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Attention: Mayor and Council

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Dear Mayor and Council:

Re: City of Edmonton Bylaws

I have been retained by Charter Advocates Canada ("**CAC**"), a non-profit legal advocacy organization whose purpose is to uphold Canada's constitutional freedoms, civil rights and human rights.

The purpose of this letter is to express CAC's serious concerns with Edmonton's proposed Bylaw 20700 "Public Spaces Bylaw" (the "**Bylaw**").

The "legal" regime described by the Bylaw is not merely legally suspect – it is anathema to Canada's constitutional order. It violates key constitutional principles including: the rule of law; federalism; democracy; and the fundamental freedoms guaranteed to Canadians under the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

The Bylaw strikes, directly and deliberately, at the heart of liberal democracy.

The Bylaw's constitutional violations are so numerous as to defy convenient summary for the purpose of this letter. My client asks me, therefore, to focus on just three main areas.

This is a warning that, should the City of Edmonton promulgate the Bylaws notwithstanding the observations set-out in this letter, the Bylaw should qualify as "clearly unconstitutional" pursuant to *Canada (Attorney General) v Power.*[1]

[1] *Canada (Attorney General) v Power*, 2024 SCC 26 at para 104 to 106.

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A government which passes "clearly unconstitutional" legislation loses its immunity from liability for *Charter* damages. The Bylaw should qualify as "clearly unconstitutional" for reasons including:

- **the constitutional violations are obvious and egregious; and**

- **the City is receiving the detailed explanation in this letter, leaving no doubt to future courts that the City proceeded with recklessness and wilful blindness as to its duties under the *Charter*.**

1. The Bylaw is so vague it does not qualify as "law"

As set-out in the preamble to the *Constitution Act*, 1867 and restated in the preamble to and section 1 of the *Charter*, Canada is a liberal democracy which operates by the "rule of law."

The rule of law requires that legislation (including bylaws) which purports to authorize state action be sufficiently clear in its drafting so as to: a) ensure the body passing the legislation is within its legal and constitutional jurisdiction[2]; b) permit citizens to understand what the law requires and, where constitutional rights are implicated, that the drafting provide a "very high degree of predictability[3]; and c) prohibit arbitrary state action.[4]

The importance of the rule of law was expressed by Justice Rand of the Supreme Court of Canada in 1959:

> *… that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.*[5]

The Bylaw is not only replete with particular prohibitions which are vague and overbroad, it is entirely subject to the plenary discretion of the City Manager.[6]

Given the City Manager's global and limitless discretion, the Bylaw only prohibits, in fact, what the City Manager chooses to prohibit. "It's prohibited if I say so" is not the "rule of law" – it is the "rule of the City Manager."

Section 6(k) significantly compounds this constitutional violation:

> *… the City Manager may prescribe practices and determine the proper allocation of resources for the enforcement of this bylaw, including the discretion to defer enforcement and any enforcement protocols;*

The purpose of this peculiar, limitless, discretion seems to be clarified in the City's GBA+ Report and elsewhere. The GBA+ Report suggests that the very purpose of this opaque provision is to

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[2] *Saumur v City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 SCR 299 ("***Saumur***") at para. 105; *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139 ("***Committee***") at para 163;
[3] *Committee* at paras. 170 and 172.
[4] *Committee* at paras. 167 and 175.
[5] *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 at para. 44.
[6] Bylaw at sections 4(1), 4(3), 6(a), 6(b), 6(k), 40(3) and 40(4).

ensure the Bylaw is enforced in a discriminatory fashion (referred to as, I understand, "equitable implementation"[7]) on the basis of race, income, residence, sex, gender, age, citizenship, family structure, and physical and mental ability.[8]

This discriminatory enforcement is, apparently, to be effected by Peace officers who are to be guided in who they discriminate against (and how) by the City Manager's (or Council's) standard operating procedures[9] and by training in "cultural competency, implicit bias, and gender sensitivity."[10]

I believe this can all be summarized as follows: the Bylaw only prohibits what the City Manager chooses to prohibit and only applies to those citizens determined by peace officers to be "deserving" of discrimination on the basis of race, income, etc. by the application of murky ideological filters.

