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# SPEAK UP OR SHUT UP? – FREE SPEECH FUNDAMENTALS

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## I. INTRODUCTION

Freedom of expression is one of the hallmarks of a free and democratic society. Since 1982 it has been formally enshrined in the *Canadian Charter of Rights and Freedoms* (the "Charter") at section 2(b) as one of the "fundamental freedoms". Section 2(b) protects freedom of thought, belief, opinion, and expression, and protects a free press and other forms of media. Local governments might feel the lofty protection to be somewhat remote and perhaps rarely to be encountered in their functions. However, as the authors hope to make clear, there are a *lot* of ways in which local governments may limit expressive behaviour.

George Orwell once wrote, in an unpublished preface to *Animal Farm*:

> If liberty means anything at all, it means the right to tell people what they do not want to hear.

Despite his decision to excise that phrase in the editing process, the authors of this paper intend to use Orwell's words as a guide, as they describe the different ways that local government can impinge on expression, permissibly or not.

While this paper deals with numerous topics, it is broadly organized into two parts. First, we address local government regulation of expression "outside the council chamber", touching on matters such as signs and panhandling. Second, we address speech "inside the council chamber", by both elected individuals and members of the public. One highlight is codes of conduct, which many local governments have begun to adopt and amend, and which can have a significant impact on free expression. Before we turn to these matters, however, we begin with a refresher on what it means for freedom of expression to be constitutionally protected.

## II. THE NATURE OF SECTION 2(B) AND THE LIMITATION OF CHARTER RIGHTS

As section 52(1) of the *Constitution Act, 1982* reminds us:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 2(b) of the Charter proclaims that everyone possesses "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The meaning of "expression" is broad. As a consequence, it is not difficult to infringe the right. Simply put, expression constitutes activity that conveys or attempts to convey meaning, generally irrespective of its content; thus, even hate speech constitutes expression.[1] While acts

[1] *R. v. Keegstra*, [1990] 3 SCR 697.

of physical violence have always been excluded, because a purportedly expressive *purpose* cannot overcome a violent *form*,[2] it took time for courts to definitively exclude threats of violence too.[3]

Freedom of expression is best described as a 'negative' right, in that the government is not generally obligated to protect or platform any particular expression: "the freedom of expression contained in section 2(b) prohibits gags, but does not compel the distribution of microphones".[4] But where some speech or action falls within the scope of expression protected by the guarantee, it is protected from government infringement. The general category of expression includes political expression, commercial expression, and more. Even non-expression is protected, to the extent that silence can be expressive in the face of obliged or compelled speech.[5]

However, as with all Charter rights, freedom of expression is subject to section 1, which states that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Charter recognizes that rights and freedoms may be subject to limitation "where their exercise would be inimical to the realization of collective goals of fundamental importance".[6] Therefore, when testing a purported limitation of a right, courts must determine (1) whether the activity at issue falls within the scope of the right, (2) whether the right has been limited, and (3) whether that limitation is reasonable according to the standard set out in section 1.

The Supreme Court of Canada provides the clearest enunciation of the first two steps, as concerns section 2(b), in *Irwin Toy Ltd. v. Quebec (Attorney General)*, a case dealing with Quebec legislation prohibiting advertising directed toward children under 13 years of age. On the first issue, the majority held that activity cannot be excluded "from the scope of guaranteed free expression on the basis of the content or meaning being conveyed". Expression can take many forms: writing, speaking, art, and physical gestures, to name but a few. The Court had no difficulty concluding that advertising aimed at children attempts to convey meaning and cannot be excluded from the scope of expression on principle.

On the second issue, the question is whether the purpose or the effect of the governmental action at issue is to restrict freedom of expression. Even an action with valid intent infringes section 2(b) if its effect is to limit free expression. Action that "aims only to control the physical consequences of particular conduct" does not infringe the right, while action that restricts the content of expression or "a form of expression tied to content" does. For government action to limit expression in effect, the expression must be tied to at least one of the values that undergirds protection of free expression: "the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing". In *Irwin Toy*, it was obvious that the intent

[2] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.
[3] See *R. v. Khawaja*, 2012 SCC 69, at para. 70.
[4] *Haig v. Canada*, [1993] 2 SCR 995.
[5] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038.
[6] *R. v. Oakes*, [1986] 1 SCR 103.

of the law was to restrict both content and forms of expression for the purpose of protecting children, as it controlled the types of claims that could be made, as well as permissible media, for instance, exempting non-commercial educational advertising and advertisements in magazines.

