

## LEGAL CONSTRAINTS ON THE FREEDOM OF CONTRACT

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*On July 19, 2021, the Supreme Court of British Columbia found that the City of New Westminster's (the "City") termination of a private licence agreement to rent its facility, infringed the Redeemed Christian Church of God, also known as the Grace Chapel's ("Grace Chapel") Charter right to freedom of expression, and may have infringed its right to freedom of religion in Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401.*

### FACTS

In 2018, the City owned and operated Anvil Centre, a facility that accommodates a variety of events and community-led programs. When the Anvil Centre was first opened, City council adopted a Booking Policy which prohibited users from promoting racism, hate, violence, censorship, crime, or unethical pursuits; misrepresenting the purpose of the function; or intending to conduct activities that contradict the purpose and vision of Anvil Centre and the City, namely, to promote an inclusive city and social equity. The Booking Policy allowed the City to cancel events at the Anvil Centre for a violation of a licence agreement.

On May 18, 2018, Grace Chapel and the City entered into a licence agreement to rent Anvil Centre on July 21, 2018 (the "**Agreement**"), for the purpose of hosting a Christian Youth conference (the "**Conference**"). The Agreement prohibited the use of Anvil Centre for an illegal purpose or which, in the reasonable opinion of the Anvil Centre, is immoral, improper, or may cause public disorder. The Agreement further incorporated by a default provision the Booking Policy's prohibition on promoting racism, hate, violence, censorship, crime, or unethical pursuits.

On June 20, 2018, a poster advertising the Conference stated that the theme of the Conference was "Let God Be

True" and used the acronym "LGBT" with rainbow colouring. The poster also mentioned the names of the speaker and singer at the Conference, as well as the people facilitating the event, and the involved Pastors (the "**Poster**").

That same day, a citizen who saw the Poster sent an email to Anvil Centre expressing concern that the Conference would be anti-LGBTQ, based upon the views of one organizer, Kari Simpson, who is an active anti-LGBTQ speaker. The complainant urged Anvil Centre to reconsider allowing the Conference to take place at their space as it would imply that Anvil Centre supports this anti-LGBTQ position.

The following day, Anvil Centre's staff commenced an inquiry and concluded that Ms. Simpson represented anti-LGBTQ views on social media, views that were inconsistent with the City's vision.

Acting on the assumption that anti-LGBTQ content would be incorporated into the Conference, the City determined that:

1. Grace Chapel's Conference contravened the Agreement and the Booking Policy;
2. Grace Chapel misrepresented the purpose of the Conference in their communications;

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3. the content of the Conference was discriminatory and promoted hatred; and
4. the Conference ran against the City and Anvil Centre's visions of inclusivity.

On June 21, 2018, the Chief Administrative Officer of the City received Anvil Centre's findings, the evidence of Ms. Simpson's social presence, copies of the Booking Policy and the Agreement, and Anvil Centre's recommendation to cancel the Agreement.

Within 7 minutes of receiving the Anvil Centre's findings, the City's Chief Administrative Officer replied that she had discussed this matter with the City's Manager of Communication and Economic Development and briefed the Mayor and agreed with Anvil Centre's recommendation.

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Consequently, Anvil Centre emailed Grace Chapel to advise that, in accordance with the Booking Policy, it terminated the Agreement and would process a refund (the "**Decision**"). Grace Chapel requested Anvil Centre to reconsider, stressing that no hate, racism, or violence will be promoted, but the City refused. In a later email, Grace Chapel requested an opportunity to explain the nature of the Conference, protesting that the Decision was made without first discussing the City's concerns with Grace Chapel. A further letter, written by Grace Chapel's legal counsel, alleging an unjustifiable infringement of Grace Chapel's freedoms protected under the *Charter of Rights and Freedoms* (the "**Charter**") was left unanswered.

Grace Chapel brought a petition seeking:

1. a judicial review of the Decision, for allegedly being biased, unfair, and unreasonable;
2. a declaration that the Decision unjustifiably infringed its *Charter* rights of freedom of

expression, association, and religion, pursuant to both the *Judicial Review Procedure Act* ("**JRPA**") and the *Charter*; and

3. to quash the Decision in accordance with the *JRPA* and prohibit the City from denying Grace Chapel the use of the venue in the future based on its views and beliefs, pursuant to both the *JRPA* and the *Charter*.

