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Sent via email

Yarmouth City Council
400 Main Street
Yarmouth, Nova Scotia
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Attn: Yarmouth City Council Members and Mayor,

Re: Election Sign Bylaw

We are writing to you because we have concerns about the constitutionality of your recently passed prohibition on election signs ("the Sign Bylaw").

The Sign Bylaw is an infringement of s. 2(b) of the *Canadian Charter of Rights and Freedoms*. To the extent that it attempts to impose a total ban on federal and provincial election signs, it is also *ultra vires* the power of Yarmouth City Council.

These violations of *Charter* protected rights cannot be justified in a free and democratic society, as they lack a rational connection to a valid public purpose, they are not minimally impairing, and they are disproportionate. There is a long line of cases which have considered sign restrictions. Restrictions that are less impairing than the one you have enacted have been repeatedly struck down by courts across Canada.

We have represented plaintiffs across Canada who have had their freedom of expression restricted by government actors. We have appeared representing these interests at all levels of court, including the Supreme Court of Canada. A list of our extensive record successfully litigating free expression issues is available on our website at www.TheCCF.ca.

We have spoken to a resident in your town who is interested in working with our organization to challenge this law. While we have extensive experience successfully litigating on this issue, it is in everyone's interest, including the taxpayers of Yarmouth, that Council repeal the bylaw to achieve compliance with the *Charter.*

Section 2(b) Right to Free Expression

The Sign Bylaw is a *prima facie* violation of free expression. 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 functioning 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 J., 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).

There is no doubt that the Sign Bylaw is an infringement of s. 2(b) of the *Charter* as it limits how and where individuals may express their political views.

Sign Bylaw not justified under s. 1 of the Charter

Once a breach of the *Charter* has been identified, the onus shifts to Yarmouth 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 Request for Decision Report of the Town of Yarmouth, dated July 9, 2020. According to the report, the rationale is to:

- Reduce plastic waste impacts on landfills and oceans;
- Reduce visual clutter in the Town, particularly the perceived need for candidates to enter into a "sign war", placing as many signs as possible in the Town; and
- Make a more financially equitable and accessible election campaign by reducing the need to secure significant funding for the production of signs.

Yarmouth must show that Sign Bylaw 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 the means chosen are (1) rationally connected to the objective; (2) minimally impairing; and (3) produces benefits that outweigh the detriment to freedom of expression.

The Sign Bylaw fails the proportionality test on all three fronts, and conflicts with a long line of cases dealing with municipal sign laws.

Rational Connection

1. *Financial Equity*

The Sign Bylaw lacks a rational connection to the rationale of making elections "more financially equitable and accessible," as articulated by Yarmouth Council. This rationale is in fact undermined by the Sign Bylaw. The inability of a new candidate to promote their name or image does not make elections more financially equitable and accessible. It protects incumbents with well-known names. The Sign Bylaw is passed by Councillors who will benefit from incumbent advantage, and is transparently self-serving.

Indeed, in the June 11 Yarmouth town council meeting, Mayor Mood commented that she has "put out more signs than anyone", and would like to avoid this cost in the future. A mayor who has extensively advertised with signs since her election in 2012 will be in an extremely advantageous position to

maintain her name recognition relative to any newcomer who is now prohibited from advertising with signs.

The case law also weighs against a rational connection on the factor of financial equity. In *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084 the Supreme Court stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources.

In *R v Guignard*, [2002] 1 SCR 472, the Supreme Court added that signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns (see also *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139).

2. *Visual Clutter*

The Sign Bylaw lacks a rational connection to the objective of preventing "visual clutter". The bylaw applies throughout Yarmouth, not merely in the downtown area where sightlines may matter. An individual living on the outskirts of town would also be subject to this restriction, even though their sign would not constitute "clutter" and would not have any impact on the aesthetic of the town.

There are cases that have considered bylaws restricting signs because they impair sightlines. In *Stoney Creek (City of) v Ad Vantage Signs Ltd.*, 1997, the court held that the "prevention of an aesthetic blight will be of varying importance, depending on the particular character of the community". A ban throughout the entire community of Yarmouth is not rationally connected to the goal of protecting sightlines. In *Vann Niagara v Oakville*, 60 O.R. (3d) 1, the Ontario Court of Appeal held that a ban that includes a prohibition of signs in "unremarkable" areas is not rationally connected to preserving the character of the town.

Further, the bylaw is only concerned with election signs. In *R v Guignard*, [2002] 1 SCR 472, the Supreme Court struck down a municipal bylaw that prohibited commercial signs with a trade name in all but industrial areas. The Court found that the bylaw lacked a rational connection because it exempted other signs of a more generic nature. The court concluded that such a restriction is arbitrary and could not be justified under s. 1 of the *Charter*. The bylaw in *Guignard* was in fact even more narrowly tailored than the Yarmouth Sign Bylaw, which bans all election signs in every part of the town. The more broadly worded Yarmouth Sign Bylaw is doomed to fail on the *Charter* analysis.

