

JUL 07 2021

S 216288

No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

City of Penticton

PETITIONER

AND:

British Columbia Housing Management Commission

RESPONDENT

**PETITION TO THE COURT**

ON NOTICE TO: British Columbia Housing Management Commission  
1701 - 4555 Kingsway  
Burnaby, B.C. V5H 4V8

AND TO: Attorney General of British Columbia  
Ministry of the Attorney General  
7<sup>th</sup> Floor, 1001 Douglas Street  
Victoria, B.C. V8W 2C5

Provincial Rental Housing Corporation  
1701 - 4555 Kingsway  
Burnaby, B.C. V5H 4V8

Pentictonia Holdings Ltd.  
3200 - 650 West Georgia Street  
Vancouver, B.C. V6B 4P7

Penticton and District Society for Community Living  
180 Industrial Avenue West  
Penticton, B.C. V2A 6X9

**This proceeding has been started by the Petitioner for the relief set out in Part 1 below.**

If you intend to respond to this Petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this Court within the time for response to petition described below, and

- (b) serve on the Petitioner
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**Time for response to petition**

A response to petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the Court, within that time.

(1) The address of the registry is:

800 Smithe Street  
Vancouver, B.C. V6Z 2E1

(2) The ADDRESS FOR SERVICE of the Petitioner is:

2100 - 1040 West Georgia Street  
Vancouver, BC V6E 4H1

Fax number for service (if any) of the Petitioner: [n/a]

E-mail address for service (if any) of the Petitioner: [rdalziel@litigationchambers.com](mailto:rdalziel@litigationchambers.com)

(3) The name and office address of the Petitioner's lawyer is:

Ryan D. W. Dalziel, Q.C.  
Hunter Litigation Chambers  
2100 - 1040 West Georgia Street  
Vancouver, BC V6E 4H1

## CLAIM OF THE PETITIONER

### Part 1: ORDERS SOUGHT

1. A declaration that City of Penticton Zoning Bylaw No. 2017-08 applies to the use of the property at 352 Winnipeg Street.
2. Costs; and
3. Such further and other relief which this Honourable Court deems just.

### Part 2: FACTUAL BASIS

#### *Overview*

4. This petition seeks declaratory relief, pursuant to Rule 2-1(2)(c) of the *Supreme Court Civil Rules*, about the correct interpretation of s. 14(2) of the *Interpretation Act*, R.S.B.C. 1996, c. 238. That provision states that “an enactment”, which includes a municipal zoning bylaw, “does not bind or affect the government”, “in the use or development of land”. The present dispute arises in the context of a policy disagreement between the Petitioner, the City of Penticton (the “City”) and the government of British Columbia, about the provision of shelter services at a particular site.

5. The BC government, through its agent the Respondent British Columbia Housing Management Commission (“BC Housing”), has taken the position that s. 14(2) entitles it to override the decision-making of a local government’s duly-elected Council, with respect to a private organization’s use of land that is privately owned. BC Housing does so, moreover, in a context in which it has repeatedly invoked the City’s land use permitting procedures, initially to its benefit, and only now asserts that it can circumvent them because it disagrees with Council’s decision. To vindicate BC Housing’s position would be to bestow upon the BC government far greater power over local governments than s. 14(2) is intended or interpreted to confer.

#### *The parties*

6. The City (the Petitioner) is a municipality incorporated pursuant to the *City of Penticton Incorporation Act, 1948*, S.B.C. 1948, c. 112. The City is empowered, pursuant to Part 14 of the *Local Government Act*, R.S.B.C. 2015, c. 1 (“Planning and Land Use Management”), to enact “zoning bylaws” that regulate the use of land, buildings and structures (Division 5 — Zoning Bylaws), and to issue “temporary use permits” (“TUPs”) that allow uses not permitted by a zoning bylaw (Division 8 — Temporary Use Permits).

