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APPLICANTS	ALBERTA MARCH FOR LIFE ASSOCIATION and JERRY PASTERNAK
RESPONDENT	CITY OF EDMONTON
DOCUMENT	**FACTUM OF THE APPLICANTS**

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PART 1: OVERVIEW

1. This case is about the Respondent's arbitrary censorship of expressive content on government property. For the second time in three years, the City of Edmonton has cancelled an initially approved lighting of the High Level Bridge in connection with the annual pro-life event, the March for Life.

2. The *Canadian Charter of Rights and Freedoms* guards against government decision-makers cancelling expression based on the content of that expression, unless the government can demonstrate that doing so is justified in accordance with law in a free and democratic society. The opposition of others, even those who may have the ear of the City, does not justify the cancellation of expression in a free and democratic society.[1] As stated by then-Justice McLachlin, "the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception."[2]

3. Alberta 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. The expression of pro-life opinions is part of the diversity of expression found in a free society, and is protected by the *Charter*.

PART 2: THE PARTIES

4. 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 Edmonton to promote respect for human life (the "March for Life").

5. The Applicant, Jerry Pasternak is a resident of Edmonton and Vice Chair of AMLA.

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[1] See Certified Record of Proceedings [Certified Record], TAB 32.
[2] ***R v Zundel***, [1992] 2 SCR 731 [*Zundel*] at 753. (**TAB 34**)

6. The Respondent, the City of Edmonton (the "City") is the operator of the High Level Bridge. The City has instituted a program by which non-government organizations and individuals can apply to have the High Level Bridge lit in colours that promote or celebrate an event, campaign or causes of their choice.

PART 3: THE FACTS

A. The High Level Bridge and the Light the Bridge Guidelines

7. In 2014, the High Level Bridge (the "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 lighting system is controlled and operated by the City.

8. Since 2014, the City has been lighting the Bridge in accordance with its "Light the Bridge" program. The stated goal of "Light the Bridge" is "to reflect the diversity of people who call Edmonton home and our connection to the global community".[3]

9. The City specifically invites citizen requests to light the Bridge.[4] Requests to light the Bridge are evaluated and decided upon pursuant to the criteria contained in the Light the Bridge Guidelines (the "Guidelines"). The Guidelines contain a set of requirements that Bridge lighting requests must conform to (see section "D"), as well as a set of restrictions (see section "H").[5]

10. Section "D" of the Guidelines states:

> Requests must be not-for-profit, community oriented and support either:
> - An event of national or international significance
> - A local festival or event that positively impacts local community spirit
> - A local, national or international awareness issue that builds community

[3] Certified Record, TAB 8 at 1.
[4] Certified Record, TAB 8 at 1.
[5] Certified Record, TAB 2 at 2.

11. Section "H" of the Guidelines states:

> The City of Edmonton reserves the right to deny requests that do not merit public support, have a risk of polarizing the community, or are mainly personal, private, political, or commercial in nature.

12. The Guidelines contain no definition of or explanation for the terms "public support", "polarizing" or "political". The peaceful expression of pro-life views is legal and constitutionally protected by section 2(b) of the *Charter*.

B. The City's Decision to Cancel a Bridge Lighting for the 2019 March for Life

13. On March 6, 2019, the Applicant, Jerry 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 "March for Life Lighting").

14. Thousands attend the March for Life each year, which has occurred since 2008. Marchers typically listen to multiple speakers who discuss issues regarding respect for human life.

15. On March 7, the next day after receiving the application submitted by Mr. Pasternak, City staff approved the March for Life Lighting.[6] However, on April 5, 2019 Mr. Pasternak received an email from City staff, which 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.[7]

(the "Cancellation Decision")

[6] Certified Record, TAB 4 at 1.
[7] Certified Record, TAB 1 at 1.

16. 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? … Unless you can support your claim I have to consider your decision as a form of censorship.[8]

17. No reply or further communication regarding the Cancellation Decision or the reasons therefore was received by the Applicants. The March for Life Lighting did not occur.

18. A nearly identical circumstance occurred in 2017, when the City approved an application to light the Bridge in colours associated with the 2017 March for Life, but then cancelled the scheduled lighting on the day it was to occur.[9]

PART 4: APPLICABLE LAW

19. The fundamental Canadian right of freedom of expression is celebrated and constitutionally protected in section 2(b) of the *Canadian Charter of Rights and Freedoms,*[10] which states:

> 2. Everyone has the following fundamental freedoms:
> …
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

20. Section 24(1) of the *Charter* states:

> 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.

