



Canada's only national political pro-choice advocacy group

POB 2663, Station Main, Vancouver, BC, V6B 3W3 • info@arcc-cdac.ca • www.arcc-cdac.ca

March 21, 2022

Regulation of Graphic Flyers of Aborted Fetuses to Residences

Dear Mayor and City Councillors of London:

May I please provide some information and recommendations to aid you during your Council meeting on Tue Mar 22, in relation to the agenda item for the bylaw to prohibit the graphic flyers?

This letter contains the following sections:

- Recommendation to pass the bylaw, with suggested amendments
- What about a legal challenge?
- Why have few cities passed bylaws against the flyers?
- The city has a robust Section 1 defence to infringe freedom of expression

Recommendation to pass bylaw, with suggested amendments

The Abortion Rights Coalition of Canada (ARCC) recommends that the city enact the bylaw specifically banning the delivery of graphic flyers to residences as recommended by the CPSC, but with two suggested amendments to make it better withstand scrutiny under the *Charter of Rights and Freedoms*. This bylaw would have the most effective impact in terms of stopping the harms of graphic flyers, as it does not depend on residents being required to post a 'No Flyers' or similar notice, and the heavier fine of \$350 would more effectively deter people delivering the flyers.

Amendment 1: We recommend a narrower definition of graphic flyers, one that specifically bans *only* flyers depicting aborted fetuses, as this would be less likely to be found overbroad or disproportionate by the courts. Further, the term "human beings" should not be used in the definition, as fetuses are not human persons under Canadian law. Suggested new definition: "*Graphic Image means a pictorial image or series of images containing, or purporting to contain, dismembered or aborted fetuses.*"

Amendment 2: We recommend that the city include another "Whereas" in the preamble that mentions the city's evidence for the harms of the graphic flyers, such as the complaints and letters received, the public petition, meeting submissions, etc. This would help strengthen a Charter Section 1 justification to limit freedom of expression. Suggested wording: "*The Municipal Council received substantial evidence from Londoners that such unsolicited flyers cause demonstrable harm to London residents.*"

Why have few cities passed bylaws against the flyers?

The city may be concerned that no other city has passed such a specific bylaw before, although four cities have bylaws against unwanted flyers in general. I would like to emphasize:

- London has been bombarded with the flyers in a much worse manner than any other municipality in Canada. This is because London is a university/college city and the Canadian Centre for Bio-Ethical Reform (CCBR) has been recruiting volunteers on both campuses.¹
- Some cities, including Toronto, Ottawa, and Winnipeg, have experienced more street signage than graphic flyers, according to our records. For example, Toronto has largely been afflicted with graphic signage on streets,² which is why they are looking at amending their Temporary Signs bylaw rather than addressing the flyers (see [page 23 of their staff report](#)). Because of this focus, Toronto Council has neither considered nor rejected a flyer bylaw, apparently relying instead on the provincial Trespass Remedy.
- Local activists and groups including London Pro-Choice and the Viewer Discretion Legislation Coalition strongly mobilized to build up awareness of and opposition to the flyers over the last few years, including delivering a petition with over 4,000 signatures, encouraging complaints to the City, and countering the flyer deliveries in affected neighbourhoods. This is not the case for other cities, which generally have had fewer complaints and less local organized opposition. Cities may even use that as an excuse to not pass a bylaw – for example [Burnaby BC](#) claimed there was no evidence a bylaw was needed because it received only one “official complaint”, even though the flyers had generated much negative media coverage and many informal complaints.

What about a legal challenge?

It’s true that enacting a specific bylaw against graphic flyers of aborted fetuses may invite a legal challenge. But I urge you to please not cave into extremist bullies. This would subject your citizens to this abusive graphic imagery for years to come with little recourse, and would set a bad example to the dozens of other cities across Canada that have also been suffering from the graphic imagery. Please see below for why a legal challenge – if it even occurs – would be defensible by the city.

Councillor Michael van Holst’s Mar 16 letter to colleagues (pg 117 of the [Agenda](#)) contains an error – the London Transit Commission did not lose a lawsuit. They settled out of court. In [ARCC’s opinion](#), the LTC failed to consider all the issues at stake, including other Charter rights and the city’s statutory objectives, thereby caving in unnecessarily. The settlement is detrimental to Londoners’ well-being, as it compels the LTC to accept false and demeaning anti-choice advertisements on the transit system.