The Bylaw's grant of two-fold-unlimited discretion (i.e. expressly under section 4(1) etc. and implicitly under section 6(k) – which I refer to herein as "**plenary discretion squared**") renders the entire Bylaw hopelessly beyond the jurisdiction of the City[11] and renders all of the Bylaw's *Charter* violations (of which there are many) categorically impermissible[12] and unjustifiable[13] under section 1 of the *Charter*.

In *Saumur*, Justice Rand, commenting on a bylaw of the City of Quebec which merely granted city officials plenary discretion to deny the right of expression on city streets (i.e. one-fold-unlimited discretion) stated:

> *What is proposed before us is that a newspaper, just as a religious, political or other tract or handbill … can be placed under the uncontrolled discretion of a municipal officer … a more objectionable interference, short of complete suppression, with that dissemination which is the "breath of life" of the political institutions of this country than that made possible by the by-law can scarcely be imagined.*[14]

Edmonton's Bylaw, therefore, boasts at least one singular achievement – its violation of Canada's constitutional norms exceeds even the imagination of the eminent Justice Rand.

In order to operate according to the rule of law (and to uphold the equality of Canadians under the law) my client warns that the Bylaw must be amended so as to remove all plenary discretion in both the definition of its prohibitions and in its enforcement.

Likewise, the City must not grant or otherwise facilitate such discretion in the enforcement of any other City bylaws, policies, programs and services.

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[7] See GBA+ Report at page 27.

[8] See GBA+ Report at page 3; see also Bylaw 20700 - Public Spaces Bylaw - Additional Information ("**Additional Report**") at page 6.

[9] See GBA+ Report at pages 136 and 138 and Additional Report at page 6.

[10] GBA+ Report at page 27 and Additional Report at page 6.

[11] *Saumur*.

[12] Void for vagueness for failing to be "prescribed by law" – see *Committee* at paras 158 to 163.

[13] The plenary discretion also renders the Bylaw's limits on *Charter* freedoms inherently overbroad – see *R. v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606 at para 70.

[14] *Saumur* at para. 102.

2. The "Special Events" prohibition unjustifiably infringes the *Charter*

In two major respects, the Bylaw's manifest purpose is to infringe the fundamental *Charter* guarantees of freedom of religion, expression and peaceful assembly[15]. The first is by placing the exercise of these rights under license.

While restrictions on these rights, especially in the form of "time, place and manner" restrictions, may be constitutionally permissible,[16] the Bylaw goes far beyond any defensible restriction. This is for several reasons.

First, the bylaw requires prior City consent, not merely prior notice. While even "prior notice" restrictions may be unconstitutional (for example, when combined with plenary discretion[17] or when overbroad in application[18]) "prior consent" restrictions are particularly suspect[19] as they risk an arbitrary consent process which, as explained above, is unquestionably the case with respect to the Bylaw in general.

In addition to the problem of plenary discretion squared, the City Manager is not only granted unlimited discretion to withhold consent,[20] the Manager retains complete discretion to impose conditions; conditions may have the effect of converting ostensible consent into practical prohibition and which conditions may, in and of themselves, be unconstitutional restrictions on fundamental freedoms. For example, the City Manager may impose a security fee for the right to assemble in a park.[21]

Constitutional freedoms are owed by governments, not bought by citizens.

A "prior consent" restriction was struck down in *Garbeau v Montréal (City of)*, 2015 QCCS 5246 on this basis.

Second, the Bylaw is vague on its face. For example, it applies a 100-person threshold with respect to "a public space owned or operated by the City." It is unclear whether the 100-person threshold applies in each titled parcel of land or in all contiguous titled parcels which are commonly "operated by" the City. Even if the Bylaw was clear on these points, citizens wondering whether a particular gathering required license would be required to inform themselves as to underlying landholdings (by searches at the Land Titled Office) and operational responsibilities (presumably by *Freedom of Information and Protection of Privacy Act* requests).

