

To: Mayor Ed Holder, Members of the Community and Protective Services Committee , City Clerk  
From: Samuel Trosow  
Re: 13<sup>th</sup> Meeting, September 21, 2021, Item 4.1(a), Flyer Deliveries to Residential Properties

Dear Members of the Community and Protective Committee

I am writing to urge you to

- (1) reject the proposed by-law that is part of the Staff Report from your Legal Services Department;
- (2) return this matter to staff with explicit instructions to prepare a by-law containing prohibitions more particularly regarding the delivery of flyers containing what purport to be images of an aborted or otherwise non-viable fetus, and that the report be returned to council by a specified time certain;
- (3) that the council schedule a timely public participation meeting on this matter.

I believe the attached by-law is fundamentally flawed because it lacks any viable enforcement mechanism and because it fails to address the urgency of the matter at hand.

The staff report is also flawed in that it fails to consider

- (1) the broad authority the city council has to enact by-laws;
- (2) the demonstrable harm that is being caused through the distribution of the subject flyers;
- (3) any meaningful discussion of whether such a by-law would survive a freedom of expression Charter challenge on account of Section 1 of the Charter.

#### **Municipal Purpose:**

The staff report correctly states that for a municipal by-law to be valid, it must have a valid municipal purpose. But it fails to fully or properly identify the full scope of the valid municipal purposes which would support the enactment of a more robust by-law.

While the proposed by-law does recite several provisions of the *Municipal Act*, including section 10(2) paragraph 5, it fails to also acknowledge paragraph (6) of that section (pertaining to the health, safety and well-being of persons). This authority under paragraph (6) is relevant, indeed crucial to the matter at hand, because of the harm that these unsolicited and unexpected leaflets cause to residents.

#### **Violation of Section 2(b) of the Charter of Rights and Freedom**

A by-law limiting persons from engaging in expressive activity including distributing leaflets to residential properties would indeed engage section 2(b) of the Charter. But as the Canadian caselaw firmly establishes, the inquiry does not end there, and the City would have the opportunity to invoke section 1 in order to justify the impugned measure. Section 1 provides:

*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While the staff report does recite the elements of a section 1 justification (in the last paragraph of 2.0), it simply moves on without any meaningful analysis.

## **Other Cities**

This section is exceptionally thin and it fails to address how a measure dealing with the prohibition of images of an aborted or otherwise non-viable fetus would fare in light of a constitutional challenge. In addition to direct municipal by-laws, there is a growing body of caselaw dealing with the refusal of advertising of these images. These cases are relevant, directly analogous and should not be glossed over. Rather than repeat them at length, I would refer you to reports prepared by the Abortion Rights Action Coalition, available online at <https://www.arcc-cdac.ca/wp-content/uploads/2020/06/take-action-against-aborted-fetus-images.pdf> and <https://www.arcc-cdac.ca/wp-content/uploads/2021/03/courts-have-endorsed-use-of-advertising-code.pdf>.

## **Other Alternative Measures to Consider**

Rather than proceed with a by-law that deals with “junk-mail” in general, (and without any meaningful enforcement mechanism at that) council should insist on crafting a by-law centering on the issue at hand, which is a very particular form of a leaflet.

Measures that potentially engage freedom of expression rights must be narrowly tailored and proportional to the nature of the harm. They also need to avoid vagueness and overbreadth. A general proscription against “junk-mail” could run into all of these problems. Rather than overshoot the problem, council should make the effort to carefully craft a by-law that limits the burden on expressive activity to be as little as possible, and which is clear in its description of exactly what is being prohibited.

There is a difference between having to take an unwanted pizza ad to the recycling bin and receiving what for many residents is a highly disturbing and harm-inducing document. The proposed measure glosses over this important difference and a better approach is needed.

## **Need for an evidence-based approach**

I am calling for the scheduling of a public participation meeting because in order to satisfy the requirements of section 1 of the Charter, the measure must have a legitimate and substantial objective. In the case of a by-law that limits the distribution of flyers containing what purport to be images of an aborted or otherwise non-viable fetus, the legitimate objective centers on the reduction of harm to recipients of the unwanted and unexpected images. While I believe that the council has already heard enough evidence to make such a finding, and that while a court would uphold the legitimate and substantial objective prong of section 1, holding a public participation meeting would be a reasonable way to further inform this decision.

## **Conclusion**

Given the amount of time that has transpired since the Council’s request for this report, its limited content is very disappointing. The Council should demand better.

Submitted on September 20, 2021

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