¹ ARCC keeps records on specific instances of graphic flyers being delivered across the country since about 2018. Our figures are **undercounts** as they are based only on reports from media, social media, and flyer recipients who contact us – but we believe they reflect an overall frequency pattern. For most municipalities that have experienced it, our records show between 1-3 days of flyer delivery in at least one neighbourhood. Cities more significantly affected by the graphic flyers include Burnaby BC and Calgary, with a recorded history of 8 and 7 days, respectively, of graphic flyer delivery in at least one neighbourhood. In comparison, we show 19 days of flyer delivery in London.

² ARCC’s record shows at least 50 days where incidents of graphic signage occurred in Toronto since 2018, usually in multiple locations on each day, and at least 3 days where flyers were delivered or distributed. Again, these figures are undercounts.

The city has a robust Section 1 defence to infringe freedom of expression

The city would be on strong legal grounds in terms of the *Charter of Rights and Freedoms*, because cities need to consider a range of objectives and rights. While the bylaw would violate freedom of expression rights under Section 2(b) of the Charter, this can be saved under a Section 1 defence, which allows justifiable limits on rights to protect other competing rights and objectives.

This is the case here, as anti-choice groups have many other means of expressing their view and do not have to rely on graphic images. Further, courts prefer that a Section 1 restriction on freedom of expression be as limited as possible, so it is not overbroad or disproportionate to the point it might unnecessarily capture other kinds of expression. (That is why we suggest the bylaw's definition of graphic images be limited to aborted fetus imagery.)

Three key factors are outlined below that cities can weigh against the freedom of expression of those delivering the graphic flyers. These factors have been informed by legal advice ARCC has received as well as existing jurisprudence. (Please note that CCBR's lawyer Alan Honner failed to acknowledge any of these factors in his submission, pg 114-115 of the Agenda.)

1. **Existing case law supports some limits on freedom of expression:** Considerable case law supports justified limits to freedom of expression to protect the Charter rights of others, relying on the Doré case and/or the earlier Oakes case. In addition to several Supreme Court cases ([R. v. Keegstra](#) on hate speech, [R. v. Butler](#) on obscenity, and [R. v. Sharpe](#) on child pornography), the following provincial cases may be of interest to the city:

- [R. v. Spratt](#) (2008 BCCA 340) allowed the infringement of anti-abortion protesters' freedom of expression around abortion clinics, in order to ensure the safety, privacy and dignity of women accessing abortion care.
- [American Freedom Defence Initiative v. Edmonton](#) (2016 ABQB 555) upheld the city's removal of a prejudicial bus ad about honour killings of Muslim women, because the City's objective of providing a safe and welcoming transit system outweighed the limitation on freedom of expression caused by the refusal to run an offensive and discriminatory ad.
- [Guelph and Area Right to Life v. City of Guelph](#) (2022 ONSC 43) granted a judicial application to an anti-choice group who sued over its bus ads being refused – however, the court did not require the City to post the ads, instead remitting the decision back to the City to reconsider and carry out a Charter balancing exercise. The court instructed the city to weigh the anti-choice group's freedom of expression against the city's statutory objectives and competing Charter rights, including gender equality rights as the intervenor ARCC had argued (Para 91).

Indeed, the graphic flyers being delivered by the CCBR can be seen to undermine gender equality rights, which are protected under Section 15 of the Charter. Not only do the flyers specifically cause harm and trauma to ciswomen and gender-diverse people who can get pregnant, they also target their legal rights and essential health needs, thereby seeking to challenge their Charter rights to equality, life, bodily autonomy, privacy, and conscience.

In Jakki Jeff's letter to Council (page 119-122 of the Agenda), none of Jeff's listed citations relate to Section 1 except [Bracken V Fort Erie Town](#) 2017 ONCA 668. That case is readily

distinguishable from the present issue,³ because the City of London's bylaw has an important purpose, is proportionate and would only minimally impair free expression (if amended as suggested). Moreover, the bylaw relates to actions taking place on private property, not on public land as in the Fort Eyrie case. Second, Jeffs cites [Lethbridge and District Pro-Life Association v Lethbridge City 2020 ABQB 654](#), to support her freedom of expression argument for the graphic flyers, but fails to mention that the judge's reasons for ruling against the City of Lethbridge's decision to remove inaccurate anti-abortion ads from bus benches was because the city had not actually done a Charter balancing of rights exercise, and because the anti-abortion ads in question *were not graphic*.