In its reasons, the court addressed the issue of whether reliance of local governments on their policies in terminating a private contract, in and of itself, shifts the decision from the private realm of contract law to public law, together with all accompanied procedural requirements. Furthermore, it confirmed that an aggrieved party may advance an independent claim pursuant to the *Charter* by a petition (as opposed to a claim) if public law relief is sought; and that the *Charter* applies to all local government's activities, including private arrangements. Finally, the court considered and resolved a relatively novel situation presented by this case's facts, where none of the available legal tests for justification of infringement of *Charter* rights readily applied.

Ultimately, the court dismissed the Petition with respect to all of the relief sought under the *JRPA*, as well as the declaration sought for an alleged breach of the freedom of association. However, the court granted a declaration that the City unjustifiably infringed Grace Chapel's right to freedom of expression. The Court also held that Grace Chapel has standing to seek a declaration with respect to an alleged infringement of its right to freedom of religion. Nevertheless, the court held that Grace Chapel provided insufficient evidence with respect to this right and granted leave to Grace Chapel to convert the matter into an action if it wishes a court determination of this issue.

## THE COURT'S ANALYSIS

### 1. PUBLIC LAW REMEDIES

Grace Chapel sought three public law remedies: a declaration, an order quashing the Decision, and an order prohibiting a future denial of use of the facility.

A declaration is only available where a public authority is exercising a statutory power, one that arises from an enactment. Quashing and prohibition orders are available where the public body's activity is of sufficient public character.

The court started its analysis by considering whether making the Decision amounted to the exercise of a statutory power. The court determined that the public body's statutory power to contract or terminate a contract as a natural person (pursuant to section 8 (1) of the *Community Charter, [SBC 2003] Chapter 26*) is permissible and therefore, insufficient for the act to be considered an exercise of a statutory power.

The court held that the City's authority to terminate the Agreement derived from the City's contractual rights. The City's reliance on the Booking Policy and vision statement in making and justifying the Decision was insufficient to convert the exercise of a contractual right into a statutory power to make the Decision. As such, the declaratory relief was unavailable to Grace Chapel.

With respect to the availability of the remaining judicial review remedies, while the court acknowledged that Anvil Centre is operated by a public body, it also noted that the termination of the Agreement flowed from the private contract, rather than the exercise of a statutory power, and that the relief sought to quash the Decision or for a prohibition order were unsuitable, given that the court hearing took place three years after the Conference date. Additionally, the Court held that there was no exceptional effect on the rights of a broad sector of the public. Consequently, the court concluded that the matter is of insufficient public character. As such, it was held that the City did not owe a duty of procedural fairness to Grace Chapel, and Grace Chapel was not entitled to a judicial review of the alleged bias by the City in making the Decision.

## **2. CHARTER REMEDIES**

In addition, Grace Chapel sought a declaration pursuant to the *Charter* that the City breached three *Charter* rights: freedom of association, freedom of religion, and freedom of expression. The central question was whether the Decision infringed any of these *Charter*

rights, and if so, whether such infringement was justified under section 1 of the *Charter*.

## **3. FREEDOM OF ASSOCIATION**

The freedom of association protects the right to join with others to form an association; to pursue other constitutional rights; and to match the strength of more powerful groups of people. The infringement must be substantial. Following a review of the evidence, the court concluded that there was no substantial interference with Grace Chapel's right of association. While Grace Chapel was prevented from meeting at Anvil Centre, it could have chosen any other location for that purpose.

## **4. FREEDOM OF RELIGION**

With respect to the freedom of religion, the court started its analysis by granting standing to Grace Chapel, as it is a church that was constituted and operated for religious purposes. However, for proving such a claim, Grace Chapel must have shown that it sincerely believed in a practice that has a connection to religion; and that the impugned City act, i.e., the Decision, interfered in a more than trivial way with Grace Chapel's ability to act in accordance with that practice. The court held that there was an insufficient factual basis to properly adjudicate this matter and that this issue would require a full trial. Therefore, the court permitted Grace Chapel to convert the Petition to an action, so that a court determination could be made after a trial process.