Third, the Bylaw applies to spontaneous gatherings including, absurdly, public spaces in which 100 or more people happen to be in attendance without any common assembly or purpose – like a popular park on any given Sunday afternoon. While the City may find it desirable to

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[15] *Charter* sections 2(a), 2(b) and 2(c).
[16] *R v Oakes* [1986] 1 SCR 103.
[17] *Bérubé v Ville de Québec* ("***Bérubé***"), 2019 QCCA 1764.
[18] *Villeneuve v Ville de Montréal*, 2018 QCCA 321.
[19] *Saumur*.
[20] Use of the phrase "must not unreasonably withhold" does nothing to remedy this arbitrariness as it merely suggests there are some boundaries, without identifying those boundaries. In any case, whatever an authorizing statute says, a delegate may never, as a matter of law, exercise their power unreasonably (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).
[21] As expressly contemplated at section 40(4)(d).

expose its citizens to fines and arrest for the spontaneous decision to attend a busy park, to the extent such overreach abut constitutional freedoms,[22] that overreach becomes fatal to the Bylaw's validity.

I understand that in the City's committee meeting on February 11, 2025, Mayor Sohi proposed an amendment in an attempt to ensure the Bylaw did not "capture protests across the board." The committee added the following clause:

> *40(5) Nothing in this section will be applied or interpreted to prevent the exercise of fundamental freedoms guarantees by the Canadian Charter of Rights and Freedoms.*

This amendment, however, fails to remedy any of the problems identified in this letter.

Of course, the amendment address neither the problem of the Bylaw's vagueness (see above) nor the problem with respect to Bylaw section 33 (see below).

In fact, the law's vagueness, as it relates to special events, is actually compounded by the amendment.

The theory behind the amendment seems to have been that by expressly exempting *Charter*-protected expression, certain[23] protests would cease to be regulated "special events." However, this is based on a misunderstanding of the *Charter*'s fundamental freedoms. Those freedoms protect Canadians in respect of all manner of religious and expressive activity and assembly, whether protest or otherwise.[24]

Given the scope of the *Charter* section 2 fundamental freedoms, properly understood, the amendment actually leads to, either, an absurd result or greater uncertainty.

If the amendment is interpreted literally, the "special event" section is effectively eliminated, which is an absurd (but welcome) result. This is because the section's only purpose is to regulate expressive activity and because the only means of enforcement is to prohibit (by threat of fine and arrest) expressive activity which is unauthorized.

Perhaps the amendment is to be construed to mean the City would not "prevent" expressive activity (by, for example, breaking-up an unauthorized event by force or by blocking would-be attendees from the event site) but

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[22] *Committee* at para 170.

[23] I take from the Mayor's comments that it was not intended to capture "protests across the board" meaning that it was intended to capture some kinds of protest.

[24] Section 2(b), for example, guarantees the right to "expression" which is any conduct, verbal or non-verbal, with "expressive content" – see, for example, *Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927.

> that the City would remain free to fine and arrest people for violating the Bylaw. In that case, the amendment does not remedy the *Charter* breaches. Government most often infringes *Charter* rights by interfering with them, and only rarely by making them physically impossible.
>
> There are many other plausible interpretations of the amendment, which is to demonstrate that the amendment compounds, rather than resolves, the Bylaw's profound vagueness.
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> With respect, an unconstitutional law can not be remedied by means of a "catch all" clause of the sort here proposed. The clause represents a sort of impermissible sub-delegation. It is the City which is tasked with the duty to carefully draft bylaws so as to ensure that, by their express terms and necessary operation, they are legal and constitutional.

