

TO: Members of London City Council Community and Protective Services

FROM: Samuel Trosow

RE: CPSC Agenda November 2, 2021 (Public Participation Meeting- Flyer Distribution)

This is to follow up on my previous communications to the CPSC on the matter of a by-law regulating the distribution of leaflets to residential properties in the city. I have requested to speak at the public participation meeting for November 2, 2021 and I request this letter be included in the Added Communications. I would like to appear in person at the meeting.

In my presentation to the Committee, I intend to cover three points. Given the time constraints of a PPM I will outline them below:

1. As the Council is being asked to enact a by-law that will engage section 2(b) of the Charter, the Council should carefully craft the measure to be justified under section 1 of the Charter

I understand that any measure that restricts the distribution of flyers is going to engage section 2(b) of the Canadian Charter of Rights and Freedoms. The test for making out a *prima facie* violation of 2(b) is very low, and under the case law the issue becomes whether the impugned measure can be justified under Section 1 of the Charter. There are several significant cases that show how a *prima facie* violation of 2(b) will nonetheless survive a constitutional challenge after the application of section 1 (*R v Butler* regarding obscenity, *R v Keegstra* regarding hate speech to name two prominent examples). Should a measure restricting leaflet distribution be challenged, a court would likely find a section 2(b) violation but then turn to a full section 1 analysis.

I stress Section 1 because the council has significant control over how this analysis would be determined. As a threshold issue, the city must show that the by-law is in furtherance of a legitimate and substantial objective. This requirement is clearly met because of the harm and distress the distribution of these unwanted leaflets causes to residents. This demonstrable harm could be recited in the preamble to the by-law. While I think the council has already heard enough from residents about it to make this finding, it would be prudent to schedule a PPM to bolster the record. Beyond that, you must show that any violations caused by the by-law is proportionate to the harm it is seeking to address. For example, the measure should be rationally related to the harm, and it should not be vague, arbitrary or overbroad. In addition, care should be taken to craft a measure that restricts the expression rights as little as possible. On this point you might want to limit the ban to specific type of leaflets (graphically portraying what purports to be an aborted fetus) rather than the much broader category of “junk-mail.”

2. A by-law regulating the distribution of flyers to residential properties in the City of London is a legitimate municipal purpose.

Concerns have been raised about whether by-law restricting the distribution of flyers to residential properties is a proper municipal purpose which can be pursued by a municipality council. This concern is understandable insofar as there are related federal and provincial measures on this subject. The federal *Canada Post Corporation Act* (R.S.C., 1985, c. C-10) gives the agency the exclusive the exclusive privilege to delivering letters to addresses within Canada (section 14) and the Ontario *Trespass to Property Act* (R.S.O. 1990, Chapter T.21) defines trespass to property, including defining trespass as an offense (sec. 2), a general exception for lawful access (section 3, subdivision 2), and providing notice prohibiting certain activities (sections 4 and 5).

While the city must avoid a direct conflict with the enactments of senior levels of government, a municipality is still able to legislate in the area so long as there is a statutory basis for the measure and so long as it is otherwise constitutionally permissible.

While the solicitor's draft by-law (attachment A to the September 21 CPSC Agenda) recites several broad municipal powers justifying a by-law, another important one needs to be added. Subdivision 6 of section 10(2) of the Municipal Act speaks to: "6. Health, safety and well-being of persons." The information given by members of the public at the meeting should assist the council in determining that a by-law limiting flyer distribution comes within the broad authority.

3. There are several constitutionally permissible by-law options the council could enact that are within the scope of its municipal powers

Given the above constraints, there are several measures that the London City Council could nonetheless enact to address the problems associated with the distribution of graphic images to residences. Briefly they include a measure that (a) limits the distribution of flyers when the occupant places a sign on the premises to the contrary; or (b) requires that the defined images be contained in an opaque envelope with a warning of its contents and an identification of the sender.

The first option is similar to the draft by-law that was attached to the CPSC meeting of September 21, 2021 (Appendix A to staff report, which was returned to civic administration for further elaboration including enforcement provisions).

Another option would be to model a by-law on former Ontario Bill 259, (Viewer Discretion Act, Images of Fetuses, 2021). The operative provision of this approach could provide:

"No person shall deliver or distribute a graphic image of an aborted or otherwise non-viable fetus (or what purports to be such images) to a place of residence in the City of London unless the following conditions are satisfied:

- a. The image is contained in an opaque envelope.
- b. The exterior of the envelope includes a description of the contents.
- c. The exterior of the envelope clearly identifies the sender."

The objective should be clearly stated in the by-law:

"The objective of this by-law is to reduce the harms associated with the residential distribution of unsolicited flyers depicting graphic images of aborted fetuses or what purports to be such images. Such harms include unwanted exposure to disturbing and graphic images, an interference with residents' peaceful enjoyment of their premises, and particular harm to children resulting from exposure to the images."

Further options can be based upon by-law enacted in other cities (including Ottawa and Calgary).

4. Conclusion

It should be stressed that the city is not being asked to take a position on the issue of the legality or morality of abortion or the provision of abortion services. That issue is beyond the scope of a municipal purpose and it is hoped that the speakers at the November 2nd PPM will not attempt to broaden the scope of the purpose of the meeting. The opportunity for members of the community to discuss why they believe the distribution of graphic images of aborted fetuses to their residences causes harm is relevant to several issues. This information should help the city make a legislative finding that the purpose and objective of any by-law is the reduction of demonstrated harm in the community. This matter is relevant both to bring the measure with a municipal purpose, and also to show that there is a legitimate and substantial justification and objective for the measure under section 1. Any limitation on expressive activity needs to be carefully justified under section 1 of the Charter, and the city would have the burden of making this showing. It should also be appreciated that other municipalities (i.e., Calgary and Ottawa) have enacted various measures dealing with this problem and their work should be helpful to you.

I will also provide the committee (at the meeting) the general outline of a draft by-law which is modeled on former Bill 259, Viewer Discretion Act (Images of Fetuses), 2021 that was introduced in the Ontario Legislative Assembly on March 8, 2021. I believe a slightly modified version of this of this bill which adopts its main features is appropriate for enactment by a municipality and is more desirable than a general ban on the delivery of leaflets.

As my limited time before the committee at the meeting will not permit a detailed discussion of its provisions, I would be pleased to discuss this further with members of the committee or with members of civic administration.

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