21. Section 52(1) of the *Constitution Act, 1982* states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

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[8] Certified Record, TAB 27 at 1.
[9] Certified Record, TABs 11 at 13-14.
[10] *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 [*Charter*], ss 1, 2(b). (**TAB 2**)

22. Section 1 of the *Charter* states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

PART 5: ARGUMENT

23. The Applicants submit the Cancellation Decision raises the following issues:

A. Whether the *Canadian Charter of Rights and Freedoms* (the "*Charter*") applies to the Cancellation Decision;

B. Whether the Applicants' *Charter* rights to free expression are engaged by the Cancellation Decision;

C. The appropriate standard of review;

D. Whether the Cancellation Decision disproportionately limits the Applicant's expressive rights, and is therefore unreasonable;

E. Whether the Cancellation Decision was effected in a procedurally unfair manner and is therefore invalid;

F. Whether the Cancellation Decision raises a reasonable apprehension of bias;

G. Whether the City's Light the Bridge Guidelines limit free expression and are not saved by section 1 of the *Charter*; and

H. The appropriate remedies.

A. The *Charter* Applies to the Cancellation Decision

24. The City, as a municipality, is government for the purpose of *Charter* applicability, and the *Charter* applies to "all of its activities", including the Cancellation Decision.[11] The Cancellation Decision was the result of the City's application of a City policy concerning

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[11] ***Canadian Federation of Students v Greater Vancouver Transportation Authority***, 2006 BCCA 529 [*Canadian Federation of Students*] at paras 54-66 (**TAB 11**), affirmed in ***Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component***, 2009 SCC 31 [*Greater Vancouver*] (**TAB 20**); ***Eldridge v British Columbia (Attorney General)***, [1997] 3 SCR 624 [*Eldridge*] at paras 40, 44 (**TAB 18**); ***Godbout v Longueil (City)***, [1997] 3 SCR 844 at paras 50-55. (**TAB 19**)

expression on a public, City-owned space that the City has explicitly opened up for expressive purposes. The authority exercised to make the Cancellation Decision is subject to the *Charter* and the City staff were therefore bound to uphold the *Charter* rights of the Applicants.

B. The Cancellation Decision Engages the Applicants' Free Expression Rights

25. The Supreme Court has established a three-part test for whether freedom of expression protected under section 2(b) of the *Charter* is engaged.[12] Applied in the present context, the three-part test asks the following three questions:

    1. Does the March for Life Lighting have expressive content, bringing it within section 2(b) protection?
    2. Did the method or location of the expression remove that protection?
    3. If the expression is protected by section 2(b), did the Cancellation Decision infringe that protection, either in purpose or effect?

26. The first part of the test is met. The colours Mr. Pasternak requested for the March for Life Lighting were purposely chosen to express the central theme of the March for Life: respect for the unique value and dignity of human life from conception to natural death. Pink represents unborn girls, blue represents unborn boys and white represents purity of love. There is deep meaning inherent in the colours and what they represent. Thus, lighting the Bridge in the specific colours of pink, blue and white in connection with the March for Life has expressive content. Indeed, the motivation underlying the Cancellation Decision was to prevent the March for Life Lighting because of the message it conveyed.[13]

27. Regarding the second part of the test, the March for Life Lighting is not excluded from constitutional protection by means of the method of expression; the meaning behind the colours does not constitute criminal hate speech, it does not advocate violence and it is not obscene or indecent as to cause harm incompatible with society's proper functioning.[14]

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[12] ***Montréal (City) v 2952-1366 Québec Inc***, 2005 SCC 62 [*Montreal*] at para 56 (**TAB 27**); ***Greater Vancouver*** at para 37. (**TAB 20**)
[13] Certified Record, TAB 5 at 1.
[14] ***R v Labaye***, 2005 SCC 80 at paras 21-23. (**TAB 32**)

28. The location of an expressive activity can only remove it from the protection of section 2(b) of the *Charter* if permitting expressive activity in that location conflicts with or undermines the values protected by freedom of expression.[15]

29. Far from undermining the values free expression protects, permitting expression through the Bridge's lighting system invariably furthers the values of self-fulfilment, and, depending on the meaning communicated by colours chosen by members of the public, the values of truth-finding and democratic discourse as well. These are the three "core values" underlying freedom of expression.[16] Two of the very purposes of inviting the public to submit requests to light the Bridge in their chosen colours is to permit individuals and organizations to raise awareness among the public about a particular issue (truth-seeking), and to fulfill themselves by communicating their message or promoting their event.[17]

