant to section 24(1) of the *Charter*, that the Respondent's Criteria (~~contained in full as an attachment to the Affidavit of the Applicant, Jerry Pasternak~~) unjustifiably infringes section 2(b) of the *Charter* and section 1(d) of the *Alberta Bill of Rights* and is therefore void and of no force or effect;

39. Costs of this Application; and

40. Such further and other relief as this Honourable Court deems just and equitable.

**Materials to be Relied on**

41. The Certified Record of Proceedings, filed December 19, 2019; and

42. ~~The Affidavit of Jerry Pasternak; and~~

43. Such further and other material as counsel may advise and as this Honourable Court may **order** or permit.

**Applicable Acts and Rules**

44. *Alberta Rules of Court*, Alta Reg 124/2010;

45. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; and

46. *Alberta Bill of Rights*, RSA 2000, c A-14.

**WARNING**

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).