No. VLC-S-S-117447
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SUE ZHANG, JOHN DOE, JANE DOE, and OTHER PERSONS UNKNOWN Erecting, Maintaining or Occupying Structures on City of Vancouver Street in the 3300 Block of Granville Street, Vancouver, British Columbia

PETITIONERS

AND:

CITY OF VANCOUVER

RESPONDENT

SUBMISSIONS OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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Introduction:

1. Since 2001 the Petitioners, practitioners of an ancient Chinese practice known as Falun Gong, have protested in front of the Chinese Consulate on the east side of the 3300 block of Granville St. The Petitioners' protest ultimately evolved into a permanent, or near permanent, vigil in a small meditation hut. There is a considerable body of evidence that shows that in mainland China practitioners of Falun Gong are persecuted by the Chinese government, and that this persecution includes "...police harassment, summary arrest without charge, physical violence, torture, and killing to harvest organs."

***Vancouver (City) v. Zhang*, 2010 BCCA 450 ("*Zhang* 2010"), para. 1**

2. There can be no doubt that the Petitioners' protest is political in nature. The purpose of the Petitioners' protest vigil is to draw attention to the plight of the Falun Gong, and their treatment at the hands of the Chinese Government. There can also be little doubt that the structures used by the Petitioners (including the use of meditation huts and billboards) cannot be separated from the political message conveyed by the Petitioners. As the Court of Appeal found: "The structures at issue support the values of democratic discourse and self-fulfillment."

***Zhang* 2010, para. 40**

3. The Supreme Court, since the inception of the *Charter of Rights and Freedoms*, has frequently emphasized the importance of political discourse. In *Libman v. Quebec,* a unanimous Court endorsed the statement that "[p]olitical expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter*".

***Libman v. Quebec*, [1997] 3 S.C.R. 569, at para. 29**

4. Similarly, in *R. v. Keegstra,* Chief Justice Dickson articulated the principle that freedom of expression fosters the democratic process:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally

> because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

***R. v. Keegstra*, [1990] 3 S.C.R. 697**

5. In the broadest terms, this case is about the regulation of free expression by the state. The specific issue raised by the Petitioners and that is before this Court is whether or not sections 71A and 71B of the City of Vancouver Bylaw No. 2849 (the "Amended Bylaw") are constitutional. The predecessor to the Amended Bylaw, section 71 of City of Vancouver Bylaw (the "Predecessor Bylaw") was declared invalid by the Court of Appeal in 2010 (*Vancouver (City) v. Zhang*, 2010 BCCA 450). The Amended Bylaw was enacted ostensibly in response to that decision.

6. The BC Civil Liberties Association (the "Association") is of the view that the City of Vancouver's response to the Court of Appeal ruling in 2010, being the Amended Bylaw, does not represents a justifiable limit on the freedom of expression of those persons subject to it. In this respect, the Association also takes the position that the Amended Bylaw does not conform to the constitutional concept of "dialogue theory" as articulated and endorsed by the Supreme Court of Canada.

***Vriend v. Alberta*, [1998] 1 S.C.R. 493;**
Hogg, Peter W., and Allison A. Bushell. "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75.

7. In this submission, the Association will first examine the Court of Appeal's decision in *Zhang* 2010. Following that, the concept of constitutional dialogue will be explored. The Association will then turn to the Amended Bylaw, and the specific restriction therein. In brief, the Association takes the position the City of Vancouver, by implementing the Amended Bylaw, has ignored the guidance offered by the Court of Appeal on how to amend its legislation so as to render it compliant with the *Charter of Rights and Freedoms*.

The Predecessor Bylaw is struck down:

8. On October 18, 2010, the Court of Appeal declared that the Predecessor Bylaw was of no force and effect as it was inconsistent with the *Charter of Rights and Freedoms*. The declaration was suspended for a period of six months.

***Zhang* 2010, para. 81**

9. The Predecessor Bylaw that was considered by the Court of Appeal in *Zhang* 2010 contained blanket prohibition that provided that a person could only erect a politically expressive structure upon receiving the written permission of the City Engineer:

> STRUCTURES, ETC., NOT ALLOWED ON STREET
>
> 71. (1) No person shall build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied (except in accordance with any by-law of the City, or except with the approval of and subject to such conditions as shall be determined by the Council) in any street, any structure, object, substance, or thing which is an obstruction to the free use of such street, or which may encroach thereon, or lay or construct, or reconstruct any sidewalk on any street, without first obtaining therefore the written permission of the City Engineer.
>
> ...
>
> (4) The City Engineer is hereby authorized to remove any structure, object, substance or thing found in any street in contravention of this section and the costs incurred may be recovered by action in any Court of competent jurisdiction.