7. BC Housing (the Respondent) is a Crown corporation incorporated under the *Housing Act*, R.S.B.C. 1960, c. 183 and the *Ministry of Municipal Affairs and Housing Act*, S.B.C. 1973 (2<sup>nd</sup> Sess.), c. 110, by B.C. Reg. 76/68, and continued by Order in Council 2388/78 and s. 10(1)(b) of the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307. BC Housing has an array of powers and duties respecting housing. It is an agent of the government of British Columbia pursuant to s. 10(2) of the *Ministry of Lands, Parks and Housing Act*.

***The City's Decision-making about the Land***

8. The land that is the subject of this proceeding is in Penticton, and has a civic address of 352 Winnipeg Street (the "Land"). The Land was purchased by Pentictonia Holdings Ltd. ("Pentictonia"), a BC company, in 2018.

**Affidavit #1 of Blake Laven, affirmed July 5, 2021 ("Laven Affidavit"), para. 7**

9. Pursuant to the City's Zoning Bylaw No. 2017-08, the Land is zoned "C5-Urban Centre Residential", which designates it for high-density commercial and residential use. The Land is not designated for use as an "Emergency Shelter", defined as a "boarding home operated by a non-profit society or government agency which provides temporary emergency accommodation, meals and support services for individuals who are in a housing crisis".

**Laven Affidavit, para. 8, Exhibit B**

10. On September 2, 2020, BC Housing submitted a Temporary Use Permit ("TUP") application to the City, to permit the operation of a "Temporary Capacity Expansion Shelter" on the Land, from October 2020 to March 31, 2021. The application contemplated a temporary shelter to accommodate shelter needs during the cold weather months, due to province-wide COVID health restrictions that would limit the capacity of the shelter at 1706 Main Street, known as Compass Court. BC Housing's Letter of Intent explicitly stated that "the shelter would be operational between October 2020 and March 31, 2021". BC Housing submitted the application as agent of Pentictonia.

**Laven Affidavit, paras. 16, 18-19, Exhibits G-I**

11. City Council approved the TUP subject to numerous conditions, including conditions setting out the maximum number of beds and requiring 24-hour staffing and security, on October 20, 2020. City staff were directed to issue "Temporary Use Permit PL2020-8834", allowing "emergency shelter" use of the Land during the term of the permit. The shelter began to operate shortly thereafter.

**Laven Affidavit, para. 20, Exhibit M**

12. The TUP expired on March 31, 2021. In February BC Housing applied for a further TUP, again as agent for Pentictonia, to extend the shelter's operations until March 31, 2022. That application was denied by Council on March 2, 2021. At the same time, City staff were directed to work with the City's Safety and Security Committee to develop guidelines for the placement of shelter and supportive housing services in the community.

**Laven Affidavit, paras. 29-32, Exhibits O, Q**

***The BC government's involvement with the Land***

13. As noted, BC Housing was active in the permitting process relating to the Land. The context for its involvement is as follows.

14. By agreement made May 1, 2020, four months before Pentictonia/BC Housing applied for a TUP, Pentictonia entered into a “short term facility licence” relating to the Land with Provincial Rental Housing Corporation (“PRHC”), initially for a three-month term. PRHC is a Crown corporation, which like BC Housing is deemed to be an agent of the government of British Columbia by s. 10(2) of the *Ministry of Lands, Parks and Housing Act*. BC Housing has stated that it controls PRHC. By amendments dated July 24, 2020, and February 8, 2021, the term of PRHC’s licence was extended such that it now runs until March 31, 2022.

**Laven Affidavit, Exhibits C, D, T**

15. The licence confers upon PRHC “an exclusive licence to occupy and use” the Land for “the temporary housing” of individuals assessed for “vulnerability, suitability and compatibility for residency” at the building on the Land. PRHC covenanted to comply with “all laws applicable” to the Land, and to “obtain all necessary permits required by any applicable government authority for its operations” on the Land. The licence states that it does not “create any relationship” between PRHC and Pentictonia, “except that of Licensor and Licensee”.

