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Brock Martland, KC* Joseph Saulnier* Trevor Martin Elliot Holzman
John M. Gordon, KC, Associate Counsel Melanie Heathman

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BY EMAIL

Brennan Bastyovanszky
Chair, Vancouver Board of Parks and Recreation
2099 Beach Avenue
Vancouver, BC V6G 1Z4

Attention: Brennan Bastyovanszky

Dear Mr. Chair:

Re: Constitutional Issues with Mid-Term Abolition of Parks Board

Pursuant to a motion passed by the Vancouver Board of Parks and Recreation ("Parks Board") on February 5, 2024, I am retained to provide a legal opinion about constitutional issues arising from the Province passing legislation, or otherwise abolishing through regulation, the Parks Board before the end of the current term in 2026. This legal opinion is intended to familiarize Commissioners with the potential *Charter* issues engaged, but is not meant for filing in court, and does not provide any legal opinion beyond the next scheduled election in October 2026.

Overview of the Parks Board

The Parks Board is an elected board of Commissioners with exclusive possession, jurisdiction, and control over public parks in Vancouver, B.C. The Parks Board was established by an 1889 amendment to what is now called the

T: 604 687 6278 506–815 Hornby Street vancrimlaw.com *law corporation
F: 604 687 6298 Vancouver, BC V6Z 2E6 eholzman@vancrimlaw.com

Vancouver Charter. The Parks Board is the only elected body of its kind in Canada. Parks Board's internal structure, including popular election of Commissioners, is found at Part XXVII of the *Vancouver Charter* (ss. 485 to 497A).

Section 485 establishes the Parks Board, that 7 commissioners will be "elected".

Section 486 sets out the election procedures for the Parks Board, noting commissioners will be elected at the same time and in the same manner as City Councillors in Vancouver. The length of term for Commissioners is a power delegated by BC to Vancouver City Council to determine (see s. 486(2)).

Section 486C addresses circumstances where Commissioners resign and the number of Commissioners falls below a certain number. The Minister may appoint persons to become commissioners to replace them, or can order that the Parks Board go on with the current number of Commissioners. No statutory power allows the Minister to abolish the Parks Board.

Sections 488 to 497A set out the powers that have been delegated to the Parks Board by BC.

On October 15, 2022, a municipal election was held in Vancouver. Residents elected the Mayor of Vancouver; 10 City Councillors; 7 Parks Board Commissioners; and 9 School Board Trustees; and voted on 3 capital plan

questions. Across the city, more than 170,000 persons cast ballots. Pursuant to s. 486(1), the positions run for four years, until the next election in October 2026.

On December 13, 2023, Vancouver City Council passed a motion formally asking the Province to dissolve the Parks Board and shift its responsibilities to City Council. The motion was to have the Province dissolve the Parks Board mid-term.

On March 8, 2024, the Premier announced any legislative change to the Parks Board would not begin until after a general election, scheduled for October 2024.

My research has not produced any analogous situation, where a higher level of government abolishes an elected governing body mid-term with no replacement. The question presented is two-fold:

(1) Would the abolishment of the Parks Board mid-term violate the *Constitution of Canada*, including the *Canadian Charter of Rights and Freedoms*?

(2) Whose rights would be infringed by such a mid-term abolition?

In order to answer these questions, it makes sense to first turn to Canada's constitutional structure and the place of municipalities within that structure.

Municipal Government, Section 92(8) of *Constitution Act, 1867*

Even though municipal governments pre-date Confederation, municipal governments enjoy no explicit constitutional protection. Unlike the federal and provincial governments whose authorities derive directly from the *Constitution Act, 1867*, municipalities are only referenced in Section 92(8) of the *Constitution Act, 1867* which assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province".

Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status.

No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 2). Subject to the *Charter*, the province has absolute and unfettered legal power to do with them as it wills.

Toronto (City) is a recent Supreme Court of Canada decision interpreting the constitutionality of a mid-election change to Toronto's ward structure. The Court held that a province does not have unfettered legal powers because all government action is subject to the *Canadian Charter of Rights and Freedoms*, but affirmed that there would have to be "substantial interference" with freedom of expression for a municipal alteration by a province to violate the *Charter*. The

Court held that substantial interference occurs where meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

Would the abolishment of the Parks Board mid-term violate the *Constitution of Canada*, including the *Canadian Charter of Rights and Freedoms*?

i. Section 2(b) of the *Charter*

Such a move by the Province could amount to a violation of s. 2(b) of the *Charter*.