***Zhang* 2010, para. 2**

10. The Court of Appeal found that the Predecessor Bylaw was unconstitutional. The Court of Appeal, in reaching this conclusion, followed the approach articulated by the Supreme Court of Canada in *Irwin Toy v. Quebec*, as applied in *Montreal (City) v. 2952-1366 Quebec Inc:*

> Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(*b*) of the *Canadian Charter*? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have *expressive content*, thereby bringing it within s. 2(*b*) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), does the By-law *infringe* that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.
>
> The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(*b*). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred (see, e.g., *Irwin Toy*, p. 968; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at

p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

***Montreal (City) v. 2952-1366 Quebec Inc*, 2005 SCC 62,**
para. 56 – 57 (Cited in *Zhang* 2010, at para. 30).

The Predecessor Bylaw infringed the Petitioners' Charter Rights

11. Given the broad ambit of the terms "expressive content" and "expression" articulated by the Supreme Court of Canada in *Irwin Toy* ("[a]ctivity is expressive if it attempts to convey meaning"), the Court of Appeal determined that the structures – namely the billboard and meditation hut erected by the Petitioners in aid of their continuing protest vigil – had expressive content. Thus, the first branch of the *Irwin Toy* test was satisfied.

***Zhang* 2010, para. 40**

12. The Court concluded that the form of the expression (being the method and location of the protest and structures) did not remove that expression from the protection under s. 2(b) of the *Charter of Rights and Freedoms*. It is of particular importance that the Court of Appeal held that the question was not "…whether the form of the expression is compatible with the street", but rather, "…whether free expression in the chosen form would undermine the values the guarantee is designed to promote" with reference to *City of Montreal*.

***Zhang* 2010, para. 35**

13. Applying the approach above, the Court of Appeal held that the Petitioners' structures "…support the values of democratic discourse and self-fulfillment". With respect to the placement of the structures, the Court of Appeal also noted that public streets are historically "…spaces in which political expression takes place and where structures are maintained….the presence of a structure on a street does not undermine the values of s. 2(b)".

***Zhang* 2010, para. 40 – 41**

14. The findings above are significant. First, the Court of Appeal expressly recognized that the form of expression – namely the Petitioners' use of structures to express their opposition to the policies of the Chinese government – was entirely consistent with the concept of "democratic discourse" that lies at the heart of section 2(b) of the *Charter of Rights and Freedoms*. Second, the Court of Appeal correctly found that city streets are areas that provide a forum for the public expression of political viewpoints, and that the use of structures to convey those viewpoints is protected.

15. Having determined that the Petitioners' use of structures was a protected form of expression, the Court of Appeal had little difficulty finding that the Predecessor By-law infringed s. 2(b) of the *Charter of Rights and Freedoms*. The Predecessor Bylaw prohibited the use of structures on City streets and did not contain any mechanism (such as a further bylaw and/or policy) to recognize exceptions.

***Zhang* 2010, para. 48**

The Predecessor Bylaw and the Section 1 Analysis:

16. The Court of Appeal had little trouble finding that: a) the Predecessor Bylaw was prescribed by law; b) the regulation of structures on public streets is a pressing and substantial objective; and c) the Predecessor Bylaw was rationally connected to that pressing and substantial objective (the regulation of structures on public streets). The issue thus turned on the application of the minimal impairment branch of the *Oakes* test.

***Zhang* 2010, paras. 56 – 61**

17. The Court of Appeal referred to the statement of the Supreme Court in *Alberta v. Hutterian Brethren of Wilson Colony* that the question under this part of the analysis is "… to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."

***Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 53.**

18. Applying the approach in *Hutterian Brethren*, Court of Appeal concluded that the Predecessor Bylaw was fatally flawed, given that it was a blanket prohibition that contained a completely discretionary exemption process:

> I accept the By-law must be looked at as part of an entire regulatory scheme, in which a general prohibition is necessary because the City could not foresee every encroachment or obstruction. I also accept that the prohibition, while general, is not absolute, because exceptions are available. I do not accept, however, that the choice not to have a policy permitting the regulated use of a structure for political expression falls with the range of reasonable alternatives open to the Council. A more minimally impairing scheme would keep the blanket prohibition, set down its purpose, and provide a procedure with clear guidelines for obtaining an exemption. As it is now, there is no regulation of political structures. There is only an absolute prohibition with an uncertain possibility of exception by Council on unknown grounds. There is nothing to reflect considerations to govern when such approval might be granted, such as public safety, the orderly use of public property or others required for proper management of city streets. The reasonable regulation of commercial and artistic expression cannot justify a by-law that effectively precludes any use of a structure, however minimal, for political expression. [Emphasis added].

Zhang 2010, para. 67

19. The Court of Appeal held that blanket prohibition could not be maintained given the fact that the City Council maintained a "…unfettered discretion to mete out individual exemptions". The Court of Appeal also held that the fact that Council maintained this unfettered discretion was particularly objectionable given the crucial role that political speech plays in Canadian society.

Zhang 2010, para. 68 and 69

20. The Court of Appeal then provided some guidance to the City of Vancouver as to what might constitute an acceptable regulatory scheme in relation to the regulation of political expression, and the use of politically expressive structures (such as the meditation hut, for instance):

> …….no evidence or argument was put forward as to why the City could not develop a policy allowing for the administrative regulation of political expression comparable to those in place for commercial and artistic expression. Had the Council instituted what might be called a "Political Structure Policy," as it did policies for commercial and

> artistic expression, as part of its regulatory scheme, my conclusion might well be different. But they chose to maintain a complete ban and, effectively, to rely on prosecutorial discretion and Council's power to direct the use of that discretion, to ensure the right to freedom of political expression was not infringed in an individual case. In so doing, I am persuaded, they rendered s. 71 unconstitutional and of no force or effect. They reached beyond that which is permitted to them when political speech is the right sought to be exercised. It cannot be said that there is not a more reasonably tailored regulatory scheme.

***Zhang* 2010, para. 69**

21. More directly, the Court of Appeal stated that the City of Vancouver could maintain a complete blanket prohibition on the use of structures, provided that the blanket prohibition was coupled with "…a procedure with clear guidelines for obtaining an exemption". The Court further noted that the "considerations" that should be reflected in such a scheme could include public safety, and the orderly use of public streets. To be fair, the Court was not directing that the Predecessor Bylaw be so amended, but rather, was offering guidance as to what kind of regulation of political expression would be more likely to withstand constitutional scrutiny.

***Zhang* 2010, para. 68**

22. For the reasons canvassed above, the Court of Appeal held that the Predecessor Bylaw did not satisfy the minimal impairment branch of the *Oakes* test. Nonetheless, and although strictly *obiter dicta*, the Court did consider the final branch of the *Oakes* test – the proportionality of effects test.

***Zhang* 2010, para. 70**

23. As framed by the Court of Appeal, the issue that the Court had to consider at this branch of the *Oakes* test is whether or not overall effects of the Predecessor Bylaw are disproportionate to the government's objective. It was not disputed by the parties that the purpose of the Predecessor Bylaw was not to regulate the content of political expression but rather, to "…control the physical consequences to its public streets of obstructing or encroaching structures or objects".

***Zhang* 2010, para. 45**

24. The City argued that the Predecessor Bylaw did not prevent the Petitioners from conveying their message, but only prohibited the use of permanent structures. The Petitioners argued that there was no evidence of any salutary effects. The Court considered both submissions to have some merit, but was ultimately persuaded by the Petitioners' argument. Thus, the Court of Appeal held that the Predecessor Bylaw was unconstitutionally disproportionate, and commented:

> Justice L'Heureux-Dube in *Commonwealth* and Justice Binnie in *City of Montreal*, both found constitutionally problematic a law that prohibits all expression, or all of one manner of expression, in a public place.

25. Having determined that the Predecessor Bylaw was unconstitutional, the Court of Appeal declared the Predecessor Bylaw to be of no force or effect, but suspended that declaration for a period of six months. Vancouver City Council enacted the Amended Bylaw that is the subject of this petition on April 19, 2011, prior to the expiration of the suspension of the declaration issued by the Court of Appeal.

