

ALAN HONNER

BARRISTER & SOLICITOR

May 1, 2022

Mayor Ed Holder
300 Dufferin Avenue
London, Ontario
N6B 1Z2

Dear Mayor Holder:

Re: Proposed By-law Prohibiting Distribution of Graphic Images

I am legal counsel for the Canadian Centre for Bioethical Reform (“CCBR”). I have previously written to you expressing concern over the constitutionality of proposed by-laws which would have prohibited the distribution of flyers containing graphic images to properties within the City of London.

I am writing you today about the “Graphic Image Delivery By-law,” which is the City of London’s latest attempt to regulate political expression relating to abortion. The proposed by-law would prohibit the unsolicited delivery of any image or photograph which shows or purports to show a fetus, or any part of a fetus, unless the image is fully concealed in a sealed envelope or package. The package or envelope would have to include, among other things, a warning that it contains a graphic image that may be offensive or disturbing to some people.

The proposed by-law is problematic because it is an attempt to regulate expression based on its content. The governing jurisprudence from the Supreme Court of Canada’s is that content can never deprive expression of protection under the *Charter*. Even on the rare occasions when the court has upheld laws which limit expression, the laws always focus on the effects of the impugned expression as opposed to the content. For example, in the criminal context, the court has upheld a law prohibiting the willful promotion of hatred. But that law did not make any advanced determination as to what sort of content promotes hatred. The law was made with respect to communications generally. Indeed, an effects-based approach to regulating expression requires an examination of both content and contextual factors, and these cannot be known in advance.

In a recent Supreme Court of Canada case, *Ward v. Quebec*, the majority of the court adopted an effects-based approach to limiting expression in the civil context. The court endorsed the view that human rights prohibitions of hate speech are concerned with protecting *social standing* as opposed to protecting *emotional serenity*. The court reiterated a principle from a previous case, *Saskatchewan v. Whatcott*, that expression cannot be restricted only because it is “emotionally disturbing” or “offensive.”

3416 Dundas Street West, Unit 201, Toronto, ON M6S 2S1
T: 416 303 6487 • F: 416 352 5255
alan@honnerlaw.ca • www.honnerlaw.ca

The proposed by-law attempts to do what the court has forbidden. It seeks to regulate expression based on content, specifically political content that some might find emotionally disturbing or offensive. The mandatory warning of the proposed by-law leaves little doubt that limiting offensive expression is the by-law's true objective. For this reason, the by-law will be found to infringe the *Charter* and the Municipality will not have recourse to the usual justification that they are merely attempting to regulate the effects of expression. In these circumstances, the infringement is unlikely to be upheld as a necessary and reasonable limit to freedom of expression.

Another difficulty with the by-law is that it imposes an unattributed warning on the envelope, which is a form of forced expression. In *RJR MacDonald v. Canada* (1995), the Supreme Court of Canada struck down portions of the *Tobacco Products Control Act* which required unattributed warnings to be displayed on packages selling tobacco products. Even regarding a matter as important as the regulation of the tobacco industry, the court found that the law was an infringement of freedom of expression and that it was not reasonable and necessary as the government was unable to explain why the warning was unattributed. The Municipality is likely to encounter similar problems if it passes the proposed by-law.

As in past occasions, the CCBR encourages City Councilors to take a principled approach to the proposed by-law and uphold the *Charter*, regardless of what their own personal views may be about the underlying political debate.

Yours truly,

Alan Honner

Alan Honner
Barrister & Solicitor

Copy:

Councillor Michael van Holst
mvanholst@london.ca

Councillor Shawn Lewis
slewis@london.ca

Councillor Mohamed Salih
msalih@london.ca

Councillor Jesse Helmer
jhelmer@london.ca

3416 Dundas Street West, Unit 201, Toronto, ON M6S 2S1
T: 416 303 6487 • F: 416 352 5255
alan@honnerlaw.ca • www.honnerlaw.ca

Councillor Maureen Cassidy
mcassidy@london.ca

Councillor Mariam Hamou
mhamou@london.ca

Councillor Josh Morgan
joshmorgan@london.ca

Councillor Steve Lehman
slehman@london.ca

Councillor Anna Hopkins
ahopkins@london.ca

Councillor Paul Van Meerbergen
pvanmeerbergen@london.ca

Councillor Stephen Turner
sturner@london.ca

Councillor Elizabeth Peloza
epeloza@london.ca

Councillor John Fyfe-Millar
jfmillar@london.ca

Councillor Steven Hillier
shillier@london.ca