Where freedom of expression has been infringed, the final inquiry is whether that infringement is justified under section 1. The test of a reasonable limit is that established in *R. v. Oakes*, in which the Supreme Court of Canada set out a two-part inquiry. First, the objective of the limit must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". Second, the means chosen must be reasonable and demonstrably justified. At this second stage, courts are concerned with proportionality between the interests of individual and group rights-holders and society, which entails its own multi-part inquiry:

- Are the measures rationally connected to the objective they purport to achieve? That is, are the measures logically capable of achieving that objective?
- Are the measures minimally impairing? That is, could no other less-restrictive measures achieve the particular chosen objective "in a real and substantial manner"?[7]
- Are the deleterious effects of the measures proportional to the importance of the objective?

In *Irwin Toy*, the Court accepted that Quebec's legislation aimed at a "pressing and substantial" objective: children are particularly vulnerable to the manipulative techniques of advertising, and advertisers should not be permitted to take advantage of that vulnerability. The Legislature's choice to draw the line at 13 years old was reasonably available to it. A ban on advertising to children was obviously rationally connected to the aim of protecting children from advertising, and it was minimally impairing with regard to that aim. The deleterious effects were not out of proportion with the objective. Advertisers' revenues might be affected, but they remained free to advertise to adults and older children and to devise new strategies for marketing children's products.

## III. EXPRESSION OUTSIDE THE COUNCIL CHAMBER: CHALLENGES TO REGULATION

### A. Streets and Sidewalks

Having laid the interpretive groundwork in the preceding section, a good place to start in understanding local government regulation of expressive behaviour is *Vancouver v. Zhang*.[8] In that case, followers of Falun Gong – a religious movement persecuted by the Chinese

[7] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

[8] 2010 BCCA 450. This was a lengthy and hard-fought court battle, producing multiple sets of reasons from the BC Supreme Court and Court of Appeal, including: 2006 BCSC 2023, 2007 BCCA 280, 2008 BCSC 477, 2008 BCSC 875, 2009 BCSC 84, 2009 BCCA 210, 2009 BCSC 614, 2010 BCCA 450, 2011 BCCA 138, and 2014 BCSC 2288.

government – challenged the City of Vancouver's decision to enforce its street and traffic bylaw. The City sought to enforce the bylaw in relation to a one-by-two-metre "meditation hut" built, as a form of protest, in front of the Chinese Consulate. A person occupied the structure 24 hours a day, 7 days a week.

The Court found that the hut had expressive content, and that the method by which the Falun Gong followers had chosen to express themselves was not excluded from the protection of section 2(b). Further, the Court found that the City's bylaw clearly constituted a limit on the Falun Gong followers' freedom of expression and could not be saved under section 1 of the Charter. Despite accepting the necessity of its general prohibitions against erecting structures on sidewalks and roadways – as Council could not be expected to foresee every possible encroachment or obstruction – the bylaw was not minimally impairing. A minimally impairing scheme, in the Court's view, would have created an exemption to the blanket prohibition that was clearly defined and adjudicated pursuant to a defined set of criteria. The Court ordered a delayed remedy, giving the City six months to amend the bylaw to make it Charter-compliant.

The Court's judgment in *Zhang* might seem harsh. After all, local governments regulate all sorts of behaviour through general prohibitions. While this was an unusual set of facts, one takeaway from this decision is that, in creating exemption provisions, local governments should put the work in at the front end to determine the grounds on which the exemption will be granted. An exemption scheme was ultimately upheld four years later by the Supreme Court of British Columbia in *Zhang v. Vancouver,* 2014 BCSC 2288. After the Court of Appeal's decision, the City created a permitting scheme that allowed the city engineer to grant permits to people seeking to build structures for expressive purposes. The Supreme Court of British Columbia found that the permit scheme, designed by the City to respond to the Court of Appeal's judgment, was a reasonable one that proportionately balanced the City's objectives with the Charter rights of people seeking to express themselves.

