CANADIAN CONSTITUTION FOUNDATION

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Dear Waterloo Regional Councillors,

I am staff counsel with the Canadian Constitution Foundation (the "CCF"), a non-partisan legal charity dedicated to defending the fundamental rights and freedoms of Canadians through communications, public education and litigation. The CCF was established in 2002 and has appeared at all levels of courts, including the Supreme Court of Canada, in cases related to the proper interpretation of rights and freedoms including the right to freedom of expression.

I am writing in regards to the amendment to the Code of Use Bylaw #13-050 (the "Bylaw") that passed at Regional Council on September 27, 2023. The CCF recognizes that it is commendable to try to counter hateful conduct in your community. However, we are concerned that the Bylaw unconstitutionally limits the rights to freedom of expression and peaceful assembly guaranteed by sections 2(b) and 2(c) of the *Charter of Rights and Freedoms,* and that these limits cannot be justified under section 1.[1]

Subsection h.1 to Schedule "B" of the Bylaw creates a prohibition on "communicating, causing or permitting communication, with any person in a way that causes the person, reasonably in the circumstances, to constitute harassment, subject to the provision that nothing in this subsection shall prevent or limit a lawful protest," on "Designated Premises" including public transportation, regional buildings and regional parks.[2] There are obvious drafting issues in this subsection, which reflect the rushed process that led to its enactment. There are words missing and/or misplaced in subsection h.1, and it will need to be amended to make it intelligible. That said, the apparent purpose of the Bylaw as it can be discerned from Report #CAO-EDI-22-01 and the comments of solicitor Graham Walsh is to address the issue of Islamophobia and ensure that regional facilities are safe and welcoming for all by empowering bylaw officers to fine, prohibit, or remove individuals from regional property if they make another person feel "harassed," including by communicating in ways that are hateful, unwelcome or objectionable.[3]

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*], ss 1, 2(b) and 2(c).
[2] Bylaw, s 1(2).
[3] Report to Regional Council from the Office of Reconciliation and Equity, Diversity and Inclusion, dated February 23, 2022 (CAO-EDI-22-01).

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Section 1.2 of the Bylaw defines "harassed" as including but not limited to "experiencing objectionable or unwelcome conduct, comment, bullying, or actions that could reasonably cause offence or humiliation, including conduct, comment, bullying, or actions because of race, religious beliefs, colour, disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression, sexual orientation".[4]

The Bylaw is an unconstitutional limit on free expression. Non-violent attempts to convey meaning in Canada are protected under section 2(b) of the *Charter*.[5] Limits must be demonstrably justified in a free and democratic society.[6] Limits that the Supreme Court of Canada has found are justifiable include the criminal prohibition on wilful promotion of hatred against an identifiable group,[7] and human rights code prohibitions on discrimination.[8]

However, expression that is merely objectionable, unwelcome, offensive or humiliating cannot be limited. This is clear from Justice Marshall Rothstein's unanimous 2014 decision *Saskatchewan (Human Rights Commission) v Whatcott*[9], a case in which the CCF acted as an intervener. Justice Rothstein made clear that expression that "ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground is not a reasonable limit on freedom of expression."[10] Merely hurtful or offensive ideas "are not sufficient to ground a justification for infringing on freedom of expression."[11]

Whatcott clarified that hateful speech can be limited under the *Charter* only where it constitutes "those extreme manifestations of the emotion described by the words "detestation" and "vilification,"[12]—and this does not include expression which, "while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects."[13]

The Bylaw is also an unconstitutional limit on freedom of peaceful assembly because it places restrictions on what can be said in places like regional parks and squares. Freedom of peaceful assembly protects, at minimum, "speech in action,"[14] and limits on assembly in public parks are especially difficult to justify. As Justice Brown of the Ontario Court of Appeal stated in *Stewart v Toronto (Police Services Board)*[15]: "Our civil liberties tradition recognizes that public parks are naturally compatible with the public expression of views, whether the content of those views support or dissent from the popular sentiments of the day."[16]

The Bylaw states that "nothing in this subsection shall prevent or limit a lawful protest." That caveat is objectively not enough to prevent the chilling effect on peaceful protests that has been created by the

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[4] Underline added for emphasis.
[5] *Irwin Toy Ltd v Quebec (Attorney General),* [1989] 1 SCR 927.
[6] *Charter*, *supra*, s 1.
[7] *Criminal Code of Canada*, RSC, 1985, c C-46 [*Criminal Code*].
[8] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*].
[9] *Whatcott*, para 57,
[10] *Whatcott*, para 206.
[11] *Whatcott*, para 90.
[12] *Whatcott,* para 57.
[13] *Ibid*.
[14] *Ontario (AG) v Dieleman (1994),* 20 OR (3d) 229 (Ont Ct (Gen Div)) at 329-330.
[15] *Stewart v Toronto (Police Services Board)*, 2020 ONCA 25.
[16] *Ibid*, para 49, citing *Montreal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, at para 61, and *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, per McLachlin J, at 230.

threat of bylaw officers issuing fines or trespass notices to people if they say or do something that a bylaw officer decides is unwelcome, objectionable or could "reasonably cause offence or humiliation."

In fact, the chilling effect on speech and assemblies has already begun: local residents including Julia Mallott and Miriam Awazi delegated to council that they are concerned that the Bylaw will be used to prevent them from engaging in protected expression and assemblies.

Awazi told council: "[The Bylaw] allows people to weaponize their feelings against the right of others to speak. Under the amendment's definition, a speaker can be speaking in good faith and still be found to be guilty of harassment."

Malott noted the Bylaw puts officers in the awkward position of having "to sort out complex questions of the blurred line between dissenting opinion and matters of objectionable and unwelcome comment."

The apparent goal of Waterloo Region council is to prevent public conduct that is in many cases already illegal. To address such conduct, action can be taken without enacting and resorting to an unconstitutional Bylaw that unjustifiably infringes on free expression and peaceful assembly. For example, Parliament has outlawed hate speech under section 319 of the *Criminal Code* where the speech rises to the extreme level where limits become demonstrably justified in a free and democratic society, and where the consent of the Attorney General of Ontario is given to prosecute.[17] Police forces including the Waterloo Regional Police have specialized hate crime units dedicated to recognizing when speech crosses the line from constitutionally-protected to criminal.

Parliament and the common law also give police forces tools to respond to unacceptable behaviour at public assemblies without infringing on expression or peaceful assembly including laws aimed at preventing a breach of the peace.[18]

It is our view that while well intentioned, Waterloo Regional Council has overstepped by enacting a Bylaw that is inconsistent with the supreme law of Canada, our constitution. The good faith goals of council can be achieved by relying on existing law and public education, and amending the Bylaw to bring it into compliance with the constitution before it comes into force on January 1, 2024.

It is our strong preference not to litigate, particularly because the flaws in the Bylaw can be remedied by Council, and because the costs of defending this unconstitutional Bylaw will be borne by the taxpayers you have been elected to represent. However, if council declines to bring the Bylaw into compliance with the *Charter,* we will be compelled to act, as we have on many previous occasions across Canada, to defend the rights of residents to freedom of expression and assembly by seeking a judicial review of the Bylaw.

We look forward to your response.

Josh Dehaas

Counsel, the CCF

[17] *Criminal Code*, *supra*, ss 319(1)-(7).
[18] *Criminal Code*, *supra*, s 31(1).