30. The City of Edmonton has outfitted the High Level Bridge with a lighting system used to convey meaning through colours and invited members of the public to request the Bridge be lit in colours of their choosing on a specified day, thereby attaching a secondary expressive purpose to the Bridge. The Bridge is historically and actually used as a space for public expression. It is a location that receives 2(b) protection.[18]

31. This conclusion is consistent with the applicable caselaw. In *Greater Vancouver*, the Supreme Court of Canada held that expression on the sides of public buses is protected by section 2(b) of the *Charter* due to the historic use of that medium for advertising, and because advertising on the sides of buses neither impairs the normal use of a bus to navigate the roads and carry passengers, nor does it "undermine the values underlying freedom of expression."[19] Similarly, in *Troller v Manitoba Public Insurance Corporation*, the Court of Queen's Bench of Manitoba has ruled that expression on personalized licence plates is *Charter*-protected.[20]

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[15] ***Canadian Broadcasting Corp v Canada (Attorney General)***, 2011 SCC 2 at para 37. (**TAB 8**)
[16] ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41 at para 75. (**TAB 35**)
[17] Certified Record, TABs 2, 8.
[18] ***Montreal*** at paras 74-81 (**TAB 27**); ***Greater Vancouver*** at paras 39-46. (**TAB 20**)
[19] ***Greater Vancouver*** at paras 39-43. (**TAB 20**)
[20] 2019 MBQB 157 [*Troller*] at para 75. (**TAB 37**)

32. In *Greater Vancouver*, the municipality determined to permit and invite citizen expression on the sides of municipal buses in the form of advertising. In *Troller*, the Crown Corporation determined to permit and invite citizen expression on personalized licence plates in the form of specifically chosen letters and numbers. In both of those cases, a secondary expressive purpose was explicitly attached by government to public pieces of property.

33. Finally, the cancellation of the Applicants' expression from the Bridge infringed their freedom of expression in both purpose and effect. The purpose of the cancellation was to prevent expressive content on the Bridge that City decision-makers claimed was "polarizing" and the effect was to prevent the Applicants from expressing their message through the Bridge lighting system.

C. Standard of Review

34. In accordance with the Supreme Court of Canada's recent clarification of the standard of review for administrative decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[21] the standard for review of the merits and substantive outcome of the Cancellation Decision is reasonableness.[22]

35. The standard of review of the Cancellation Decision on the issue of procedural fairness—which includes the question of whether there is a reasonable apprehension of bias—is correctness.[23]

D. The Cancellation Decision Disproportionately Limits the Applicant's Expressive Rights, Rendering the Decision Unreasonable

I. Reasonableness Review of Administrative Decisions that Limit Charter Rights

36. In addition to reviewing "to ensure that [it is,] as a whole[,] transparent, intelligible, and justified", a court reviewing an administrative decision that engages *Charter* protections must look to whether the *Charter* rights infringement occasioned by the decision is proportionately

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[21] 2019 SCC 65 [*Vavilov*]. (**TAB 6**)
[22] ***Vavilov*** at paras 23-25. (**TAB 6**)
[23] ***Mission Institution v Khela***, 2014 SCC 24 at para 79 (**TAB 26**). In ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817 [*Baker*] at para 45 (**TAB 5**), the Court stated that "procedural fairness […] requires that decisions be made free from a reasonable apprehension of bias by an impartial decision maker."

balanced *vis-à-vis* any objective claimed to be achieved by the decision.[24] A decision that disproportionately limits *Charter* protections is unreasonable.[25] As the Supreme Court ruled in *Trinity Western*:

> For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision proportionately balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.[26]

37. Once, as here, a claimant has established that their *Charter* rights have been limited by the decision under review, the onus is on the decision maker to demonstrate that the limitation is proportionately balanced by giving effect, as fully as possible, to the *Charter* protections at stake.[27] This burden flows from the structure of the *Charter* and the language of section 1, which requires that limits on *Charter* rights and freedoms be "demonstrably justified in a free and democratic society."[28] The Alberta Court of Appeal recently stated:

> To be consistent with the *Charter*, the limitation must, in my view, be demonstrably justified in a free and democratic society. Although that expression about demonstrable justification does not figure prominently in the cases from *Dore* onward, it is not erased from the *Charter* as linguistic frill. As

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[24] ***Vavilov*** at para 165 (**TAB 6**); ***Doré v Barreau du Québec***, 2012 SCC 12 [*Doré*] at paras 55-57 (**TAB 16**); ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12 [*Loyola*] at paras 37-39. (**TAB 25**)

[25] ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32 [*TWU*] at para 79 (**TAB 22**), citing ***Doré*** at paras 3 and 7 (**TAB 16**) and ***Loyola*** at para 32 (**TAB 25**); see also ***CHP v Hamilton (City)***, 2018 ONSC 3690 [*CHP*] at para 57 (**TAB 13**): "Failure to balance said interests will, by definition, render a decision unreasonable as per *Doré v. Barreau du Quebec*".