The Association's Position on the Amended Bylaw:

26. The Association's position is premised on the assumption that the Amended Bylaw infringes section 2(b) of the *Charter of Rights and Freedoms*. This approach assumes that the determinative issue that is before the Court on this petition is whether or not the Amended Bylaw is a reasonable limit on freedom of expression, such that it is saved under s. 1 of the *Charter of Rights and Freedoms.* The City of Vancouver bears the onus of demonstrating that the Amended Bylaw is a reasonable limit on section 2(b) of the *Charter of Rights and Freedoms.*

27. The Amended Bylaw is not reasonable limit on freedom of expression. In crafting the Amended Bylaw, the City of Vancouver City Council has failed to address the central concerns expressed by the Court of Appeal. In some respects, the Amended Bylaw exacerbates those very concerns, while simultaneously creating new restrictions on political expression in the City of Vancouver. The restrictions run do not satisfy either the minimum impairment or proportional effects branch of the *Oakes* test.

28. By proceeding to enact the Amended Bylaw without due regard for the Court of Appeal's prior ruling, the City of Vancouver has failed to live up to its responsibility to attempt to craft legislation that is capable of withstanding constitutional scrutiny. The City's failure to do so does not accord with the concept – repeatedly endorsed by the Supreme Court of Canada – that the Courts and the legislative bodies are engaged in a dialogue.

29. The Association says that the Court is not required to defer to the City's judgment that the Amended Bylaw is a reasonable response to the constitutional issues identified by the Court of Appeal. In support of this submission, the Association will explain the dialogue metaphor that has been utilized by the Courts as a means of explaining the constitutional responsibilities of the branches of government. Following that, the Association will focus on the specific sections of the Amended Bylaw that are not responsive to the Court of Appeal's ruling and the new issues that arise as a result.

The Theory of a Constitutional "Dialogue":

30. The notion that the Courts and the legislature are engaged in a dialogue is a useful metaphor that explains the proper role of the Court vis-à-vis the legislature. The dialogue metaphor was first articulated by Professor Hogg, and subsequently adopted by the Supreme Court of Canada in *Vriend v. Alberta*.

***Vriend v. Alberta*, [1998] 1 S.C.R. 493**

31. In *Vriend*, the Supreme Court commented that since the inception of the *Charter of Rights and Freedoms*, the interaction between the judicial, legislative and executive branches of government had become more dynamic, particularly given the power of the judicial branch to review the decisions of the executive and legislative branches:

> In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

Vriend, supra

32. The dialogue between the judicial branch and the legislative and executive branches of government provides for a means by which each of the branches of government is held accountable to the other:

> The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it.
>
> ***Vriend, supra***

33. Thus, and as described by the Supreme Court in, *inter alia*, *Vriend*, the dialogue that occurs between the branches of government (particularly in cases of constitutional significance) acts to enhance the democratic process. It is the legislative branch that enacts laws. It is the Court that determines whether or not those laws are constitutional and that provides guidance as to what future laws are likely to withstand constitutional scrutiny. It is then the role of the legislature to craft laws following that guidance in mind. The democratic process is enhanced by this exchange, simply because the outcome will generally be the enactment of considered legislation that respects the constitutional rights of the citizenry.

34. The dialogue between the Court and the legislature (and/or executive, as the case may be) is contingent on each of the branches of government respecting the role of the other. There is nothing that prevents the legislature from enacting legislation – following predecessor legislation being found unconstitutional – that differs from that envisaged by the Court, provided that the substantive constitutional defects identified by the Court are addressed. This principle was succinctly stated by the Supreme Court of Canada in *R. v. Mills*:

> Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy.
>
> ***R. v. Mills*, [1999] 3 S.C.R. 668**

35. Just as the Court must respect that the role of the legislature in crafting legislation, so too must the legislature respect the role of the Court. Bluntly put, the dialogue between the branches of government is a two way street. In dissenting reasons in *R. v. Hall*, Mr. Justice Iaccobucci stated the proposition thusly;

> The mere fact that Parliament has responded to a constitutional decision of this Court is no reason to defer to that response where it does not demonstrate a proper recognition of the constitutional requirements imposed by that decision.
>
> ***R. v. Hall*, [2002] 3 S.C.R. 309**

36. Chief Justice McLachlin, echoed the sentiments of Mr. Justice Iaccobucci in the majority decision in *Sauvé v. Canada*:

> Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".
>
> ***Sauvé v. Canada*, 2002 SCC 68, at para. 17**

37. Finally, although the legislature is entitled to craft legislation in response to a finding that previous, similar legislation was unconstitutional, it does not follow that simply by enacting new legislation, the Court must defer to the legislature when determining whether the new legislation is constitutional. Chief Justice McLachlin articulated this principle in *Canada v. JTI-MacDonald Corporation*, "the mere fact that the legislation represents Parliament's response to a decision of this Court does not militate for or against deference".

