

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 **BRIEF OF ARGUMENT OF THE APPLICANTS**

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PART 1: OVERVIEW

1. The Applicants apply to this Honourable Court for leave to permit affidavit evidence in support of their claims of a reasonable apprehension of bias and an unjustifiable infringement of freedom of expression. The Applicants further seek an order requiring the City to provide a relevant record that the City has refused to produce, or, in the alternative, to permit further affidavit evidence. The evidence sought to be admitted by the Applicants is relevant and was in the City's possession at all material times.

PART 2: THE PARTIES

2. 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 people with disabilities. AMLA conducts an annual peaceful outdoor march in Alberta to promote awareness of issues regarding respect for human life (the "March for 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 (the "Bridge"), which is outfitted with 60,000 programable lights. The City has instituted a program by which non-government groups can apply to have the Bridge lit in colours reflecting their events, campaigns, or causes.

PART 3: THE FACTS

5. On March 6, 2019, Mr. Pasternak submitted an application to the City for the Bridge to be lit on May 9, 2019 in the colours of pink, blue, and white in connection with the 2019 March for Life (the "Pro-Life Lighting"). The next day, May 10, the City approved the Pro-Life Lighting. The City subsequently renege and denied the Pro-Life Lighting. Mr. Pasternak received an email from City staff on April 5, 2019 stating that the Pro-Life Lighting was being denied because of the "polarizing nature of the subject matter" (the "Decision to Cancel").¹

¹ Certified Record of Proceedings, filed December 19, 2019 [Certified Record], at TAB 1.

6. On October 4, 2019 the Applicants filed an Originating Application for judicial review of the Decision to Cancel. An Amended Originating Application was filed on May 21, 2020, with leave of the Court.²
7. A Certified Record of Proceedings (the “Certified Record”) was filed by the Respondent on December 19, 2019. Pursuant to Rule 3.18(2)(e), included in the Applicants’ Notice to Obtain Record of Proceedings was a request that the Respondent provide, or explain why it cannot be provided, a record of:

Anything else in your possession relevant to the decision, including a list of all citizen requests to light the High Level Bridge received by the City of Edmonton in the three years preceding the date of the filing of this Notice, and a list of all requests that have been approved therein.

8. Except for an undated list of 11 apparently approved requests to light the Bridge contained at Tab 8 of the Certified Record, the Respondent failed to provide the above requested lists or an explanation why they could not be provided.

PART 4: APPLICABLE LAW

9. Rule 3.22 of the Alberta Rules of Court states that the only evidence the Court will usually consider on a judicial review application is the Certified Record of Proceedings produced by the respondent, but that the Court may permit other evidence (Rule 3.22(d)).
10. Rules 3.18(2) and 3.19 provide that a respondent to a judicial review application must produce a Certified Record of Proceedings that contains, in addition to the reasons for the decision, and among other items, “anything else relevant to the decision or act in the possession of [the decision-maker]” (Rule 3.18(2)(e)).
11. Rules 3.18(3) and 3.19(3)(b) state that the Court may add to anything required to be produced in a Certified Record of Proceedings.

² See *Alberta March for Life Association v Edmonton (City)*, 2020 ABQB 220; <https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb220/2020abqb220.html>. (TAB 3)

PART 5: ARGUMENT

The Affidavit of Mary Smolis-Hunt

12. Generally, judicial review of administrative decisions is conducted solely based on the Record of Proceedings filed by the respondent. However, there are exceptions.
13. Affidavit evidence is admissible where an applicant has alleged a reasonable apprehension of bias, where the affidavit evidence sought to be admitted is relevant to the allegation and the facts in support do not appear on the record.³ The Applicants have alleged the City was biased regarding the Pro-Life Lighting and was therefore predisposed to deny or cancel the Pro-Life Lighting and disregard the City's policy governing Bridge lightings. The Affidavit of Mary Smolis-Hunt includes evidence in support of the claim that the City is ideologically biased regarding politically charged public policy issues and predisposed to be prejudiced toward views such as the Applicants' pro-life views.
14. The sole statement from the City explaining the Decision to Cancel is the assertion that the "subject matter" of the March for Life is "polarizing", a reference to the City's *Light the Bridge Guidelines* (the "Bridge Guidelines").⁴ However, the City has provided no explanation of the term "polarizing" or examples of what would or would not be "polarizing" pursuant to the Bridge Guidelines. The Applicants claim that the City applies the Bridge Guidelines, particularly the restriction on "polarizing" Bridge lightings, in an arbitrary and inconsistent manner as a result of its bias toward certain ideological or political views and opinions.
15. The Affidavit of Smolis-Hunt includes 185 pages of comments posted to the City's Facebook page in response to many posts made by the City in connection with the theory of anthropogenic climate change ("Anthropogenic Climate Change").⁵ These 185 pages contain hundreds of comments full of intensely opposing views, argument, accusations, invective, and insults which demonstrate the strength of the disagreement and depth of the division among the Edmonton community regarding Anthropogenic Climate Change. Anthropogenic Climate Change is also considered by some residents of Edmonton to be politicized, to be

³ *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at para 41; <https://www.canlii.org/en/ab/abqb/doc/2006/2006abqb904>. (TAB 2)

⁴ Certified Record at TAB 2, page 2.