### B. Signs

Both the *Community Charter* and *Local Government Act* permit local governments to control signs, including their size, appearance, and location. However, just because the enabling legislation authorizes this type of control does not immunize local governments from Charter claims against the way in which they exercise the power. In *Langley Township v. James*,[9] the Township enacted a sign bylaw, one provision of which prohibited the erection of signs that faced Highway 1, with an exception for temporary signs advertising farm produce. The respondents, whose property abutted Highway 1, had, for some years, erected signs facing the highway, selling advertising space to local businesses. The Township contended that the prohibition reduced "clutter" in the community and furthered public safety, while still supporting direct sale of local agricultural goods ("farm gate sales"). In response to the Township's petition to enforce compliance, the respondents alleged the bylaw was unconstitutional.

[9] 2004 BCSC 31.

The Court noted that the Township's bylaw was content-neutral, except to the extent that it exempted farm gate sales. But for the exemption, the bylaw's limitation of the *form* of signs was constitutional; it restricted the location, number, and size of signs, but it generally permitted erection of signs within the Township, regardless of subject matter. The Court found no evidence that completely prohibiting signs that faced Highway 1 struck at the purposes underlying section 2(b). However, the "arbitrary and content based" promotion of one type of activity both infringed the right and could not be justified under section 1. As such, the Court limited its declaration of invalidity to the phrase "except for temporary signs advertising farm produce". The respondents, falling under the complete prohibition, were ordered to comply.

In *Kaps v. City of Surrey*,[10] the City had passed amendments to its sign bylaw. The petitioners were community activists opposed to the plan to replace the RCMP with a local police service. They challenged the amending bylaw's constitutionality. The sign bylaw prohibited property owners from erecting signs on their property unless they acquired a permit, in some cases subject to an inspection. In any event, a single-family residential lot could host a maximum of one sign. Prior to the amendments, the sign bylaw exempted "Political Signs" – signs specifically linked to causes and candidates at municipal, provincial, and federal elections – from the permitting and inspection requirement. The amendments broadened the meaning of "Political Signs" to encompass more voting activities (such as referenda) and "support or approval" of political organizations or "municipal, provincial or federal issue[s]". They also added further stipulations about when political signs could be erected and when they had to be taken down.

While the Court accepted that the intention of the amendments was to "merely provide clarity on the dates and types of signs which fall within the permitted exemption", it found that the language used was ambiguous. Political signs were removed from the general exemption and given their own section. Consequently, it was possible to read the provisions as stating that all political signs (including the petitioners' "Keep the RCMP in Surrey" signs) were banned except during the specified voting events and time frames. In the result, the Court found in favour of the petitioners, holding that the bylaw breached section 2(b) and was not justified under section 1. However, in the circumstances, it acted to solve the problem without declaring the bylaw invalid, instead ordering the City to interpret (and amend) the bylaw to permit political signs other than those specified as relating to voting periods at all times.

### C. Panhandling

In *Federated Anti-Poverty Groups of BC v. Vancouver (City)*,[11] the petitioners challenged the legality and constitutionality of a city bylaw that prohibited, among other things, obstructing pedestrian traffic while soliciting, continuing to solicit after receiving a negative response, and soliciting within ten metres of bank entrances and ATMs. In some areas, the geographic control would virtually preclude all panhandling. The bylaw defined "solicit" to mean "without consideration, ask for money, donations, goods or other things of value whether by spoken,

[10] 2022 BCSC 1191.
[11] 2002 BCSC 105.

written or printed word or bodily gesture". It made an exception for soliciting for charity purposes under a licence. On the issue of legality, the Court accepted that the City could regulate panhandling just as it did a multitude of other non-pedestrian street activities, like busking, loitering, and sidewalk cafes. The bylaw did not discriminate against a class of persons ("panhandlers"), but instead controlled an activity within the City's purview. Section 317(1)(a) of the *Vancouver Charter* expressly permitted regulation of "pedestrian, vehicular, and other traffic". The bylaw was aimed at keeping sidewalks passable and controlling panhandling that could be construed as intimidating.