> ***Canada v. JTI-MacDonald Corporation*, 2007 SCC 30, at para. 11**

38. Applied in the instant case, the City enacted the Predecessor Bylaw. That bylaw restricted freedom of expression in a manner that could not be justified with reference to section 1 of the *Charter of Rights and Freedoms*. The Court of Appeal invalidated that bylaw, but – recognizing that the regulation of structures on city streets was the responsibility of the City - provided guidance as to what would constitute a constitutionally sound scheme. The City of

Vancouver enacted the Amended Bylaw - which failed to take into consideration the very concerns expressed by the Court of Appeal.

The Amended Bylaw is not a Reasonable Limit on Freedom of Expression:

39. The purpose of the Amended Bylaw is essentially the same as the purpose of the predecessor Bylaw: to control the physical consequences to Vancouver city streets of obstructing or encroaching structures or objects. The minimal impairment requirement of the *Oakes* test asks whether there less harmful means of achieving that purpose.

***Hutterian Brethren*, para. 53**

40. For the reasons below, the Association takes the position that the Amended Bylaw does not satisfy the minimal impairment analysis, as the City has failed to address the constitutional issues identified by the Court of Appeal. Furthermore, and although only briefly canvassed below, the Amended Bylaw creates new restrictions on political expression that do not accord with the spirit of the Court of Appeal's prior ruling.

The City Retains Unfettered Discretion under the Amended Bylaw:

41. In *Zhang I*, the Court of Appeal found that the Predecessor Bylaw did not satisfy the minimal impairment analysis since the Predecessor Bylaw contained only a blanket prohibition on the construction of any "structure, object, substance, or thing" coupled with an entirely discretionary exemption process ("written permission of the City Engineer").

42. Thus, a person applying for a permit under s. 71 of the Predecessor Bylaw was essentially at the mercy of the City. The Court of Appeal noted that there were no guidelines, or policies in place that governed in what circumstances this discretion would be exercised by the City.

***Zhang* 2010, para. 69.**

43. The Amended Bylaw does almost nothing to remedy this concern. Section 71A of the Amended Bylaw – with limited and specific exceptions – creates a blanket prohibition on the construction of politically expressive structures unless a permit is obtained from the City Engineer.

44. Section 71B is the key provision of the Amended Bylaw. Subsection 71B. (1) is mandatory, and requires that a person seeking to obtain permit does so in a prescribed form. Subsection 71B (2) requires that the applicant provide detailed drawings and other materials that show the dimensions and materials used to create the structure.

45. Subsection 71B (3), provides that the City Engineer "may" issue a permit, provided that the applicant's structure does not infringe any of the detailed requirements in paragraphs 71B (3) (a) – (r). Those requirements, *inter alia*, govern the following:

(a) The size and dimensions of the proposed structure – (f), (l) – (o);

(b) The specific location on the street – (h) – (j);

(c) The content of the structure – (p)

(d) the period of time in which a structure is permissible – (r).

46. Therefore, under s. 71B (3) of the Amended Bylaw, the City Engineer has no discretion to issue a permit for any structure that offends any of the detailed requirements, yet retains the unfettered discretion to issue or not issue a permit for a political structure when it does not so offend. On a plain reading of s. 71B of the Amended Bylaw, even where an applicant applies for a permit, provides drawings and does not offend any of the express prohibitions in s. 71B, the City Engineer is still at liberty to deny the issuance of permit.

Schedule "A", Amended Bylaw, s. 71B (3)

47. The Amended Bylaw does not adequately address the Court of Appeal's stated concerns that the Predecessor Bylaw "...maintains a general prohibition subject to Council's unfettered discretion to mete out individual exemptions". Rather, the Amended Bylaw maintains the City's unfettered discretion to issue permits, but mandates when the City *cannot* issue permits. It is certain that political structures that do not comply with the restrictions found in subsection 71B (3), will not be approved. It is remains uncertain – given that the City maintains complete discretion over the issuance of permits – as to what structures will be approved.