⁵ Exhibit "B" to the Affidavit of Mary Smolis-Hunt.

“propaganda”, and to be associated with a “progressive”, “liberal”, “environmentalist” or “left-wing” political ideology.⁶

16. Despite how divided—how “polarized”—the residents of Edmonton are regarding the issue of Anthropogenic Climate Change, the City, whether on its own initiative or by request, lit the Bridge in association with Anthropogenic Climate Change events and campaigns three times in 2017 and 2018.⁷ In fact, the City is highly supportive of Anthropogenic Climate Change, going so far as dedicating a City website to an Anthropogenic Climate Change campaign.⁸
17. The City has conveniently ignored social media evidence of “polarization” regarding Anthropogenic Climate Change, even while relying on social media posts in connection with pro-life issues in the city of Ottawa to support its Decision to Cancel. Included by the City at Tab 23 of the Certified Record is 54 pages of Twitter posts and comments in response to the flying of a flag in Ottawa in association with the 2017 National March for Life event.⁹ It appears that the inclusion of such evidence in the Certified Record is for the purpose of justifying the City’s conclusion that the March for Life is “polarizing”. However, this raises the inconsistency in the City’s dealings with views and opinions which are controversial but which it supports, such as Anthropogenic Climate Change, and views and opinion which it does not support.
18. The City, in apparent contravention of its own Bridge Guidelines, has lit the Bridge in connection with Anthropogenic Climate Change, notwithstanding the extensive record of social media comments from residents of Edmonton demonstrating the “polarizing” nature of Anthropogenic Climate Change. The Applicants submit this occurred as a result of the City’s ideological bias. The affidavit evidence sought to be admitted is relevant, material and necessary to the determination of one of the ultimate issue at hand in this litigation, namely, whether or not the City was biased in cancelling the Pro-Life Lighting.

⁶ Exhibit “B” to the Affidavit of Mary Smolis-Hunt at pages 14-15, 60-61, 63, 74-76, 81, 85, 91-93, 97, 102, 104 and 109, and Exhibit “A” to the Affidavit of Mary Smolis-Hunt at page 4.

⁷ The Bridge was lit for Cities IPCC Conference on March 5, 2018, for the Change for Climate Global Mayors Summit on March 4, 2018, and “in support of a green energy future” on June 2, 2017, which is associated with the City’s Environmental Strategic Plan. See Exhibit “A” to the Affidavit of Mary Smolis-Hunt.

⁸ See Exhibit “C” to the Affidavit of Mary Smolis-Hunt.

⁹ Certified Record at TAB 23.

19. Similarly, whether on its own initiative or by request, the City, 14 times, lit the Bridge in association with LGBT events and awareness campaigns during the same four year period that it twice refused to light the Bridge in association with a pro-life event.¹⁰ The numerous LGBT Bridge lightings, considered in the context of the refusal of the City to permit any pro-life Bridge lightings, further exhibit the City's political and ideological bias.

20. The City's bias in this regard is apparent to at least two members of the public who complained to the City regarding the Decision to Cancel.¹¹ One commented in 2017 in response to the City's decision in that year to also cancel an initially approved Bridge lighting for the March for Life:

I ask you this, what would the reaction be if you decided not to light the bridge in rainbow colours for the Pride Parade? Would the City of Edmonton then change policy and light the bridge? If so, that is a complete and utter double standard. By refusing to light the bridge (when you previously agreed) for the reason of not making a "political statement", you are in fact making a "political statement".¹²

21. In addition to a reasonable apprehension of bias, the Applicants claim the Decision to Cancel is a form of censorship that amounts to an unjustified limitation of section 2(b) of the *Charter*. The affidavit evidence of Bridge lightings in connection with "polarizing" issues sought to be admitted is relevant to this claim.

22. The Applicants will argue the Bridge is a constitutionally protected location regarding expressive content. The City is therefore constitutionally prohibited from censoring expression in that location based on mere disapproval of or disagreement with the content of the expression. The Decision to Cancel was not made in good faith pursuant to any valid content-neutral criteria. It was predicated upon the City's disagreement with the content of pro-life expression. Evidence of past lighting approvals and denials are relevant to this claim. Further, the proposed affidavit evidence is not new or fresh, as it was available to the decision-maker at the time the Decision to Cancel was made.

¹⁰ See Exhibit "D" to the Affidavit of Mary Smolis-Hunt.

¹¹ Certified Record at TAB 21 and TAB 33.

¹² Certified Record at TAB 21.

