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ATTN:
Council of the Corporation of the City of Hamilton
via email: clerk@hamilton.ca

This letter serves as my official submission to the Corporation of the City of Hamilton regarding a proposed bylaw banning letters critical of Council behaviour from being submitted as public correspondence.

In what has become an annual exercise for Hamilton City Council, Deputy City Clerk Janet Pilon, City Clerk Andrea Holland, and City Solicitor Nicole Auty have brought forth recommendations to this Council which will violate the Charter Rights of Hamiltonians to express themselves regarding matters of public interest.

In a democracy, citizens have the right to express displeasure with their elected government.

The proposal to forbid correspondence to Council is anti-democratic and violates the oath of office sworn by members of Council. (Suggested reading: Grade 10 civics curriculum)

It is quite unfortunate that it is both being proposed and being considered. In a responsibly managed municipal government, this kind of proposal would not even be contemplated, let alone made a priority during a public health emergency.

It is even more unfortunate that I must submit this correspondence with the expectation this matter will end up in Superior Court of Justice.

Legislation

1) Constitution Act, 1982, Canadian Charter of Rights and Freedoms;
2) Municipal Act, 2001, SO 2001, c 25;
3) City of Hamilton Act, 1999, SO 1999, c 14, Sch C;
4) Codes of Conduct - Prescribed Subject Matters, O Reg 55/18.

Decisions of Council Subject to the Charter

In this letter, I provide Council with basic arguments against the proposed provisions of the Procedural By-Law. One can cite the Grade 10 Ontario Curriculum for civics classes to explain how the proposed Bylaw is illegal.

The City of Hamilton is a municipality incorporated under the City of Hamilton Act, 1999. Decisions of the municipalities are bound by the Charter of Rights and Freedoms[1].

In a 1994 decision, Supreme Court Justice McLachlin (as she was then) wrote "It is important that municipalities not assume powers which have not been conferred on them, that they not violate civil liberties ... and that abuses of power are checked."[2]

In banning correspondence critical of Council behaviour, the City of Hamilton assumes powers to regulate speech not conferred upon it and violates civil liberties for the purpose of preventing citizens from speaking against abuses of power.

City of Hamilton v. Hamilton Distillery Co (1907) 38 S.C.R. 239 is also informative regarding the need for the Courts to intervene when municipalities seek to confer powers upon themselves which are not granted in law.

Expressive Activities, Municipal Government, and the Charter

Gammie v. Town of South Bruce Peninsula[3] is informative regarding how the Charter protects the expressive activities of residents in seeking redress with their elected municipal governments.

In the decision, the Ontario Superior Court Justice Price explains the importance of public expressive activities to the ability of residents to exercise their rights in our democracy.

Put simply, municipalities cannot regulate expression because they do not like it.

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[1] Godbout v. Longueuil (City), [1997] 3 SCR 844, par. 51.
[2] Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231.
[3] Gammie v. Town of South Bruce Peninsula, 2014 ONSC 6209

Hamilton City Council has expressed, in a 13-2 vote on February 25, 2015, the position that members of Council should be allowed to assault individuals without any consequence. The current proposed by-law bans residents from expressing disagreement with this decision in the form of written correspondence on Council agendas.

Without a doubt, written correspondence in Council agendas is expressive activity protected by the Charter. Unless a letter takes an unprotected form, “such as violence or threats of violence”, a municipality cannot ban the expression.

While Hamilton City Council may not like it when residents express the opinion that elected officials should behave themselves in a manner befitting their office, it does not have the power to prohibit residents from expressing this view to Council.

Written correspondence to Council is at the centre of municipal political life in Hamilton. During COVID, these letters take greater importance as the opportunities to engage in political life are curtailed by necessary public health measures.

Council responds to issues when it receives many letters upon matters of importance to residents of Hamilton. Debates resulting from correspondence are lengthier and more substantive as the number of letters increase. For example, the recent debates regarding the police budget are reflective of this in practice.

Similarly, while a single letter regarding traffic safety in a particular location is ignored by Council, a series of letters regarding a particular location will usually result in debate by Council. Usually, Council acts in response to letters.

This proves the effectiveness and importance of correspondence to the expressive activities of the citizens of Hamilton.