[26] ***TWU*** at paras 80. (**TAB 22**)

[27] See ***Canadian Centre for Bio-Ethical Reform v City of Peterborough***, 2016 ONSC 1972 at para 15 (**TAB 9**): "The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant's freedom of expression was not limited more than reasonably necessary given those statutory objectives."

[28] *Charter*, s 1. (**TAB 2**)

> pointed out in *Loyola*, at para 40, "*Doré*'s proportionality analysis is a robust one and 'works the same justificatory muscles" as the *Oakes* test'".
>
> Furthermore, and of key importance, the onus on proving the 'section 1 limit' on expression freedom even under administrative law should be on the state agent as it is the exercise of power by an emanate of the state.[29]

38. The Ontario Divisional Court described the burden of justification placed on the administrative decision maker as follows:

> The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant's freedom of expression was not limited more than reasonably necessary given those statutory objectives.[30]

II. The Severity of the Cancellation Decision's Infringement of Free Expression

39. As the Ontario Divisional Court reminds, a government decision the effect of which will be censorship is not "trifling, ephemeral or marginal in importance", but rather "of profound significance."[31] State censorship is never trivial in a free and democratic society, and it is no less so when the medium that would have been used to express the message is a system of lights on a bridge.

40. This is particularly so when, as here, the content of the expression goes to the core of what 2(b) protects, which the pro-life expression underlying the March for Life Lighting does. As the British Columbia Court of Appeal has found:

> [26] Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate

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[29] ***UAlberta Pro-Life v Governors of the University of Alberta***, 2020 ABCA 1 [*UAlberta*] at paras 161-162 (**TAB 38**); see also ***Doré*** at para 63 (**TAB 16**): "Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion".

[30] ***Canadian Centre for Bio-Ethical Reform v Peterborough (City)***, 2016 ONSC 1972 at para 15. (**TAB 9**)

[31] ***CHP*** at para 53. (**TAB 13**)

> on abortion. Professor Dworkin has said this about the importance of those convictions to most people:
>
> > [To people who are religious in the traditional way] [t]he connection between their faith and their opinions about abortion is not contingent but constitutive: their convictions about abortion are shadows of more general foundational convictions about why human life itself is important, convictions at work in all aspects of their lives. ... People who are not religious in the conventional way also have general, instinctive convictions about whether, why and how any human life -- their own, for example -- has intrinsic value. No one can lead even a mildly reflective life without expressing such convictions. These convictions surface, for almost everyone, at exactly the same critical moments in life -- in decisions about reproduction and death and war.
>
> [27] It follows that the importance of communicating those ideas and beliefs lies at the "very heart of freedom of expression".[32]

41. McLachlin J (as she then was) aptly summarized the nature of the *Charter's* guarantee of freedom of expression in *R v Zundel*:

> The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false [….] Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception.[33]

42. The Supreme Court has stated that freedom of expression ensures that, "without fear of censure", all individuals are able to "manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[34] Government censorship is not justified by "mere ill-will as a product of

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[32] ***R v Watson***, 2008 BCCA 340 at paras 26-27, quoting Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled" (1992), 59 U Chi L Rev 381 at 412-13. (**TAB 33**)

[33] ***Zundel*** at p 753. (**TAB 34**)

[34] ***Irwin Toy Ltd v Quebec (Attorney General)***, [1989] 1 SCR 927 [*Irwin Toy*] at paras 42-43. (**TAB 21**)

controversy."[35] The City of Edmonton and its residents "are expected to put up with some controversy in a free and democratic society."[36]

43. Further, the obligation of the City to respect freedom of expression "include[s] within its ambit a duty of neutrality as to the content of the expression where there are competing views as to valid content of expression."[37] Above and beyond the requirement to avoid bias, the City is constitutionality obligated to not engage in favouritism based on the content of citizen expression on locations that attract 2(b) protection.