Fourth, each of the Bylaw's: vagueness; application to spontaneous gatherings; and automatic invalidation of any permit which has been breached by any person at any time,[25] would leave a citizen (who, by some miracle, came to understand his or her attendance at a "special event" was Bylaw compliant) entirely uncertain from moment-to-moment whether or not the permit remained valid. As nicely expressed by Justice Marie-France Bich in *Bérubé*, commenting on a bylaw with similar effect (albeit one that only required "prior notice"):

> *… This constraint, symbolically as much as concretely, is prejudicial to the civic community in that it has dissuasive effects on civic engagement*.[26]

In other words, leaving citizens unreasonably uncertain as to whether their constitutional freedoms are restricted has an impermissible "chilling effect" on the robust exercise of their constitutional freedoms. Further, conditions imposed on the "special event" may be very likely to be breached by someone, somewhere, granting peace officers, *de facto,* complete and unlimited discretion to declare a permit void at any time they might deem convenient.

Fifth, even if all of the above fatal flaws with the Bylaw's terms could be resolved, the City's chosen and highly invasive "prior consent" requirement applies to all times, places and manners. Constitutional freedoms are subject only to "… reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[27] Such justification includes ensuring that limits are impaired "as little as possible" and only where countervailing considerations are "pressing and substantial" and "proportionate".[28]

To validly limit constitutional rights a government must craft legislative limits narrowly and precisely – like the careful use of a scalpel. The Bylaws are drafted with such vagueness and overbreadth they resemble, rather, an aimless sledgehammer.

Finally, but by no means exhaustively, a permit would only license the gathering itself – it would not license any particular conduct at that gathering. It seems entirely unlikely the City Manager

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[25] Bylaw at section 4(3).
[26] Bérubé at para 160.
[27] *Charter* at section 1; further, under the *Alberta Bill of Rights,* any limits on Albertans' fundamental freedoms must "be demonstrably and proportionately justified based on evidence…"
[28] Oakes at paras. 74 and 75.

would issue a permit for attendees to engage in "harassment" or "inappropriate behavior" as defined in the Bylaw. As explained in the part below, the City's prohibition of "harassment" (and "inappropriate behavior") seems, itself, clearly unconstitutional but takes on a particularly objectionable dimension when applied to citizens who assemble for the purpose of democratic engagement, the search for truth or social progress, or as a means of self-actualization.[29]

My client, therefore, warns that the Bylaw must be amended so as to remove section 40 "Special Events."

3. The Bylaw unconstitutionally prohibits "harassment"

The second major mechanism by which the Bylaw seeks to supress *Charter* guarantees is by means of its prohibitions on "harassment" and "inappropriate behavior".[30]

As set-out above, infringements of constitutional rights can only be justified where a pressing and substantial governmental purpose, which is consistent with a free and democratic society, is carefully and proportionately balanced by means of narrow, clear and explicit prohibitions.

In addition to the Bylaw's fatal problem of plenary discretion squared, the City's attempt to prohibit "harassment" and "inappropriate behavior" should be found "clearly unconstitutional" for additional reasons.

First, as explained above, in order to constitute a constitutional (and otherwise legal[31]) prohibition, a law must be sufficiently clear as to what is prohibited. The Bylaw is inherently and irredeemably uncertain because the offence requires a particular subjective effect on a third person. To put it another way, whether or not the Bylaw is breached by conduct or a comment depends on how other people feel about it.

For example, Person A might approach Person B then Person C for the purpose of proselytizing or political outreach. Supposing Person B finds such proselytizing unobjectionable, then no matter how "objectionable" the content of Person A's expression, it is not prohibited as "harassment" under the Bylaw. If Person C, on the other hand, finds the expression objectionable, it is prohibited. As a result, the keys to determining whether conduct is prohibited lay hidden in the minds of other citizens.

The Bylaw's use of a subjective test is in my opinion, therefore, illegal and unconstitutional.[32]

Second, the manifest objective of the "harassment" prohibition[33] is, categorically, neither a pressing and substantial objective nor consistent with a free and democratic society.