Residents who submit letters to Hamilton City Council regarding the behaviour of Councillors do so for purposes protected by guarantee of Free Expression provided in Section 2(b) of the Charter of Rights.

Clearly in this instance it must be explained that “the purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment”.[4]

Political violence, intimidation, threats, and other improper behaviours engaged in by some members of Hamilton City Council discourage political and social participation.

Letters regarding Council behaviour serve to advance the goal of promoting political and social participation.

Citizens are discouraged from expressing themselves when met with hostility, intimidation, and disparaging remarks by elected officials.

Redressing this behaviour is critically important to our democracy.

Letters regarding this topic are important to the health of our democracy inviting the strongest possible protection under the Charter.

Council’s can no more prohibit these letters, than Council’s can prohibit individuals from bringing signs into Council Chambers.

As Superior Court Justice Price wrote in *Gammie*, Council can only regulate “the forms of signs that could be brought into Council Chambers to paper or cardboard without solid handles”.[5]

The Charter protections for written correspondence to Council are the same as attending a Council meeting. The legal principles espoused in *Gammie* apply to written correspondence.

It is true the Municipal Act does not implicitly require correspondence to be included in public agendas. However, when read in its entirety, the only means of meeting the requirements of open meeting rules[6] is for correspondence to be published as part of the Council agenda.

Thus, while ending all critical correspondence would remove the Charter violation in this instance, it would create a separate violation of law.

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[4] R. v. Zundel, [1992] 2 S.C.R. 731

[5] Gammie v. Town of South Bruce Peninsula, 2014 ONSC 6209 at par. 92

[6] Municipal Act, 2001, SO 2001, c 25, s 239

Once a government creates a platform for expression, that platform is subject to the Charter[7].

In *Greater Vancouver,* the transportation authority forbade political ads. The ads in question in this case were encouraging people to vote.

The Supreme Court of Canada held that government cannot forbid speech for political reasons.

"The policies allow for commercial speech but prohibit all political advertising ... In sum, 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.[8]"

Council cannot choose to only accept correspondence which it likes.

"It is clear from this Court's s. 1 jurisprudence on freedom of expression that location matters, as does the audience"[9], Supreme Court Justice Deschamps wrote in the unanimous decision.

In the matter presently in front of Council, the location of the expression is the [virtual] City Council Chamber. The audience is the City Council.

These factors further contribute to both the appropriateness of the public addressing concerns about Council behaviour by means of written correspondence, and to the strong Charter protections afforded to this expression.

"Since the Canadian Charter clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier) simply avoid the application of the Charter by devolving powers on municipal bodies"[10], wrote Supreme Court Justice Major in *Godbout* explaining why the Charter applies to municipalities.

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[7] Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295

[8] Ibid at par. 77

[9] Ibid at par. 78

[10] Godbout v. Longueuil (City), [1997] 3 SCR 844, par. 51

It follows that Council cannot remove Charter protections from correspondence by devolving an authority to the City Clerk.

Simply put, the City Clerk cannot exercise the authority to decide when a letter is, or is not, critical of Council.

Irwin Toy[11] provides an effective reference explaining how the Superior Court will strike down this Bylaw.

The Court will determine that correspondence regarding Council behaviour is within the scope of protections afforded by the Charter.

The Court will find that the purpose of this government action is to restrict that freedom of expression. An Oakes Test will be applied, and this bylaw will not be saved by Section 1 of the Charter.

I will briefly address *Bracken v. Fort Erie*[12] before providing an Oakes Test for Council's consideration.

The facts of *Bracken* need not be exhaustively detailed in this letter. Much like the basics of civics taught in Grade 10, the facts of this case should already be well known to members of Hamilton City Council

Writing for a unanimous Ontario Court of Appeal, Justice Miller provides some key insights relevant to the matter before Council in the proposed bylaw.