**Laven Affidavit, Exhibit C**

16. However, neither PRHC nor BC Housing operates the shelter. The shelter is operated by a BC society, the Penticton and District Society for Community Living (“PDSCL”). BC Housing and PDSCL entered into an operating agreement for a one-year term starting July 1, 2020, under which PDSCL is committed to providing “Core” and “Essential Services” to “Clients” (*i.e.*, individuals and families who are homeless or at risk of homelessness) that include meeting “Clients’ immediate needs for overnight accommodation, basic nutrition and hygiene”.

**Laven Affidavit, Exhibit K**

17. BC Housing’s responsibilities under that agreement were (a) the assignment of a liaison representative, (b) providing advice and guidance to PDSCL, (c) providing timely responses, (d) monitoring the operation of the shelter and PDSCL’s use of funding, and (e) developing provincial standards and guidelines. The agreement states that it “will not be construed as creating any partnership or agency” between BC Housing and PDSCL.

**Laven Affidavit, Exhibit K**

***The current impasse***

18. PDSCL continues to operate the shelter, now in contravention of the zoning bylaw. By letters dated March 8, March 19, and April 12, 2021, BC Housing and PDSCL have expressed their intention to continue doing so notwithstanding the expiry of the TUP. BC Housing has invoked s. 14(2) of the *Interpretation Act* as the basis for doing so. BC Housing describes s. 14(2) as conferring “Paramountcy powers” upon the BC government. BC Housing has stated that “pursuant to Section 14(2) of the Act, it could properly and lawfully override the Bylaws of the City of Penticton that currently prevent the use of the Property as the Shelter.”

**Laven Affidavit, Exhibits T, W, Y**

19. The Land is situated in a primarily residential neighborhood. It is across roadways from two seniors' homes and adjacent to a residential strata building. Council's decision to deny the extension of the TUP followed significant public opposition to the extension, voiced by residents and businesses.

**Laven Affidavit, paras. 6, 26**

20. The shelter's operations have been the subject of a significant number of "service calls" to the City. The City's bylaw officers have attended regularly to deal with issues including waste left on public and private lands around the shelter, individuals sleeping outside of the shelter, individuals doing drugs around the shelter, and negative interactions between individuals frequenting the shelter and neighbouring residents.

**Laven Affidavit, para. 20, Exhibit M**

21. The perspective of City staff is that use of the Land as a shelter is not consistent with best planning practices, given the character of the neighborhood and the impact on its residents. The analysis of the City's Safety and Security Committee, reflected in the guidelines it developed, has focussed instead on use of the larger Compass Court site as the appropriate means of satisfying the community's shelter needs, together with other smaller, 8-12 person shelters that will be more manageable and present fewer civic issues.

**Laven Affidavit, paras. 43-44, Exhibit R**

22. The City does not oppose the provision of shelter services to the individuals currently attending the Land. Its policy disagreement with the government of British Columbia relates only to the site and facilities at which those services will be provided. With respect to the Land specifically, the objective of the City's officials is an eventual end to its current non-compliant use, through the orderly decampment of the shelter, not its immediate closure.

**Laven Affidavit, para. 45**

### **Part 3: LEGAL BASIS**

#### ***The interpretive question at issue***

23. This Petition is brought pursuant to Rule 2-1(2)(c) of the *Supreme Court Civil Rules*, which contemplates a proceeding by way of petition to the court where the "sole or principal question at issue is alleged to be one of construction of an enactment". That is so here, where the facts are not materially controversial and the parties' legal (as opposed to policy) dispute turns upon the reach of s. 14(2) of the *Interpretation Act*.

24. Section 14 states:

- (1) Unless it specifically provides otherwise, an enactment is binding on the government.

- (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the *Assessment Act*, does not bind or affect the government.

25. There are two reasons why BC Housing cannot invoke s. 14(2) to “override” the zoning bylaw’s prohibition of the Land’s continued and unauthorized use as an “emergency shelter”: the BC government has waived any immunity in this case; and the BC government is not engaging in the “use or development” of the Land.