On the issue of constitutionality, the Court accepted that panhandling is expressive activity "by which the panhandler expresses his or her plight to another while seeking assistance". However, the nature of public streets and sidewalks, as well as the way the bylaw targeted panhandling only in a finite set of circumstances, led the Court to conclude that the specific aspects of panhandling impacted did not fall within the scope of freedom of expression that section 2(b) protects. Because it did not actually prohibit panhandling, but only specific obstructive manners in which it occurred, the bylaw had neither the purpose nor effect of restricting freedom of expression. The types of obstructive or aggressive panhandling controlled by the bylaw did not promote values underlying the protection of free expression, even if panhandling generally engaged the value of social-political participation in community. In sum, the regulation of panhandling that the bylaw effected did not infringe section 2(b).

*Federated Anti-Poverty Groups* again illustrates the importance of ensuring that bylaws that target a particular mischief are not drafted overbroadly. Complete prohibition of an activity with expressive content, even one that may be associated with problematic behaviours, is likely to fall afoul of section 2(b). By contrast, bylaws that specifically target those behaviours are much more likely to withstand Charter scrutiny.

### D. Newspaper Boxes

Providing a similar message is the case of *Can. Newspapers Co. v. Victoria (City)*,[12] in which the appellant sought judicial review of the City's decision not to allow it to place 138 newspaper boxes on public property, alleging a breach of section 2(b). The chambers judge below determined that the decision did not infringe freedom of expression. The City reasonably decided that the boxes would negatively affect the City's appearance, vital to its tourism industry, and the decision did not preclude distribution of the appellant's newspapers by other means, although these might not be as profitable. The appellant argued that freedom of the press under section 2(b) extends to the right to distribute newspapers to subscribers. In response, the City argued that there is no right to place newspaper boxes on city sidewalks, nor to impede their use by other people.

[12] 1989 CanLII 5247 (BCCA).

On appeal, the Court decided that, looking to both purpose and effect, the City's decision did not limit the appellant's rights under section 2(b). Again, the City's intention was to preserve the City's aesthetic appearance, which also served the City's commercial purposes. While it accepted that the appellant's commercial activity had expressive content, the Court noted that "the question of whether the appellant's commercial interest has been infringed must be looked at in light of the fact that the city has also a commercial interest for which it is entitled to seek protection". The City's refusal did not aim at the appellant's free expression, and it was left free to distribute newspapers by other methods that did not conflict with the City's legitimate interest, including through street vendor sales, newspaper carriers, and, with permission, placement of newspaper boxes on private property.

## E. The Town Square

When courts assess challenges regarding free expression on public property, they consider whether the expression at issue is consistent with the historical or actual function of the place in which it is occurring.[13] Whether literal or figurative, the public square is a place saturated with notions of free expression and exchange of ideas. In *Bracken v. Fort Erie (Town)*,[14] the Ontario Court of Appeal considered whether a citizen's protest near the town hall, which he undertook with undeniable gusto, was protected by section 2(b).

Mr. Bracken, who was opposed to a bylaw that would permit a medical cannabis facility to be built across the street from his home, engaged in protest by marching in the town square, shouting "kill the bill" through a megaphone, recording his activities and interactions, and sometimes aggressively questioning people who engaged with him. Fearing for the safety of its employees, the Town issued Mr. Bracken a trespass notice. Having refused to obey the notice, Mr. Bracken was handcuffed and arrested, and placed in a police cruiser for fifteen minutes. After the arrest, the Town issued Mr. Bracken another notice, this one banning him from the town hall for one year.

It was a key issue on appeal whether Mr. Bracken's protest was "violence" or a "threat of violence", as such behaviour, even if it occurred in a place that was traditionally used for political expression, is not protected by section 2(b). The Court of Appeal, overturning the lower court's decision, found that Mr. Bracken's activities did not constitute violence:

> Violence is not the mere absence of civility. The application judge extended the concept of violence to include actions and words associated with a traditional form of political protest, on the basis that some town employees claimed they felt "unsafe". This goes much too far. A person's subjective feelings of disquiet, unease, and even fear, are not in themselves capable of ousting expression categorically from the protection of s. 2(b).

[13] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62.
[14] 2017 ONCA 668.

Further, there was no question that the area in front of the town hall was a place in which free expression has traditionally occurred in the past and could be expected to occur in the future. The Court characterized the area in which Mr. Bracken's protest took place as "paradigmatically the place for expression of public dissent". Also of note, the Court placed some importance on the fact that there were other options available to the Town besides immediately banning him from the property for a year. In other words, the actions of the Town were not necessary to accomplish the purpose it was trying to achieve.