In paragraph 54:

> "Freedom of expression has received broad protection in Canadian law, not only through the Charter, but also through legislation and the common law. As Rand J. noted in Saumur v. City of Quebec, 1953 CanLII 3 (SCC), [1953] 2 S.C.R. 299, at p. 329: "Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Section 2(b) further entrenches the limits on government action in order to safeguard the ability of persons to express themselves to others. As expressed in Irwin Toy Ltd. v. Quebec

[11] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927
[12] Bracken v. Fort Erie (Town), 2017 ONCA 668

(Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 968-969:

> Freedom of expression was entrenched in our Constitution and is guaranteed ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (Palko v. Connecticut, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (Switzman v. Elbling, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p. 306). And as the European Court stated in the Handyside case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:
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> . . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".” (par. 25)
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> “There can be no question that the area in front of a Town Hall is a place where free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society. The literal town square is paradigmatically the place for expression of public dissent.”

Continuing, Justice Miller writes in paragraphs 57 and 58:

> I acknowledge that several of the affiants attested that Mr. Bracken’s speech was incomprehensible, and that the application judge made that finding. But again, the finding was unsupportable. Some affiants, up on the balcony or elsewhere on the second floor, might not have heard him distinctly. Others, who distinctly heard him saying “kill the bill” might not have had sufficient context to understand the message. That did not make his speech “incomprehensible”, with the insinuation – made in various places in the Town’s affidavits – that Mr. Bracken was raving. To the contrary, Mr. Brady, watching from the atrium and well-acquainted with Mr.

> Bracken's grievances, heard Mr. Bracken and clearly understood what he was saying. He didn't like it.
>
> Mr. Bracken's speech, that day, was directed towards protesting the expected adoption of a by-law that he understood to be promoting the interests of a marijuana facility across from his home. He wanted the by-law defeated. He also criticized the members of Town Council. No doubt, they did not like being called liars and communists. Mr. Brady did not like Mr. Bracken calling for him to be fired. On cross-examination, he stated that Mr. Bracken had no right to say so. He viewed it as a threat to his livelihood. The language was neither polite nor restrained. But as this Court pointed out in Cusson v. Quan, 2007 ONCA 771, 87 O.R. (3d) 241, rev'd 2009 SCC 62, [2009] 3 S.C.R. 712, at para 125: "(d)emocracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those ... who exercise power and authority in our society... Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy."

The Oakes Test

The Oakes Test[13] is the burden which Hamilton City Council must meet to prove to the Superior Court that this ban is a reasonable limit on free expression that can be demonstrably justified in a free and democratic society.

Firstly, is the objective of the bylaw both "pressing and substantial"?

The objective of the bylaw is to stifle public discourse regarding the behaviour of elected officials. This is not a pressing government objective.

It is not even a government objective. It is a personal political desire of some members of Hamilton City Council.

This bylaw fails this first test.

Most laws subjected to Charter challenge meet this hurdle, that this bylaw will not speaks to just how far outside the range of reasonableness it is.

[13] R. v. Oakes, [1986] 1 S.C.R. 103

For the sake of legal argument, let's assume a Court decided to allow the Bylaw to pass the first test.

The propose of this assumption is purely to demonstrate how the bylaw will fail on the second stage proportionality analysis.

The infringement is rationally connected to "the law's purpose" which is to stifle expression critical of Council. There is no other means to achieve this purpose. Therefore, it will meet this part of the analysis.

The infringement is not a minimal impairment. It is a blanket ban on all discourse regarding Council behaviour. It fails on minimal impairment.

The proportionate effects are much too grave for any Court to entertain allowing this bylaw to stand. Beyond stifling debate regarding Council behaviour, the bylaw will allow behaviours which intimidate residents and prevent them from engaging in democratic processes.

Ultra Vires

Ontario Regulation 55/18 requires municipal councillors to codify a Code of Conduct which includes a section regarding "respectful conduct, including conduct toward officers and employees of the municipality or the local board, as the case may be."

The proposed ban on critical letters regarding the conduct of members of council not only violates the Charter. It is *ultra vires*.

Council is required by regulation to consider submissions from the public regarding Council behaviour. The Council cannot consider the letters in closed session as per the open meeting requirements.

The Council cannot pass bylaws beyond the powers granted to it, or restricted by, the Province of Ontario.

Conclusion

The proposed ban on correspondence critical of Council behaviour fails all legal tests.

If Council wishes to proceed to pass this illegal bylaw, I will take the necessary steps to challenge at the Superior Court of Justice to uphold the fundamental foundations of our democracy.

Submitted by:

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