Jeffs also claims that "None of us has a right not to be offended." But in this case we do – the people delivering the flyers are intruding onto private property, and residents are a captive audience forced to see the unwanted expression.

2. **Courts respect Ad Standards decisions and advertising code:** As of 2022, eight court decisions have [endorsed cities' use](#) of the *Canadian Code of Advertising Standards*, which is administered by Ad Standards on behalf of the advertising industry. It's important to note that the graphic imagery of aborted fetuses – both in the form of flyers delivered to homes and signage on streets – has been deemed by Ad Standards to violate the Code:

- In three separate decisions in 2014, 2015, and 2017, Ad Standards Council ruled that graphic flyers depicting aborted fetuses contravened Clause 14 (d) of the Code: "Council concluded that by its use of highly graphic and disturbing images, the advertiser displayed obvious indifference to conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population." In all 3 cases, the flyers were delivered by and/or produced by the Canadian Centre for Bio-ethical Reform (CCBR).
- In a 2009 decision, Ad Standards Council ruled that a large image of an aborted fetus on the side of a moving truck contravened Clauses 14(c) and (d) of the Code: "Council...concluded that the advertising using the image of an aborted embryo in this medium and in this way, displayed obvious indifference to conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population. Council also concluded that the imagery, when combined with the words 'unmasking choice', denigrated women who have chosen to have an abortion." The truck with billboards was operated by the CCBR.

Courts have emphasized that the Advertising Code and Ad Standards decisions cannot be the *only* factor that cities rely on. But since courts have consistently supported cities' use of the Code, this gives added authority to cities to prohibit the graphic flyers by taking into account the decisions and the Code as *one part* of a Charter balancing exercise.

3. **Municipalities have broad authority to protect public safety:** Local governments can pass bylaws to protect public safety and well-being, ensure a safe and welcoming transit system, and fulfill other statutory objectives on behalf of their communities. Such laws can even [overlap](#)

³ In the Fort Eyrie case, a resident who was angry about a town decision stood on public property in front of town hall yelling through a megaphone. The town issued a one-year trespass notice against him and had him arrested. But the court said he was not obstructing anyone or posing any harm, concluding: "The [town] could not establish that it was acting for a sufficiently important purpose. Even if it were to succeed on that basis, it would nevertheless fail as its actions did not minimally impair the applicant's freedom of expression and there was no proportionality between the deleterious and salutary effects of the expulsion and trespass notice."

[with provincial laws](#) or jurisdiction provided there is no conflict – i.e., it is not the case that municipalities cannot legislate in this area, as Councillor van Holst has claimed.

The [same court decisions](#) that support cities' use of the Advertising Code also recognize municipal authority in upholding their statutory objectives, and indeed, expect cities to include these in a Charter balancing exercise of competing rights.

In the case of the graphic flyers, the City of London has ample evidence of the harms to the community in the form of the petition and multiple complaints and submissions, including descriptions of emotional upset, rage, fear, and traumatic responses and aftereffects, which occurred amongst children, people who have had miscarriages or abortions, and others. CCBR's lawyer Alan Honner (pg 114-115 of the Agenda) claims the graphic images may only "*potentially* trigger a negative reaction," but the city's evidence shows this is demonstrably false.

As mentioned earlier, to strengthen a Charter Section 1 justification, I recommend that the city add a "Whereas" clause that recognizes the evidence of harms caused by the graphic flyers.

To conclude, ARCC asks the Mayor and Council to please pass the bylaw as recommended by the CPSC, along with our suggested amendments including to narrowly tailor it to graphic flyers of aborted fetuses. Please take into account the above factors and objectives that would justify the prohibition of these flyers under Section 1 of the Charter and make the bylaw defensible if challenged in court.

Thank you very much for this opportunity.



Joyce Arthur (she/her)
Executive Director
Abortion Rights Coalition of Canada (ARCC)
joyce@arcc-cdac.ca