***BC waived any immunity pertaining to the Land***

26. The “Crown immunity” confirmed or preserved by provisions such as s. 14(2) is subject to waiver by the government. Waiver will be found where the government takes steps that implicitly accept the benefits of a statutory regime. The rationale for the doctrine is that any right taken by the Crown is encumbered by any restrictions or limitations that are inherent in the right. The Crown cannot disregard such restrictions in order to obtain a larger right than was actually conferred upon it.

***Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225**

***Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015**

27. Pentictonia was precluded by the zoning bylaw from conferring any right to use the Land as an emergency shelter. The BC government, acting through its agent PRHC, acknowledged and accommodated this by covenanting to “obtain all necessary permits”, as a term of its licence. The BC government, acting through its agent BC Housing, then took steps to obtain the permitting benefit contemplated by the *Local Government Act* and the zoning bylaw, by way of its applications for Pentictonia’s TUP. By acquiring a right of use that was necessarily subject to the zoning bylaw’s restrictions on use, and by accepting the benefits of the municipal land use regime in obtaining the TUP for Pentictonia, the BC government waived any Crown immunity from the zoning bylaw that it possessed in respect of the Land.

***BC is not the user of the Land***

28. The application of s. 14(2) is restricted to the BC government as user or developer of land. The BC government must be the physical occupier of the land, or otherwise its “user” in the ordinary or everyday meaning of that word. The BC government’s immunity inherently belongs to it and is not capable of being transmitted to other persons. The BC government is not the user of land when it grants rights of use to private actors, nor does assisting or enabling a private actor’s use for government purposes amount to use by the government.

***Squamish (District) v. Great Pacific Pumice Inc.*, 2000 BCCA 328**

***British Columbia Lottery Corporation v. Vancouver (City)*, 1999 BCCA 18**

29. The Land is privately owned (by Pentictonia), and the shelter is privately operated (by PDSCL). BC Housing's enabling and supportive role with respect to PDSCL's provision of services does not amount to "use" of the Land by BC Housing for purposes of s. 14(2). Because BC Housing does not own the Land and is explicitly not a partner or principal of PDSCL, there is no avenue by which PDSCL's shelter can be regarded as the BC government's "use".

*cf. Buechler v. Island Crisis Care Society, 2019 BCSC 1899*

30. The BC government's special freedom to use and develop land as it sees fit cannot be equated with a power to decide how land will be used and developed by others. It is properly the role of the City and other local governments to make decisions about the latter. Local governments' tasks in making land use bylaws, and in deciding whether to vary them, affect the community as a whole, and are intended to reflect its collective interests. Those interests are complex and often divergent: councillors' decisions balance an array of social, economic, political and other considerations. These decisions are fundamentally an exercise in democratic government, which ought not unilaterally to be trumped by the preferences of a provincial agency. Instead, the interpretation and application of s. 14(2) should respect the responsibility of the City's elected representatives to serve the people who elected them, and to whom they are ultimately accountable.

*Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5*

*Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13, [2000] 1 S.C.R. 342*

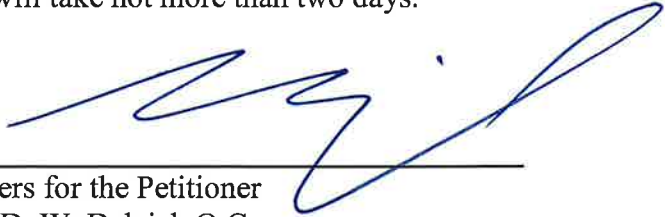
**Part 4: MATERIAL TO BE RELIED ON**

31. Affidavit #1 of Blake Laven, made July 5, 2021; and

32. Such further and other material as counsel may advise and this Honourable Court may permit.

The Petitioner estimates that the hearing of the Petition will take not more than two days.

Dated: July 7, 2021

  
\_\_\_\_\_  
Lawyers for the Petitioner  
Ryan D. W. Dalziel, Q.C.  
Brian T. Duong  
Hunter Litigation Chambers



**To be completed by the Court only:**

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this petition

with the following variations and additional terms:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge  Master