44. It is a serious matter for the City to arbitrarily censor lawful expression and determine a particular message cannot be the subject of a bridge lighting. Such denial demeans and delegitimizes those attempting to communicate their particular message in comparison to all the other members of society who *are* able to utilize the bridge for public expression. It is also a loss for society as whole, which possesses a right to hear and see expression[38] and only thrives to the degree free expression pervades. The infringement of free expression in this case is total, rendering the Cancellation Decision indefensible as representing a proportionate balancing of *Charter* rights.

III. The Cancellation Decision does not Proportionately Balance Free Expression

45. Once it is shown that a discretionary administrative decision restricts freedom of expression, a reviewing court must look to the reasons given for the limitation, to determine whether the limit is reasonable.

46. The City restricted the Applicants' *Charter* right to free expression for no transparent, intelligible or reviewable reason. The restriction is, for that reason alone, unreasonable. "Failure to balance [*Charter*] interests will, by definition, render a decision unreasonable as per *Doré*."[39]

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[35] ***Committee for the Commonwealth of Canada v Canada***, [1991] 1 SCR 139 at para 79, quoting ***Boucher v The King***, [1951] SCR 265, at p 288. (**TAB 15**)
[36] ***Greater Vancouver*** at para 77. (**TAB 20**)
[37] ***UAlberta,*** at para 200. (**TAB 38**)
[38] ***Little Sisters Book and Art Emporium v Canada (Minister of Justice)***, 2000 SCC 69 at para 41. (**TAB 23**)
[39] ***CHP*** at para 57. (**TAB 13**)

47. Whether an administrative decision reflects a proportionate balance between *Charter* protections and applicable statutory objectives is properly an inquiry into the decision that was actually made.[40] In the present case, this question appears to answer itself: the City's decision does ***not*** reflect a proportionate balancing of the *Charter* protections at play because it was neither the product of a transparent process nor was it supported by intelligible reasons. The decision the City ***actually made*** unreasonably restricted the Appellants' freedom of expression.

48. The sole statement from the City explaining the Cancellation Decision 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 "Guidelines").[41] However, the City provided no explanation for this assertion. Nor has it provided an explanation of the term "polarizing" or examples of what would or would not be "polarizing" pursuant to the Guidelines.

49. Far from demonstrating a proportionate balance of *Charter* protections, the scant reasons given by the City for the Cancellation Decision are devoid of any indication of a *Charter* analysis. There is no evidence in the record showing that the City's decision-makers ever turned their minds to the impact of the Cancellation Decision upon the *Charter* protections it engaged.

50. The failure of the City in this case to engage in a *Charter* analysis, renders the Cancellation Decision unreasonable on its face. Consequently, the City is unable to meet its burden to justify the Cancellation Decision as a reasonable and proportionate balance of the *Charter* rights engaged by the Cancellation Decision.

51. This is consistent with the Supreme Court's *Vavilov* decision, which notes that "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome":

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an

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[40] See ***Vavilov*** at para 15 (**TAB 6**): "the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it"; see also para 83: "It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome."

[41] Certified Record, TAB 2 at 2.

> unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision.[42]

52. Ignoring the fact that the City failed to even attempt to balance *Charter* protections—which is fatal to any finding that the Cancellation Decision is reasonable and justified—the Cancellation Decision is not a proportionate balance of the *Charter* protections at stake. The Cancellation Decision is similar to the decision in *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*,[43] which the BC Court of Appeal set aside, after concluding:

> In the case at bar, there are no dots for a court to connect. In denying the CCRB's advertisement request, [the decision-maker] 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.[44]

53. Similarly, the Cancellation Decision makes no acknowledgement of the *Charter* protections for free expression, which it infringed, and likewise made no attempt to explain how it reflected a proportionate balance in light of the City's objectives. The Cancellation Decision is an unreasonable infringement of the *Charter* freedoms of expression, which requires appropriate and just remedies from this Court.