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[29] *R v Keegstra*, [1990] 3 S.C.R. 697 at para. 30.

[30] Bylaw at sections 33 and 34.

[31] *Red Hot Video Ltd. v Vancouver (City)*, (1985), 18 C.C.C. (3d) 153.

[32] Take no comfort in the *Occupational Health and Safety Act*'s similar use of subjectivity (see, especially, ss. 1(n) and (rr)). The legality and constitutionality of those (recent) provisions have yet to be tested and, for the reasons given in this letter, I expect will almost certainly be declared illegal and unconstitutional in due course. In any case, the Bylaws use of subjectivity goes far beyond the use in that legislation.

[33] At least, at its limits.

Freedom of expression is a fundamental pillar of freedom and democracy.[34] Likewise, freedom of expression is necessary to the search for truth[35] and social progress. As expressed in John Milton's *Areopagitica* (1644):

> *And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing.*

More to the point, therefore, it is the freedom to express what is provocative which is the "breath of life for parliamentary institutions."[36] Without the freedom to express what others find "tormenting", "troubling", "worrying", "objectionable", and "unwelcome", democracy and the search for truth and social progress become mere pantomime:

> *There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. … Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.*[37]

This point has been repeatedly stressed by the Supreme Court of Canada.[38]

However, the very purpose of the Bylaw, at least insofar as it relates to "harassment" and "inappropriate behavior", is to target only expression which provokes.

The City seeks to establish a "safe space" from which citizens would be, in fact, safe only from meaningful expression.

Moreover, the City's approach, as reflected in the GBA+ Report, indicates that enforcement discretion is to be exercised in a content-specific manner:

> *While municipalities may lawfully limit amplification and regulate gatherings, too*

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[34] *Reference Re Alberta Statutes*, [1938] S.C.R. 100 ("***Alberta Reference***") at pages 145 to 146.
[35] *Alberta Reference* at page 133.
[36] *Alberta Reference* at page 133.
[37] *Boucher v The Queen*, 1954 CanLII 3 (SCC), [1955] SCR 16 at para 85.
[38] See for example, *Switzman v Elbling*, [1957] S.C.R. 285 at pages 304 to 305 and *R. v Kopyto* (1987), 24 O.A.C. 81 ("***Kopyto***") at pages 90 to 91.

> *many restrictions on the right to protest and or gather can lead to the silencing of historically underrepresented voices.*[39]

The elevation of marginalized voices is, of course, a worthy and valid goal. However, as revealed in the quote above, the City misunderstands its constitutional obligations.

"Too many restrictions" on voices which don't enjoy the City's favour represents a more serious constitutional violation than too many restrictions on the voices that do enjoy the City's favour.

It is the suppression of expression disfavoured by government which lays at the very heart of the section 2 fundamental freedoms. As expressed by Justice Cory of the Supreme Court of Canada:

> *History has repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media and then the individual in order to prevent the dissemination of views and opinions that may be contrary to those of the government.*[40]

It may be easier to understand the principle to say: the constitutional right to freedom of expression is only needed by those citizens whose expression the government suppresses.

For several reasons the City's prohibition of "harassment" and "inappropriate conduct" is, therefore, categorically inconsistent with freedom and democracy and, as such and in my opinion, clearly unjustifiable under the *Charter's* section 1. By prohibiting expression which is provocative, the Bylaws target the very expression which is the primary object of the s. 2 guarantees. As stated by Justice Dickson of the Supreme Court of Canada:

> *Parliament cannot rely upon an* ultra vires *purpose under s. 1 of the Charter.*[41]

My client, therefore, warns that the Bylaw must be amended so as to remove sections 33 "Harassment" and 34 "Inappropriate Behaviors"

Sincerely,

Glenn Blackett
Barrister

[39] GBA+ Report at page 8.
[40] Kopyto at pages 90 to 91.
[41] *R. v Big M Drug Mart Ltd.*, [2005] 1 S.C.R. 295 at para 140.