



Christine Van Geyn
Litigation Director
Canadian Constitution Foundation
cvangeyn@theCCF.ca

August 12, 2024

Sent via email

Niagara Region

1815 Sir Isaac Brock Way
P.O. Box 1042
Thorold, ON L2V 4T7
Canada

Attn: Niagara Regional Council

Re: Recommended Changes to Council's Procedural By-law and Code of Conduct for Members of Council and Local Boards

We are writing to you because we have concerns about the constitutionality of recently recommended changes to Niagara Regional Council's Procedural By-law, scheduled to be voted on by Regional Council at the August 29, 2024 meeting. In particular, we are concerned about the portion of Recommendation 4 in the July 25, 2024 [staff report](#) to Council, which reads:

"Members of the public, including delegates, are not permitted to have signs, props, placards or flags of any kind at meetings of Regional Council or its Committees".

The ban on signs, flags, props and placards in Recommendation 4 is an infringement on the rights of members of the public protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. This violation of *Charter*-protected rights cannot be justified in a free and democratic society, as it is not minimally impairing or proportionate. The pertinent case law analyzing this precise issue is attached to this letter.

We encourage you to vote against this ban at the August 29 council meeting. Should the amendment to the Procedural By-law pass and come into force, it is highly vulnerable to a constitutional challenge, which the CCF is prepared to initiate. We have represented plaintiffs and applicants across Canada who have had their freedom of expression restricted by government actors. In fact, we are currently involved in litigation against Niagara Regional Council.¹ We have appeared at all levels of court, including the Supreme Court of Canada, to advocate for the fundamental freedoms of Canadians. Our extensive record successfully litigating free expression issues is available on our website at www.TheCCF.ca.

¹ See; *The Canadian Constitution Foundation and Julian Charles Renaud v The Regional Municipality of Niagara*, Court File No. DC-24-275-JR,

The prohibition on signs, props, placards and flags violates the guarantee to freedom of expression protected in the Charter

The ban on signs, placards, flags and props is a *prima facie* violation of free expression. It is especially troubling because it silences political speech in the context of the democratic process. The Supreme Court of Canada has maintained that the connection between freedom of expression and the political process is “perhaps the linchpin” of section 2(b) protection (*R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827).

Because of the importance of the right to free expression, “any attempt to restrict the right must be subjected to the most careful scrutiny.” (*R. v. Sharpe* [2001] 1 S.C.R. 45). Limits on political speech will generally be the most difficult to justify. (*Thomson Newspapers Co. v. Canada* [1998] 1 S.C.R. 877; *Harper v. Canada*, [2004] 1 S.C.R. 827). Free expression has long been regarded as fundamental to the working of a free democracy and to the maintenance and preservation of our most fundamental freedoms. The *Charter* confers a “broad and virtually unlimited right” to free expression (McLachlin JJ, as she then was, partial dissent in *Canadian Human Rights Commission v Taylor* [1990] 3 S.C.R. 892). Freedom of expression plays a critical role in the development of our society. It makes it possible for all individuals to express their views on any subject relating to life in society. Some forms of expression, such as political speech, lie at the very heart of freedom of expression (*R. v. Sharpe* [2001] 1 S.C.R. 45; *R v Guignard*, [2002] 1 SCR 472). Free expression is valued above all as being instrumental to democratic governance.

The banning of signs, flags, props and placards during the democratic process is a violation of that constitutionally protected right when that right receives the most protection.

The violation of freedom of expression caused by the ban on signs, props, placards and flags is not justified by s. 1 of the Charter

These limits on the right to freedom of expression cannot be justified under section 1 of the *Charter*, and the case law supports this conclusion. Once a breach of the *Charter* has been identified, the onus shifts to Niagara Region to justify the breach by employing the analysis under s. 1 of the *Charter*.

The rationale for the Sign bylaw is laid out in the [staff report](#) of July 25. According to the report, the rationale is to:

- Maintain decorum in Council Chamber, which is a place of business;
- Prevent distractions that may hinder deliberations and reduce focus; and
- Prevent distractions and obstructing the view of members of the gallery.

Niagara Region must show that the ban on signs, flags, props and placards is a reasonable and demonstrably justified limit to free expression through a proportionality test set out in *R v Oakes* [1986] 1 S.C.R. 103. The proportionality test requires that there be a pressing and substantial purpose and that the means chosen to advance this purpose are (1) rationally connected to the objective; (2) minimally impairing; and (3) produce benefits that outweigh the detriment to freedom of expression.

The sign ban fails the *Oakes* test, and conflicts with existing case law.