Earlier, I summarized the Toronto case involving changes to the ward structure in the middle of an election campaign. In that case, the Court affirmed that section 2(b) guarantees the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". This protection has traditionally been interpreted expansively. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee (*R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 763-64). Freedom of expression is the mechanism through which our democracy, the collective expression of the citizenry's will, is protected and realized. As long as an activity conveys or attempts to convey a meaning, and does not involve violence or threats, it constitutes "expression" falling within the ambit of s. 2(b).

An important limiting principle, though, is that s. 2(b) generally imposes a negative obligation, rather than a positive one, on government actors (s. 2(b) prohibits gags, rather than compelling the distribution of megaphones).

If the s. 2(b) claim is negative in nature (asking for freedom from government action), the framework asks:

1) Does the activity in question have expressive content, thereby bringing it within section 2(b) protection?
2) Does the method or location of this expression remove that protection? and
3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect?

However, if the s. 2(b) claim is positive in nature, it will be determined pursuant to the "single core question" set out in *Toronto (City)* (at para. 25): is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?

Abolition of the Parks Board mid-term could be characterized as a negative s. 2(b) claim. The claimants would be seeking freedom from government legislation suppressing an expressive activity. Serving in elected political office is activity with expressive content. So is the democratic vote, if it was voters bringing the

claim. Abolishing an elected governing body mid-term removes that expressive activity, and the effect is to disenfranchise more than a hundred thousand citizens who voted in the last election for seven Parks Board Commissioners, and it disenfranchises the seven Commissioners who were elected to serve out a four-year term.

If challenging the abolition of Parks Board mid-term was characterized as a positive s. 2(b) claim, the Province set up the statutory framework managing Vancouver's parks and recreation sites. The Province determined this delegation of powers would have an elected governing board that would manage the parks for four years. The question is whether this amounts to a substantial interference with expression, or if the Province had the purpose of interfering with expression when it passed legislation abolishing the Parks Board?

In the *Toronto (City)* case, the Supreme Court of Canada drew a distinction for positive rights claims between a circumstance where the Province changes the municipal ward boundaries approximately 2 months before the election date, and a circumstance where there the Province passes a statutory reduction of the length of a municipal election campaign to just two days. The Supreme Court seemed to hold that, as a practical matter, such a reduction to two days in the election campaign would have the effect of constituting a substantial interference with freedom of expression and meaningful expression may very well be found to be effectively precluded (at para. 27).

And while the Supreme Court in *Toronto (City)* held that it is constitutionally permissible for a Province to change municipal government without municipal consent, the Court was clear that in the context of a positive s. 2(b) claim, extreme government action that extinguishes the effectiveness of expression – for instance, instituting a two-day electoral campaign – may rise to the level of substantial interference with freedom of expression (at para. 39) and violate the *Charter*.

Section 2(b) is a section of the *Charter* that can be invoked in this situation. The focus is on the situation presented here: The Province vested delegated powers to a municipal governing board, and holds elections for the officials wielding those delegated powers. It follows that the locus of deliberative engagement on those delegated policy issues becomes the elected body that the Province set up. One of the underlying principles of the s. 2(b) right is fostering and encouraging participation in social and political decision-making, which runs counter to such a move by the Province (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976).

ii. Section 2(d) of the *Charter*

Section 2(d) of the *Charter* says that everyone has the freedom of association. Freedom of association protects three distinct types of activities:

- the "constitutive" right to join with others and form associations;

- the "derivative" right to join with others in the pursuit of other constitutional rights; and
- the "purposive" right to join with others to meet on more equal terms the power and strength of other groups or entities.

An action abolishing the elected Parks Board mid-term may provide the foundation for a constitutional challenge under s. 2(d) of the *Charter*, although this area is unexplored in the jurisprudence.

Certainly, there is a strong argument that serving on an elected governing body falls under the "constitutive" right to join with others and form associations. Under the constitutive right, the government is prohibited from interfering with individuals meeting or forming associations, but may interfere with the activities pursued by the association.