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[42] ***Vavilov*** at para 96. (**TAB 6**)
[43] ***Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority***, 2018 BCCA 344 [*South Coast*]. (**TAB 10**)
[44] ***South Coast*** at para 54 (emphasis added). (**TAB 10**)

E. The Cancellation Decision Violates the City's Duty of Procedural Fairness

54. As stated by the Supreme Court of Canada in *Baker v Minister of Citizenship and Immigration*, an administrative decision which "affects 'the rights, privileges or interests'" of individuals "is sufficient to trigger the duty of [procedural] fairness".[45] Procedural fairness is "eminently variable" and "'its content is to be decided in the specific context of each case'".[46]

55. In *Baker*, a non-exhaustive list of factors influencing the content of the duty was provided: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance to the individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the [administrative body] at issue.[47]

56. In *Therrien (Re)*[48]—decided after *Baker*—the Supreme Court of Canada described the "duty to act fairly" as having "two components: the right to be heard (*audi alteram partem*) and the right to an impartial hearing (*nemo judex in sua causa*)."[49] In *Nova Scotia Public Service Long Term Disability Plan Trust Fund v Hyson*,[50] the Nova Scotia Court of Appeal described the former as "a fundamental principle of natural justice."[51]

57. The Cancellation Decision was not made in a procedurally fair manner. Given the March for Life Lighting was initially approved and the Applicants freedom of expression was engaged, the Applicants should have been notified that the City was considering a decision to cancel the March for Life Lighting, told what concerns the City had, and provided with a fair opportunity to respond to those concerns with evidence and argument.[52]

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[45] ***Baker*** at para 20, quoting ***Cardinal v Director of Kent Institution***, [1985] 2 SCR 643 at 653. (**TAB 5**)
[46] ***Baker*** at para 21 (quoting ***Knight v Indian Head School Division No 19***, [1990] 1 SCR 653 at 682 **TAB 5**). See also ***Murray Purcha & Son Ltd v Barriere (District)***, 2019 BCCA 4 at para 41. (**TAB 28**)
[47] ***Baker*** at paras 22-27. (**TAB 5**)
[48] ***Therrien (Re)***, 2001 SCC 35 at para 82. (**TAB 36**)
[49] ***Therrien (Re)*** at para 82. (**TAB 36**)
[50] ***Nova Scotia Public Service Long Term Disability Plan Trust Fund v Hyson***, 2017 NSCA 46 [*Hyson*]. (**TAB 29**)
[51] ***Hyson*** at paras 38, 39. (**TAB 29**)
[52] ***CHP*** at para 50. (**TAB 13**)

F. The Cancellation Decision Raises a Reasonable Apprehension of Bias

58. The Applicants allege the City is ideologically and politically biased regarding pro-life expression and was predisposed to deny or cancel the March for Life Lighting based on disapproval of or disagreement with the message expressed by the March for Life Lighting.

59. In *Baker,* it was stated that "[p]rocedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision maker",[53] The test for a reasonable apprehension of bias was set out in the dissenting judgment of de Grandpré J. in *Committee for Justice and Liberty v Canada (National Energy Board)*,[54] in which he stated that:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[55]

60. The Rules of Court prevent applicants for judicial review from providing the court with evidence.[56] However, the City has not sought to strike the Applicants' many references to various past lightings of the Bridge, such as repeated lightings for LGBT-themed events.[57]

61. The evidence before this court is that the Cancellation Decision is the ***second*** time a March for Life-related lighting has been cancelled after being initially approved, and that the only known requests to light the Bridge that the City has ever denied are requests connected with pro-life expression. In response to direction from this Court, the City has confirmed that it has never

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[53] ***Baker*** at para 45. (**TAB 5**)
[54] ***Committee for Justice and Liberty v National Energy Board***, [1978] 1 SCR 369 [*Committee for Justice and Liberty*] (**TAB 14**). See also ***LN v SM***, 2007 ABCA 258 at para 19. (**TAB 24**)
[55] ***Committee for Justice and Liberty*** at 394, as quoted in ***Baker*** at para 46. (**TAB 14**)
[56] *Alberta Rules of Court*, r 3.22 (**TAB 1**); An application by the Applicants to have evidence admitted was dismissed—see the reasons for decision of Justice Bercov, filed October 1, 2020 and indexed as 2020 ABQB 575. (**TAB 4**)
[57] See the reasons for decision of Justice Michalyshyn, filed March 31, 2020 and indexed as 2020 ABQB 220. (**TAB 3**)

received a request to light the Bridge from a "pro-choice" organization, rendering meaningless any claim that the City is not biased because it has also not lit the bridge in connection with a pro-choice event.[58]

62. The Applicants claim that the City selectively applies the Guidelines to deny pro-life themed expression and that doing so raises a reasonable apprehension of bias.