Zhang 1, 2010, at para. 67

48. The Amended Bylaw is significantly more restrictive than the Predecessor Bylaw in this regard. The City enacted the Amended Bylaw without due regard to the constitutional issues identified by the Court of Appeal. The Court should not defer to a legislative response that is not responsive to those issues. This is particularly so when what is at issue is the right of a citizen to express his or her political views and contribute to the Canadian political discourse.

The Amended Bylaw is unduly restrictive:

49. The Court of Appeal in *Zhang I* repeatedly noted the importance of political discourse in a constitutional democracy.

50. The Amended Bylaw does not properly take account of the importance of political expression. It unjustifiably regulates when politically expressive structures may be used, the form of the political structures, imposes strict and precise requirements on permit holders, and creates financial penalties for any breach of those requirements.

Restrictions on location:

51. Section 71B (3), as outlined above, provides that the City Engineer "must not" issue a permit if the permit offends any of the detailed requirements set out in that section. Many of the requirements in section 71B (3) infringe s. 2(b) of the *Charter of Rights and Freedoms*, and are not justifiable with reference to the *Oakes* test.

52. For example, under section 71B (3) (h), a person cannot obtain a permit if he or she intends to place the politically expressive structure within five metres of a building entrance or exit. Similarly, section 71B (3) (i) restricts a permit holder from erecting a structure near, among other things, bus stops.

Schedule "A", Amended Bylaw, s. 71B (3) (h)

53. On a superficial level, this restriction may seem to be reasonable. However, the practical effect of this restriction is to limit the ability of a permit holder from conveying his or her viewpoint at a specific location, to a specific audience. For example, a permit holder may wish to position the politically expressive structure that objects to the labour practices of a

particular business near a building entrance of that business. The purpose of positioning the structure near the entrance would be to provide customers entering and exiting the business information about the permit holder's political objections to those business practices. Such an exchange is completely consistent with the notion, articulated by the Court of Appeal, that city streets are historically a place where political views are expressed.

***Zhang* 2010, para. 40 – 41**

54. Furthermore, the use of a political structure to present a message to a specific audience – such as pedestrians at a bus stop, or patrons of a business – is a relatively inexpensive means of disseminating political information to an accessible audience.

55. It is not a complete answer that the restriction found in s. 71B (3) (h) of the Amended Bylaw does not restrict the content of the politically expressive structure, only the location. The effect of the restriction is to limit the exchange of political ideas. The exchange of political ideas fosters political decision making, and lies at the heart of section 2(b) of the *Charter of Rights and Freedoms*:

> The encouragement of "social and political decision making" (*Irwin Toy*, at p. 612), which is the essence of the value of "community participation", recognizes the value of public discussion and debate on social and political matters.

***Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139,**

Restrictions on the form of politically expressive structures:

56. The Amended Bylaw also restricts the form of politically expressive structures. Section 71B (3) (l) – (o), collectively provide that a politically expressive structure must not be more than 1.6 metres in height, width, or depth. 71B (p) provides that a politically expressive structure cannot have electrical components or moving parts.

Schedule "A", Amended Bylaw, s. 71B (3)

57. The Amended Bylaw requires that the politically expressive structures conform to these dimensions. These requirements unduly limit the ability of a person to convey his or her political message in the form that he or she thinks may be most effective. For example, a person

may want to create a life like, stand alone, statue or effigy of a politician who happens to be more than 1.6 metres in height. A person cannot obtain a permit for this structure under the Amended Bylaw.

58. It is not difficult to conceive of numerous other politically expressive structures that are no longer permissible on the streets of Vancouver by virtue of the restrictions on the dimensions found in the Amended Bylaw. What is difficult to understand is how the City can maintain that this is a reasonably tailored legislative response to the Court of Appeal's ruling in *Zhang*.

Requirements for permit holders:

59. Assuming that a person has successfully obtained a permit, section 71B (4) of the Amended Bylaw imposes ongoing requirements that are also unduly restrictive:

(a) be in constant attendance at the structure for a minimum of six non consecutive hours – s. 71B (4) (a); and

(b) remove the structure between the hours of 8PM and 8AM - s. 71B (4) (b);

Schedule "A", Amended Bylaw, s. 71B (4)

60. The restrictions in section 71B (4) are a significant barrier to political expression, and also impose unrealistic requirements on the holder of a permit.