## **5. FREEDOM OF EXPRESSION**

For a violation of the freedom of expression, the activity must have an expressive content. The court held that there is no doubt that the singing and speaking at the Conference had an expressive content.

Even where the activity has expressive content, it will not be protected under the *Charter* if its location or method undermines the values of the guarantee. For example, violent expression is a method that undermines this guarantee. The court held that there was no evidence that the activities at the Conference would involve violence, or other forms of prohibited expression, and

that government-owned property that is open to the public to rent falls within the sphere of *Charter* protection.

Therefore, the court held that Grace Chapel's expressive activity was protected under the *Charter*. Analyzing the purpose and effect of the Decision, the court also found that by cancelling the Agreement, the City infringed Grace Chapel's protected right to engage in the expressive activity in Anvil Centre.

The court then considered whether the infringement was justified under section 1 of the *Charter*.

The novelty of the court's decision rests in tailoring a legal test for a justification of a *Charter* infringement by government's contractual decisions. The court considered two possible analytical frameworks, one that deals with infringement of a *Charter* right by an enactment, requiring a minimal impairment with the right, and another that was confined to administrative decisions, requiring a proportionate balancing of the *Charter* protections. As none of the available legal tests easily applied to contractual decisions, the court combined the two and viewed them through the lens of reasonableness.

The court found an imbalance between the City's efforts to investigate the community member's complaint to protect LGBTQ rights, and the lack of similar efforts to inform itself about the intended content of the Conference. Furthermore, while protecting LGBTQ rights, the City did not consider how it might minimize the infringement of Grace Chapel's *Charter* right. Therefore, the court provided the requested declaration that the City had failed to proportionately balance the competing *Charter* rights and the Decision unreasonably and unjustifiably infringed Grace Chapel's right to freedom of expression. The court's determination was reinforced by the fact that the City refused to reconsider the Decision following Grace Chapel's request. The court emphasized that, had the City explored any ways to minimize the infringement, the result might have been different.

## KEY TAKEAWAYS

The courts have a constitutional duty to ensure that public bodies do not overreach their lawful powers. When public authorities exercise statutory powers, or their activity is of sufficient public character, an aggrieved party may be entitled to judicial review and public law remedies in accordance with the *JRPA*. In this process, the court reviews the decision-making process and the decision itself to ensure its reasonableness and fairness. The scope of the local governments' duty of fairness varies depending on the context of each case.

While public law remedies are not always available under the *JRPA*, the same remedies may be available under the *Charter* if a *Charter* right is engaged, even when local governments' activity is of a private nature.

To minimize the risk of a decision or the decision-making process being held to unreasonably and unjustifiably violate *Charter* rights, decision-makers should endeavor to make reasonable and informed decisions. This includes avoiding making decisions founded on assumptions, and instead conducting an investigation to confirm assumptions or obtain missing information; allowing aggrieved parties an opportunity to be heard before the decision is made (or at least on reconsideration if requested); assessing the impact of the decision; considering the possibility of an alternative, less infringing decision; and endeavoring to balance equally and adequately the competing *Charter* rights.



**TALYA PELED BAR**  
**604.358.0252**  
**TALI@CIVICLEGAL.CA**

Talya is an associate lawyer of the firm and maintains a general municipal law practice with a focus on construction, procurement, and insurance law. Her experience includes bylaw drafting, advising on liability issues, and representing local governments in court, negotiations, and mediation. Talya articulated at Civic Legal LLP and was called to the Bar in June 2021. She completed her Master of Laws (CL) at the Peter A. Allard School of Law at the University of British Columbia. Prior to obtaining her master's degree, Talya graduated summa cum laude with a Bachelor of Law in Israel. During law school, she volunteered with the Israel Anti-Poverty Association, where she provided legal advice to low-income clients and taught academic writing and legal research to junior law students. Before relocating to Canada, Talya practiced as a lawyer for over three years and gained extensive experience in civil litigation, including medical malpractice. Through this unique background, Talya strives to understand each client's needs and craft an effective and practical solution.

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710 - 900 West Hastings Street, Vancouver, BC V6C 1E5  
604.639.3639 | [www.civiclegal.ca](http://www.civiclegal.ca) |  CivicLegal