While we agree that maintaining decorum, ensuring efficient meetings and removing disruptions and obstructions are valid public purposes, we question whether a **total ban** on all signs, props, placards and flags is rationally connected to these goals. These items are typically not so distracting that Council is unable to deliberate, and are certainly far less distracting than the cell phones Councillors are frequently seen using during meetings.

The total ban on signs is not minimally impairing. There are far less restrictive options available to council to achieve the goal of efficient meetings without distractions.

In *Gammie v. Town of South Bruce Peninsula*, 2014 ONSC 6209, Justice Price considered a case where a constituent brought two signs into a special budget meeting in council chambers on February 10, 2012, and signs to another public meeting on January 31, 2012. Because of the signs and because of some of Mr. Gammie's other conduct, he was banned from council chambers. The case is appended to this letter, but we highlight the following passages, which consider the proportionality and minimal impairment of the prohibition:

[92] I am not persuaded that it was only possible to prohibit violent, disruptive, expression by limiting proper expression at the same time. Example of measures that would prohibit only disruptive expression are a resolution that prohibited Mr. Gammie from having recording devices in his possession at Council Meetings, or that restricted the forms of signs that could be brought into Council Chambers to paper or cardboard without solid handles, or that limited his communication with Town staff, as the third Resolution does, to one designated employee, being the Town's Administrator, or the Town Clerk. If the only way to limit unprotected expression were to limit protected expression at the same time, this argument would have to be made under s. 1 of the Charter. The 2013 Resolution's prohibition of Mr. Gammie from entering Council Chambers, which limited all expression, protected and unprotected, violated s. 2(b) to the extent that it limited protected expression.

[103] The Town Council could, and should, have passed a resolution that restricted Mr. Gammie's right to enter the Council Chambers in a more limited manner. For example, a resolution could have prohibited only his attendance at Council meetings with recording devices, or with signs mounted on hard backings, or restricted his communication with members of Council to the confines of Council Chambers, and in accordance with the rulings of the Chair of such Meetings, or restricted his communication with Town staff to business hours and at Town Offices or Council Chambers or, as in the third Resolution, with designated staff. Having regard to the availability of such measures, all of which would be less restrictive than the resolution that was passed, the Town cannot establish, on a balance of probabilities, that the limit in its resolution was the least restrictive possible.

The infringement caused by the resolution therefore could not have been justified under s.1. [emphasis added]

Like in *Gammie*, Niagara Regional Council cannot limit protected expression by banning all signs, flags, placards and props. The concern about maintaining decorum and preventing distractions must be more carefully tailored. For example, prohibiting large items that may obstruct views could be a demonstrably justified limit. The damage to free expression caused by the total ban far exceeds any hypothetical benefit of efficiency or reducing distractions.

Comments on the July 25 Council Meeting

We watched the July 25 Council meeting where the recommendations for changes to the Procedural By-law were debated and public delegations were made. We make the following two points based on some comments made at that meeting.

1. *Municipal Councils Are Distinct from Provincial Legislatures and Federal Parliament*

There were several references to restrictions on the gallery in Parliament and provincial legislatures, including comments by Chair Bradley. However, it is important to recognize that municipal councils are not equivalent. Municipalities are creatures of statute and do not have parliamentary privilege. Parliamentary privilege covers an expansive swath of activity, including the power of legislatures to regulate their own internal affairs and the power to discipline their members as they see fit. These are inherent privileges that the courts cannot review or interfere with. The idiosyncrasies that allow for the banning of props, signs, flags and placards in legislatures do not apply to municipalities, which as creatures of provincial statute can have their internal procedures reviewed by courts of competent jurisdiction for compliance with the *Charter*.

2. *Council must consider the bigger picture*

Second, we understand the impetus of this change to the Procedural By-law was a particularly difficult meeting held on January 25, 2024. That meeting involved a motion related to the war between Israel and Hamas in Gaza. It may be the case that councillors are entrenched in their positions on this issue, and as a result are losing sight of larger principles at play. The prohibition on flags, signs, placards and props goes far beyond this issue, and would silence proper democratic speech on every imaginable issue that could come before council. We encourage councillors not to be blinded by concerns arising out of one especially disruptive council meeting about a subject that is notoriously divisive, and to consider the broader issues of freedom of expression.

Conclusion

As we have mentioned at the top of this letter, we are seriously concerned that this bylaw is an unjustified infringement on the constitutional rights. We encourage members of council to vote against the Procedural By-law change on August 29. Should these amendments constituting a total ban on signs,

props, placards and flags pass, we will take steps to litigate. Of course, it is our preference that the Regional Council conduct itself in compliance with our constitution, and save everyone involved including the taxpayers of Niagara region from costly litigation.

We look forward to your response.

Regards,

Christine Van Geyn

Christine Van Geyn
Director of Litigation
Canadian Constitution Foundation
cvangeyn@TheCCF.ca