61. Most significantly, subsection 71B (4) (b), would prohibit a permit holder from maintaining a politically expressive structure during the evening. For instance, a person may wish to erect a politically expressive structure outside of Rogers Arena during an evening concert to protest the performing artist's presence in the City, or their political views, or something similar.

62. The Amended Bylaw is an absolute prohibition on the use of politically expressive structures from the hours of 8pm to 8am. It is exceedingly difficult to justify this restriction, particularly given the Court of Appeal's statement that public streets are historically those "…spaces in which political expression takes place and where structures are maintained".

***Zhang* 2010, para. 40**

63. The City of Vancouver's justification for the requirement in 71B(4)(b) that politically structures must be removed between the hours of 8pm and 8am is that it is likely that the structure would be left unattended, and that this poses a safety risk. Even if it is accepted that this is so, this reasoning fails to take into account the fact that persons may wish to use – and attend at - a politically expressive structure to convey a viewpoint after 8pm.

64. The effect of the Amended Bylaw is to completely stifle a form of political expression on city streets in the evening. The Supreme Court's statement in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, could equally apply to the Amended Bylaw:

> ...the policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression.

***Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 at para. 77.**

65. Section 71C provides that a permit is only valid for thirty days (and cannot be extended), while also prohibiting the issuance of more than six permits in a given year for any one block or location. The effect of s. 71C – and the companion restriction in s. 71B(3)(r) is to prohibit the use of political structures in support of continuous vigils that last more than 12 hours – such as the Falun Gong protest – in their entirety.

66. The requirements of s. 71B(4) (b) and 71C are classic examples of time and manner restrictions. The Court of Appeal in *Zhang* - albeit under the proportionality analysis – offered further guidance to the City as to the use of time and manner restrictions, commenting:

> Justice L'Heureux-Dubé in *Commonwealth* and Justice Binnie in *City of Montréal*, both found constitutionally problematic a law that prohibits all expression, or all of one manner of expression, in a public place. While the By-law provides for exceptions to be granted, the City did not justify why this regulatory scheme, as opposed to a more sensitively tailored regulatory scheme, has salutary effects for the City. The practitioners have demonstrated there are deleterious effects on their free expression from the By-law.

***Zhang* 2010, para. 75**

67. Together, sections 71B and 71C prohibit the use of political structures in support of vigils that last longer than 12 hours at a time, or 30 days of constant protest. The use of political structures on City streets between 8pm and 8am is altogether forbidden. The Court of Appeal identified that absolute prohibitions - such as those created by the Amended Bylaw - would be constitutionally suspect. The City has not heeded the Court of Appeal's warning.

68. The Amended Bylaw also differs from the Predecessor Bylaw in another key area. The Predecessor Bylaw provided that the City could recover the cost of removing a structure by way of a civil action. In contrast, the Amended Bylaw now provides that a person that fails to obtain a permit, or otherwise offends against the restrictions contained in s. 71B(4), is subject to automatic financial penalties between $1000 - $5000 for each offence.

Schedule "A", Amended Bylaw, s. 103 (6)

Conclusion:

69. The Association submits that the sweeping restrictions contained in the Amended Bylaw, and the potential financial penalties associated with some of those restrictions, almost completely ignore the letter and spirit of the Court of Appeal's ruling in *Zhang* 2010.

70. The City's reaction to that ruling – being the Amended Bylaw – is a cogent example of the constitutional dialogue breaking down.

71. Although the City is entitled to craft a regulatory response to the Court of Appeal's ruling and is not obligated to adopt the precise regulatory scheme suggested by the Court of Appeal, it does not follow that this Court must defer to the City's judgment that the Amended Bylaw is a reasonable response to the constitutional issues identified by the Court.

72. Chief Justice McLachlin's statement in *Sauve*, that the dialogue between the legislative branch and the judicial branch cannot be reduced to a rule of "if at first you don't succeed, try, try again" is applicable in the instant case. The Amended Bylaw – like the Predecessor Bylaw – is an unconstitutional limit on freedom of expression.