63. That the apprehension of bias is not merely subjective and in the mind of the Applicants is evidenced by complaints the City has received from members of the public. 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".[59]

A further complaint received in response to the 2017 decision to cancel includes the following comment:

> I read about your cancellation regarding the lighting of the High Level Bridge with Pink, Blue and White Ribbons. I was very disturbed that your minds where changed [*sic*] at the last minute due to some tweets. My question to you now is… When they have the guy parade [*sic*] will you keep the lights off then to [*sic*] even though they request it? Will you be fair and just to all the citizens of Edmonton?[60]

Another complainant stated in response to the Cancellation Decision:

> I am concerned that you rejected a controversial request from the prolife organization while accepting requests from many other controversial organizations. I feel you are discriminating one group over others [sic]. I am not a supporter of prolife or many of the other organizations you have accepted. I understand the reason sited [*sic*] for the rejection was possible controversy but I

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[58] ***Alberta March for Life Association v Edmonton (City)***, 2020 ABQB 575 at para 59. (**TAB 4**)
[59] Certified Record, TAB 21.
[60] Certified Record, TAB 25 at 1.

> suspect it had more to do with political bias based on the other controversial organizations I have seen displayed through the lighting.[61]

64. The limited record of internal emails between City staff indicate very little thought or discussion went into whether, why or how lighting the Bridge for the March for Life was in contravention of the Guidelines, or otherwise unacceptable. Rather, it appears to be simply ***assumed*** by City staff that lighting the Bridge in connection with pro-life views must somehow violate the Guidelines.[62]

65. An ***informed*** person, viewing the matter ***realistically***, would, in light of the repeated Pride-related Bridge lightings and repeated cancellations of pro-life-related Bridge lightings, conclude that the City is ideologically or politically biased and incapable of fairly deciding a request to light the Bridge for the March for Life. The Applicants submit the Cancellation Decision was not made in good faith pursuant to any valid content-neutral criteria. It was predicated upon the City's political and ideological opposition to the content of pro-life expression.

G. The Light the Bridge Guidelines' Limits on Free Expression are not Saved by Section 1 of the *Charter*

66. As already established, the Bridge is "a location where expressive activity is protected by s. 2(*b*) of the *Charter*."[63] Like the policy at issue in *Greater Vancouver*, the Guidelines limit the right to freedom of expression on the Bridge by restricting content that "[does] not merit public support", that is "mainly political" or that "[has] a risk of polarizing the community".[64] The issue, then, is whether the City is able to demonstrate that the limitation is justified in a free and democratic society.[65]

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[61] Certified Record, TAB 33.
[62] Certified Record, TABs 5, 11.
[63] ***Greater Vancouver*** at para 46. (**TAB 20**)
[64] Certified Record, TAB 2 at 2; ***Greater Vancouver*** at para 47. (**TAB 20**)
[65] ***Greater Vancouver*** at para 47. (**TAB 20**)

I. The Guidelines are Insufficiently Precise to be Prescribed by Law

67. To be considered "prescribed by law" for the purposes of section 1 of the *Charter*, the Guidelines must be "sufficiently precise" such that they "enable people to regulate their conduct by [them], and to provide guidance to those who apply the law."[66]

68. The restriction relied upon by the City for the Cancellation Decision is that Bridge lighting requests not "have a risk of polarizing the community." The Applicants submit that this criterion is so vague, broad and subjective, that it does not meet the necessary threshold, which is meant to "preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves."[67] The Applicants and the wider public have no means of knowing how to satisfy this criterion. The rule of law exists to provide certainty regarding the limits of state power and the rights of citizens. Uncertain and nebulous criteria open the door to arbitrary and inconsistent state decision making, as in the instant case.

69. Regarding the requirement that laws be sufficiently precise, the Supreme Court has said:

> A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met.[68]

70. There are extremely few topics or issues that do not have at least some risk of at least some polarization among a community as large, diverse and pluralistic as Edmonton's. Such a broad, almost unlimited restriction grants City decision makers nearly unrestrained power to deny a Bridge lighting request. There is no "intelligible standard" discernible in the generality of the discretion conferred by this criterion.[69]

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[66] ***Greater Vancouver*** at para 50, quoting Peter Hogg in *Constitutional Law of Canada* (5th ed. 2007), vol 2 at 122. (**TAB 20**)
[67] ***Greater Vancouver*** at para 53. (**TAB 20**)
[68] ***Osborne v Canada (Treasury Board)***, [1991] 2 SCR 69 at para 51. (**TAB 30**)
[69] ***Irwin Toy*** at para 63. (**TAB 21**)

71. The Guidelines contain no qualifications or parameters for what would constitute "polarization", how much polarization is too much, what degree of "risk" is too much, or how to assess that "risk". What one person may perceive to be "polarizing", another perceives to be a foundational societal value, like the Applicants' do in regard to the value of human life. What one person may perceive to have a risk of polarizing the community, another perceives to be entirely uncontroversial.