Even cases where bylaws restricting signs have been held to be justified limitations cannot save the Yarmouth Sign Bylaw. In *Ville de Montreal c Astral Media Affichage*, 2019 QCCA 1609, the Montreal sign bylaw was upheld, but it only applied to a specific borough with a unique historic character. And that bylaw made exemptions for public signs and for signs related to public and community events for a set period.[1]

3. *Plastic Waste*

Finally, there is absolutely no connection between the Sign Bylaw and reducing plastic waste. The Sign Bylaw also applies to election signs that are not made of plastic. A homemade wooden sign would be equally subject to the bylaw. And other types of signs, for example, commercial signs that may be made

[1] City of Montreal Bylaw 01-277, Urban Planning By-Law for Pleateau-Mont-Royal Borough, s. 526 and 537, accessible at http://ville.montreal.qc.ca/sel/sypre-consultation/afficherpdf?idDoc=278&typeDoc=1

of plastic, are not subject to the Sign Bylaw. The Sign Bylaw is not content neutral, and is concerned with restricting a particular type of speech, not the means of how that speech is displayed.

The Sign Bylaw also specifically exempts signs in residential windows, which could also be plastic. During the June 11 Yarmouth Town Council meeting, Councillor Hood and Mayor Mood both acknowledged that this exemption undermines their own rationale, by commenting that "if the environmental rationale is to apply, we need to make all signs, including window signs."

Since regulating the speech of individuals ***within their own homes*** appeared to be a bridge too far, even for this Council, councillors voted to include such an exemption, thereby demonstrating the fabricated nature of the supposed plastic waste rationale.

Minimal Impairment

The Sign Bylaw is not minimally impairing. The Sign Bylaw is a complete prohibition on election signs. A total prohibition of commercial signs has never been justified by the courts under s. 1, let alone the more closely protected political speech contained in election signs.

Complete prohibitions on expression are much more difficult to justify. As McLachlin J (as she then was) wrote in *RJR-MacDonald, para. 163,*

> [i]t will be more difficult to justify a complete ban on a form of expression than a partial ban … A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

In *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084, the Supreme Court of Canada (and, before it, the Ontario Court of Appeal) agreed with the defendant Ramsden's argument that the absolute prohibition on postering on public property was not minimally impairing. The Supreme Court adopted the view of the majority of the Ontario Court of Appeal that "[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated."

Another total prohibition was considered in Alberta, in the case *Edmonton (City) v Forget*, 74 D.L.R. (4th) 547 (Alta. Q.B.). In that case, the court struck down the City's absolute prohibition against postering on public utility poles.

In the case of *Vann Niagara v Oakville*, 60 O.R. (3d) 1, the court struck down bylaws that banned all billboard and third party advertising on private land. The Court held that this constituted a total ban, that "there has been no effort to tailor the Sign By-law such that it minimally impairs the right to freedom of expression."

The Supreme Court of Canada also considered a complete prohibition in in *R v Guignard*, [2002] 1 SCR 472. The City of St Hyacinthe, where the sign was erected, prohibited "advertising signs" in any area but industrial zones. The city deemed Mr. Guignard's sign as "advertising" because it mentioned a trade name. The Supreme Court struck down the challenged portions of the by-law. The Court found that while the city did have a valid goal of lessening pollution, the means chosen to achieve the goal – a total prohibition in all but industrial zones – were disproportionate and not minimally impairing.

Like the bylaws in these cases, the Yarmouth Sign Bylaw is a total prohibition, which courts have consistently struck down as a non-minimally impairing limit to the s. 2(b) *Charter* right to free expression.

Proportionality

The damage to free expression caused by the Yarmouth Sign Bylaw far exceeds any hypothetical benefit that such a bylaw could produce.

Even if there were a rational connection between the goals articulated by council and the Sign Bylaw, the Sign Bylaw is not proportionate. The cases mentioned above that deal total prohibitions held that such bylaws are disproportionate, in addition to lacking minimal impairment.

A little clutter or potential plastic waste cannot outweigh the constitutionally guaranteed right of residents to express their political preference in the midst of an election, the time when the right to express such preferences matters most.

Moreover, we are deeply concerned that the debates at Council on June 11 and July 9 centered more on the impact of the bylaw on the councillors themselves than its impact on the residents they are elected to represent.

Multiple councillors, including the Mayor, mentioned the "sign expense" as being a lead reason they were voting in favour of the Bylaw. The councillors seemed to show little concern for the fact that the bylaw impacts more than just themselves. The self-serving desire to save money on advertising in a campaign by incumbent councillors with strong, existing name recognition cannot outweigh the right of residents of Yarmouth to express their political desires. If councillors desire to save money, they can choose not to produce signs rather than restricting the right of their residents to post signs on their own property in the midst of an election.

Conclusion

As we have mentioned at the top of this letter, we have been in conversation with a Yarmouth resident who would like to put up election signs and whose right to free expression will be unduly restricted by the Sign Bylaw. It is our preference that the Yarmouth City Council repeal this bylaw rather than force us to bring costly litigation.

[redacted] Councillor Jim MacLeod even stated "maybe I look forward to a challenge." We would remind Council that the challenge you are contemplating is not a positive thing. This is not the challenge of scaling a mountain – it is defending an unjust and illegal law which you have enacted.

We look forward to your response.

Yours truly,

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