23. The City has included in the Certified Record a significant amount of material that was not before the decision maker at the time the Decision to Cancel was made.¹³ The City says this material may be relevant to the issues of “polarization” and breach of constitutional rights.¹⁴ Whether that is so, the post-decision material included in the Certified Record by the City appears to be selected on the basis that it is supportive of the reasonableness of the City’s decision. It is “fresh” evidence, the type of which the Applicants would not be permitted to provide without leave of the Court. In light of the broad nature of the Certified Record, the Applicants submit they should be permitted to provide material—material that was available to the decision-maker when the Decision to Cancel was made—that is also relevant to the issues of “polarization” and breach of constitutional rights.
24. The current facts are similar to those in *Alberta's Free Roaming Horses Society v. Alberta*¹⁵ in so far as this case is also “not a typical judicial review case where the Record of Proceedings shows the materials submitted and considered by a tribunal, along with their reasons for decision”.¹⁶ The City did not engage in a robust or procedurally fair decision making process and did not communicate meaningful reasons for its decision. Only a brief conclusion was provided to the Applicants for why the Decision to Cancel was made and the Certified Record supplied by the City provides no insight into the City’s reasoning.

Production of a Relevant Record

25. In the Notice to Obtain Record of Proceedings, the Applicants requested a list of approved and denied citizen requests to light the Bridge. The City failed to respond to the request in the Certified Record, either by providing the requested list, or explaining why it cannot be provided.¹⁷
26. The Applicants herein now seek a list of all citizen requests to light the Bridge approved or denied by the City of Edmonton in the three years preceding the date of the Decision to Cancel,

¹³ This post-decision material consists largely of emails and social media posts. See Certified Record at TAB 27 through to TAB 34.

¹⁴ Certified Record at page 3.

¹⁵ 2019 ABQB 714; <https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb714>. (TAB 1)

¹⁶ *Alberta's Free Roaming Horses Society v. Alberta*, 2019 ABQB 714 at para 25; <https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb714>. (TAB 1)

¹⁷ Except for an undated list of 11 apparently approved requests to light the Bridge contained at TAB 8 of the Certified Record.

being April 5, 2019 (the “Requested List”). The City is mandated by Rule 319(1) and 318(2)(e) to provide the Requested List as part of the required Certified Record of Proceedings. The Requested List is relevant to the Decision to Cancel and was in the possession of the decision maker at the time the Decision to Cancel was made. The City is always in possession of the list of prior Bridge lightings and aware of what past Bridge lighting requests have been approved or denied.

27. As a matter of course, the City, in considering whether to deny or cancel a Bridge lighting, would compare with past approved, denied, or cancelled Bridge lightings. Indeed, in making the Decision to Cancel, the City considered a prior decision in 2017 to cancel an initially approved Bridge lighting connected with the 2017 March for Life.¹⁸ Inevitably, the City considered other past approved Bridge lightings, or denied or cancelled Bridge lightings, if any.
28. The Requested List is highly relevant to the Applicants’ claims of bias and *Charter* infringements. In addition to filing affidavit evidence that demonstrates the City has permitted “polarizing” Bridge lightings, the Applicants have also filed affidavit evidence demonstrating the City regularly permits Bridge lightings that are “mainly political in nature”, further contravening the Bridge Guidelines.¹⁹ Provision of the Requested List would reveal the extent of adherence to the City’s own Bridge Guidelines. This is relevant for this Court in assessing whether the City acted in a biased manner and based the Decision to Cancel on disagreement with the content of pro-life expression, over and above any consideration of the Bridge Guidelines.
29. The Applicants therefore apply to this Honourable Court to exercise its discretion pursuant to the Alberta Rules of Court for an order directing the City to provide the Requested List.
30. In the alternative, if this Court declines to order the production of the Requested List, the Applicants apply to have the Supplemental Affidavit of Mary Smolis-Hunt permitted on the same basis as the initial Affidavit of Mary Smolis-Hunt.

¹⁸ Certified Record at page 2 and at TAB 11 through to TAB 26.

¹⁹ Exhibits “F” through “L” to the Supplemental Affidavit of Mary Smolis-Hunt.

PART 6: RELIEF SOUGHT

31. An Order pursuant to Rule 3.22(d) granting leave to admit the evidence contained in the Affidavit of Mary Smolis-Hunt, filed February 25, 2020;
32. An Order pursuant to Rules 3.18(3) and 3.19(3)(b) directing the City to file an Amended Certified Record of Proceedings containing a list of all citizen requests to light the High Level Bridge approved or denied by the City in the three years preceding the date of the Decision to Cancel, being April 5, 2019;
33. In the alternative, an Order pursuant to Rule 3.22(d) granting leave to admit the evidence contained in the Supplemental Affidavit of Mary Smolis-Hunt, filed February 25, 2020;
34. Costs; and
35. Such further and other relief as this Honourable Court deems just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of July 2020:

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line that extends to the right and then curves back up to cross the 'J'.

James Kitchen

Counsel for the Applicants

Table of Authorities to the Brief of the Applicants

TAB 1. *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714

TAB 2. *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*,
2006 ABQB 904

TAB 3. *Alberta March for Life Association v Edmonton (City)*, 2020 ABQB 220