***Sauve, supra,* para. 17**

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15 DAY OF September, 2014

Brent B. Olthuis	W. David McEwan
Counsel for the Intervener	Counsel for the Intervener

SCHEDULE "A"

STRUCTURES CONVEYING POLITICAL EXPRESSION

71A. A person must not build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied in any street, any structure, object, or substance which is an obstruction to the free use of such street, or which may encroach thereon, without having first obtained a permit issued by the City Engineer, in accordance with this Bylaw, except that this section does not apply to a person:

(a) installing signs authorized by the City Engineer on or over City streets, and intended to control traffic or parking, or to provide directions or street identification;

(b) putting up or installing street decorations authorized by the City Engineer;

(c) putting up or installing any other temporary sign or structure which is authorized by by-law, or by provincial or federal legislation;

(d) installing advertising devices which are integral with public conveniences, as covered by special agreements with the City, such as bus shelter advertising, map stand advertising or automated public toilet advertising; or

(e) placing a sign or notice on a free standing kiosk or other structure on a street, which is provided by and in a location designated by the City Engineer, specifically for free public use for the purpose of political expression.

STRUCTURES CONVEYING POLITICAL EXPRESSION

71B. (1) A person seeking a permit under section 71A for any structure, object or substance which conveys political expression, must apply for the permit in the form prescribed by the City Engineer.

(2) The applicant for a permit under section 71A must submit with the application drawings indicating the construction methods, materials and dimensions of any proposed structure for which a permit has not been previously issued.

(3) The City Engineer may grant a permit under section 71A, except that the City Engineer must not grant a permit if the structure, object or substance:

(a) obstructs or interferes with pedestrian or vehicular traffic;

(b) obstructs or interferes with any utility , postal or similar installation;

(c) obstructs or interferes with any other structure, object, substance or construction works which occupy the street pursuant to a permit;

(d) obstructs or interferes with the use of street furniture;

(e) obstructs or interferes with City works, on or adjacent to the street;

(f) has a width greater than 25% of the width of an adjacent business frontage;

(g) is located on street frontage abutting a site which:

(i) contains only dwelling uses,

(ii) in the case of mixed uses, contains ground floor dwelling uses, or

(iii) is located in a zoning district listed in Schedule F, except that subsection (g) does not apply to any Consulate which is listed with the Government of Canada as a Consular Office;

(h) is within 5 meters of a building entrance or exit;

(i) is within 5 meters of a bus stop, street intersection, driveway crossing, loading zone, taxi zone, or wheelchair ramp;

(j) is within 0.5 meters of a curb;

(k) is attached or affixed to cement, asphalt or other hard surface on the street;

(l) measures more than 1.6 meters in height at the highest point;

(m)measures more than 1.6 meters in width at the widest point;

(n) measures more than 1.0 meter in depth at the deepest point;

(o) has a base area larger than 1.6 square meters;

(p) contains moving parts, electrical or electronic components or lights;

(q) is structurally unsafe or unstable; or

(r) was at the same location or in the same city block applied for, within the previous sixty days.

(4) The holder of a permit granted under section 71A, or their authorized representative, must:

(a) attend at the structure, object, or substance for a minimum of six non-consecutive hours between the hours of 8 a.m. and 8 p.m. daily;

(b) remove the structure, object or substance from the street between the hours of 8 p.m. and 8 a.m. daily; and

(c) keep the structure , object, or substance safe and in good repair at all times.

(5) The holder of a permit granted under section 71A must not use or permit the use of:

(a) electronic signs;

(b) electric or gas lighting or appliances;

(c) extension cords; or

(d) open flames, propane tanks, gas or electric heaters, or barbeques at or near the structure, object or substance authorized by the permit.

(6) The holder of a permit granted under section 71A must not use or promote the use of expression which:

(a) is obscene;

(b) promotes hatred or violence;

(c) is defamatory; or

(d) contains commercial content.

TERM OF PERMIT

71C A permit granted under section 71A is valid for thirty days from the date of issuance, except that the City Engineer must not issue:

(a) a permit for a term greater than thirty days;

(b) more than six non-consecutive permits per year, for any block or location;

(c) more than one permit for every sixty days, for any block or location; or

(d) a permit to an applicant who is the current holder of such a permit.

City of Vancouver *Street and Traffic Bylaw No. 2849*, pp. 38-42.