The association at issue here has to be informed by the democratic context in which it was formed. The democratic principle lies at the heart of Canada's Constitution, and an association formed through participation in the democratic electoral process is likely the kind of association whereby a higher government is prohibited from interfering with individuals forming such an association until the elected term expires.

Section 3 of the *Charter* does not apply

Another *Charter* right that may be considered is Section 3, which contains a right to vote in provincial and federal elections. The Supreme Court of Canada's decision in *Toronto (City)* held that s. 3 has no application to municipal elections and its values are not transferrable to a claim under s. 2 of the *Charter*.

Who should bring the constitutional challenge – voters or commissioners?

If a constitutional challenge is to be filed under a section of the *Charter*, then Parks Board will have to turn its mind to who the claimant should be. I see two separate types of claimants in this case.

First, the most straight-forward claim under s. 2(b) of the *Charter* would be from the perspective of voters in Vancouver. A voter in Vancouver could step forward and allege that their right under s. 2(b) of the *Charter* has been infringed by an action abolishing the Parks Board mid-term. That is because their political expression, through their vote for 7 Parks Board Commissioners for a term of four years, would have been extinguished mid-term. That was the case in the *Toronto (City)* litigation, where part of the claim was brought by a group of voters.

Secondly, because this claim is not about interference with an election campaign but interference with an elected governing body's continuing function, the Chair

of the Parks Board would be another suitable claimant. The claims could still be brought under s. 2(b) (as well as s. 2(d)) of the *Charter*.

Parks Board will want to turn its mind to the kind of evidence it would need to marshal in order for a court to find that a constitutional infringement has occurred and turn its mind to the kind of evidence required to withstanding governmental justification arguments under s. 1 of the *Charter*, which states that rights and freedoms protected in the *Charter* are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While it is beyond the scope of this legal opinion to delve into what evidence Parks Board ought to marshal, should the claim be brought by voters in Vancouver, Parks Board is advised to seek a range of backgrounds and experiences with Vancouver's parks and recreation sites to demonstrate that while persons have many different life experiences, voting in democratic elections for Parks Board Commissioners represents the collective expression of the citizens of Vancouver. Under the s. 1 analysis, Parks Board should turn its mind to whether the other side's arguments – about cost cutting, expedient government decisions, and claims that the parks and recreation sites will be better maintained under direct City Council oversight – are contradicted by evidence that Parks Board has in its possession.

Recent Surrey Policing case

In a recent decision, the Supreme Court of British Columbia dismissed a petition brought by the City of Surrey, seeking to set aside a provincial act that required the City to adopt its own municipal police force, rather than contracting with the RCMP (2024 BCSC 881). The reviewing judge was satisfied that s. 2(b) does not protect a municipal government's electoral "mandate" from nullification by a higher level of government. I don't view the *Surrey* decision as resolving the issue in this case, which is not about whether the Province can invalidate a policy decision that was prioritized by a municipal government. Further, there was no elected element to the leadership of the police forces at issue in the *Surrey* decision.

Injunction

Should the Parks Board seek to challenge any legislation or regulations abolishing the Board mid-term, the Parks Board should consider filing for an interim injunction staying the effect of the legislation until such time as there can be trial on the merits to determine the constitutional issues.

There are three requirements that the claimant has to satisfy to get an interim junction staying the effect of legislation:

1. There has to be a serious question to be tried (i.e. the question is not vexatious or frivolous);
2. There must be irreparable harm if the relief is not granted; and

3. There is a final assessment of the balance of convenience

Recently, an interim injunction was granted staying the effect of a provincial law intended to restrict drug consumption in designated public places until such time as a trial can be held on the merits (see *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290, appeal dismissed 2024 BCCA 97).

Given the unprecedented nature of abolishing an elected board mid-term, and the fact that no analogous cases can be found, suggests that this is a strong case for a stay pending a trial on the merits. This may have the effect of enjoining the legislation until the next municipal election in the fall of 2026.

Please feel free to contact me should you have any questions or concerns.

Yours truly,

MARTLAND & SAULNIER

ELLIOT HOLZMAN

EH/km