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Friday, August 23, 2024

BY E-MAIL

Mayor Laura Cabott
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Councillor Michelle Friesen
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Councillor Dan Boyd
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Councillor Ted Laking
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Councillor Kirk Cameron
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Councillor Mellisa Murray
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Councillor Jocelyn Curteanu
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Dear Mayor and Council,

Re: Unconstitutionality of Whitehorse Policy 2024-07 (the Civility Policy)

I have been retained by the Canadian Constitution Foundation (the **CCF**), a non-profit with an established history of defending the constitutional rights and freedoms of Canadians through communications, public education and litigation.

The CCF respects the work of local councils and understands the need to maintain a certain level of order in council meetings. The CCF, however, after a careful review of the Civility Policy passed by the Whitehorse City Council, is of the opinion that this policy violates the right to freedom of expression guaranteed under section 2(b) of the *Charter of Rights and*

Freedoms and will chill members of the public from attending Council meetings and participating in our local democracy.

I have received instructions from the CCF to commence legal proceedings against the City of Whitehorse pleading the unconstitutionality of the Civility Policy. My client has instructed me, however, to delay the filing of a lawsuit to provide the City of Whitehorse with an opportunity to amend its policy at or before its Council meeting to be held on the 16th of September 2024, in order to bring the policy into compliance with s. 2(b) of the *Charter of Rights and Freedoms*.

As explained, the CCF has conducted a careful review of the Civility Policy, including a comparative analysis of similar policies in Canada. The CCF has identified the following issues with the Civility Policy.

Restrictions on Attire

The section of the policy entitled PARTICIPANT'S ATTIRE is an unjustified limit on the freedom of expression and ought to be excised from the Policy entirely.

This section allows the presiding officer at a meeting to require a participant to remove or cover up any attire "including buttons, non-religious headwear, pins, or other item" that the presiding officer decides are "disrespectful." The policy suggests that "disrespectful" attire includes any attire with language, statements, or imagery that is detrimental, discriminatory, offensive, profane, racial, sexist, violent, or vulgar."

A policy that allows a presiding officer at a city council meeting to block people from conveying messages that he or she finds "offensive" or "detrimental" or "vulgar" cannot possibly be a justified limit on freedom of expression.

Members of the public have long worn buttons, pins and headwear to political meetings to convey political messages. The subjective “offensiveness” of those messages does not remove their protection.

As the Supreme Court recently reiterated, the purpose of the constitutional protection of freedom of expression is to protect expressions – however unpopular, distasteful or contrary to the mainstream thinking.¹

Only the most extreme forms of expression may be outlawed. Justice Rothstein, for a unanimous Supreme Court, held that even expression that “ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground” can be protected by s.2(b) of the *Charter*.²

Merely hurtful or offensive ideas “are not sufficient to ground a justification for infringing on freedom of expression.”³

Ban on signs in Council venues

The Policy’s ban on bringing signs into the venue where Council is meeting is also not a justified limit on the right to freedom of expression and must be removed from the Policy.

Council could perhaps restrict the size or form of signs to meet pressing and substantial justifications like maintaining safety, but a total ban on bringing signs into meetings cannot be justified.⁴

¹ *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, para 59, citing *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at 968.

² *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#), para 206.

³ *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#), para 90.

⁴ *Gammie v Town of South Bruce Peninsula*, [2014 ONSC 6209](#), paras 103-105; see also *Ramsden v Peterborough (City)*, [1993 CanLII 60 \(SCC\)](#).

Ban on “inappropriate” written materials

Another portion of the Policy that must be removed completely is the section entitled WRITTEN MATERIALS. This section provides a wide-ranging power for the Presiding Officer or Administration to discard or refuse to distribute any document if they have reasonable grounds to believe that distribution of it in an open and public forum may be “inappropriate”.

The definition of “inappropriate” is impossibly wide, with no attempt at a concrete definition made by the Civility Policy. Instead, a list of examples is provided, such list including a document that “violates the prohibited grounds sections of the Canadian Human Rights Act or the Yukon Human Rights Act, contravenes the Council Procedures Bylaw, promotes criminal or illegal activities, makes accusations, or contains libellous or insulting language directed to Council, Administration, members of the public, or identifiable groups...”

This too disproportionately limits expression. Citizens are entitled to use language in their communications that others, including politicians, may find “insulting” or accusatory.

Ban on “microaggressions”

A final portion of the policy that is not a justified limit on freedom of expression is the requirement that “participants are to refrain from microaggressions,” which are defined as “a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude towards a member of a marginalized group.”

As explained above, even speech that “ridicules, belittles or otherwise affronts the dignity” of people is not considered so extreme that it can be outlawed. It is thus difficult to see how “subtle” and sometimes “unconscious” or “unintentional” expressions can be banned by Council.

As Councillor Ted Laking explained during debate on the Policy at the August 12 meeting, delegations are an important way for members of the public to express their opinions, and the Policy presents a risk of subjective enforcement and censorship.

I can put it no better than Councillor Ted Laking himself: “Everybody has an opinion and the person who’s calling for another opinion to be censored this week may find that they are having their opinion censored the following week...”

To give but one illustration of Councillor Laking’s point, might I remind you that feminists in the early 20th century wore pins to express their support for suffragists. At that time, many men in positions of power – clinging on to discriminatory traditions – would have found such pins to convey “inappropriate”, “detrimental”, or “offensive” views. Your Civility Policy would have entitled such pins to be banned from City Council meetings.

Conclusion

The CCF urges you to amend the Policy as soon as practically possible to bring it into compliance with the Charter. The CCF is available to discuss this matter further should you wish to do so.

Finally, if the policy is not amended to the CCF’s satisfaction by September 16, 2024, the CCF has instructed me to take swift legal action against the City of Whitehorse’s Civility Policy.

Please act accordingly.

Best regards,

A handwritten signature in black ink, appearing to be 'Vincent Larochelle', with a long horizontal line extending to the right.

Vincent Larochelle