72. What a very small, but very loud minority may strongly oppose, an overwhelming majority may be indifferent about. Conversely, an issue or topic may "polarize" a dissenting segment of the community, but please the segment of the community which commands more political favour.

73. The restriction in the Guidelines that the City says the March for Life Lighting contravenes—having a risk of polarizing the community—is so arbitrary that it is incapable of being a limit on freedom of expression that is prescribed by law and therefore incapable of being justified by section 1.

II. The Limitation on Freedom of Expression is Not Minimally Impairing.

74. The Applicants submit that even if the Guidelines are found by this Court to be prescribed by law, there is no discernible pressing and substantial objective to restricting expression on the Bridge that has "a risk of polarizing the community".

75. Further, like the criterion in *Greater Vancouver* that restricted content that could "create controversy", the criterion in the Guidelines that restricts content that has "a risk of polarizing the community" is unnecessarily broad and therefore does not minimally impair freedom of expression.[70]

H. The Remedies Sought are Appropriate and Just in the Circumstances

76. This Court, as a superior court of general and inherent jurisdiction, is always a court of competent jurisdiction to issue remedies under section 24(1) of the *Charter*, a power embodied "in the supreme law of Canada" which "cannot be strictly limited by statute or

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[70] ***Greater Vancouver*** at para 77. (**TAB 20**)

rules of the common law."[71] Accordingly, this Court is empowered to remedy *Charter* violations in any way that it considers appropriate and just in the circumstances and has wide discretion to issue remedies which should "meaningfully vindicate the rights and freedoms" of the Applicants.[72]

77. The Supreme Court has held that "[a] court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it." [73] Those factors are met in this case. Further, a declaration is "an effective and flexible remedy for the settlement of real disputes".[74] A declaration would provide needed guidance to the City regarding its substantive and procedural obligations under the *Charter* and administrative law when making decisions regarding applications to light the High Level Bridge.

78. The Applicants submit an order of *prohibition* should be issued, to ensure that the City does not deny lighting the Bridge in specific colours on the basis of the lawful ideas, views, opinions, perspectives, values or beliefs of the March for Life. Such a remedy both vindicates and protects the exercise of expressive rights through the Bridge lighting system.

PART 6: RELIEF SOUGHT

79. A Declaration pursuant to Rule 3.15 of the Alberta Rules of Court and section 24(1) of the *Charter* that the Cancellation Decision unreasonably limited the Applicants' *Charter* section 2(b) right to freedom of expression;

80. An Order pursuant to Rule 3.15 of the Alberta Rules of Court and section 24(1) of the *Charter* in the nature of *certiorari*, quashing the Cancellation Decision;

81. A Declaration that the Cancellation Decision was made in a procedurally unfair manner;

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[71] ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 62 [*Doucet-Boudreau*] at para 51. (**TAB 17**)
[72] ***Vancouver (City) v Ward***, 2010 SCC 27 at para 20 (**TAB 39**), citing ***Doucet-Boudreau*** at paras 55-58. (**TAB 17**)
[73] ***Canada (Prime Minister) v Khadr***, 2010 SCC 3 at para 46. (**TAB 7**)
[74] ***R v Gamble***, [1988] 2 SCR 595 at 649. (**TAB 31**)

82. A Declaration that the Cancellation Decision is tainted by bias;

83. Orders pursuant to Rule 3.15 of the Alberta Rules of Court and section 24(1) of the *Charter*:

    A. In the nature of *prohibition*, precluding the City from denying a request to light the Bridge in the colours of pink, blue and white in connection with the March for Life on the basis of the content of the March for Life's pro-life expression;

    B. In the alternative, in the nature of *mandamus*, requiring the City to administrate the lighting of the Bridge in a fair and equitable manner without political or ideological favouritism;

84. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that section H of the Light the Bridge Guidelines unjustifiably infringes section 2(b) of the *Charter* and is therefore void and of no force or effect;

85. In the alternative, a Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that the criterion contained in section H of the Light the Bridge Guidelines, "have a risk of polarizing the community" unjustifiably infringes section 2(b) of the *Charter* and is therefore void and of no force or effect;

86. Costs; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd day of October 2020:

James Kitchen
Counsel for the Applicants

TABLE OF AUTHORITIES

LEGISLATION

CASE LAW