While they do not directly deal with local government decisions, *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*[15] and *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*,[16] ("*CCBR*") are relevant to the issue of what constitutes the public square. Both of those cases dealt with advertising on public transit buses. In *Canadian Federation of Students,* the Federation challenged BC Transit and TransLink advertising policies that contained the following provisions:

> 7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy;
>
> …
>
> 9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office;

BC Transit and TransLink, based on the policy provisions, refused to post two advertisements. One encouraged people to vote in the upcoming provincial election, while the other expressed concern with changes in the public education system.

While the Court acknowledged that the purpose for which the policies were adopted – "providing a safe, welcoming public transit system" was important enough to warrant a limit on freedom of expression, it also found that the particular provisions were not rationally connected to that objective. In other words, political speech does not necessarily create an unsafe or unwelcoming environment, particularly in a recognized public forum:

> While a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which "create controversy" is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society. Finally, article 9 represents the most overt restriction on political advertisements, as it bans all forms of

[15] 2009 SCC 31.
[16] 2018 BCCA 344.

> political content regardless of whether the message actually contributes to an unsafe or unwelcoming transit environment. In sum, the policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression.

In the *CCBR* case, CCBR challenged TransLink's decision to refuse to run its pro-life/anti-abortion advertising on its buses. The Court of Appeal overturned TransLink's decision, not because it was unavailable to it, but because it was not clear that TransLink even considered CCBR's right to free expression when it made its decision. TransLink was also unable to explain how refusing to run CCBR's advertisements would proportionately balance the right to free expression with the objectives set out in its statutory mandate.

*Canadian Federation of Students* and *CCBR* both provide important guidance for local governments, which manage both literal and figurative public squares. Local governments must ensure that their policies on the management of such spaces are Charter-compliant. They must also take care to apply those policies in a manner that reflects a proportionate balancing of Charter rights with the relevant objects of the policies.

## IV. EXPRESSION INSIDE THE COUNCIL CHAMBER: CODES OF CONDUCT, DEFAMATION AND DIFFICULT PEOPLE

### A. Codes of Conduct

There has recently been a big push for local governments to regulate in relation to the conduct of elected officials. Section 113.1 of the *Community Charter* now requires that local governments consider amending or adopting a code of conduct within specified timelines. Codes usually contain broad statements of aspirational principles that set a standard for elected officials, but they also contain specific provisions prohibiting certain conduct and, importantly, permitting Council to impose remedies in response to a breach. Prohibitory provisions are routinely drafted to forbid a variety of behaviours, including matters already covered by the *Community Charter,* such as conflicts of interest, acceptance of gifts, and use of influence. They often contain other rules, however, that address issues like use of social media, decorum in the council chamber, and "discreditable conduct" that may engage the *Charter of Rights and Freedoms*.

Integrity commissioners in Ontario, a jurisdiction that has had codes of conduct far longer than British Columbia, have considered how code of conduct regulations might impact the expressive rights of elected officials in some detail, particularly in relation to discreditable conduct provisions. As an example, the discreditable conduct provision in Toronto's Code of Conduct, reads:

> **14.0** In connection with their office, a member must:
>
> a) Not engage with others, including the public, City staff and other members, in a manner that is abusive, bullying, intimidating or derogatory.
>
> b) Ensure that their work environment is free from discrimination and harassment.

A similar provision was at issue in *Newman v. Brown*.[17] In that case, the Mayor was alleged to have bullied another councillor by naming that councillor in a sharply worded letter that was subsequently included in the agenda package for a public meeting. The Commissioner found that no violation had occurred, in part because of a lack of evidence. However, it was also important to the Commissioner that the letter was political speech:

> … [D]isagreeing with the policy, position or record of another politician is not prohibited by the Code. It is an expression of political opinion that lies outside an Integrity Commissioner's purview. In a democracy, this type of opinion is subject to being tested through political debate… All politicians possess the same right to explain and to defend their positions, including the right to respond to criticism, and the right to debate with others on issues. If one politician takes issue with what another politician has said, then utilizing the tools of political debate to respond to inaccuracies and exaggerations in political debate is far more appropriate than asking an Integrity Commissioner to police the political debate...

A clear thread running through the decisions of Ontario integrity commissioners is that political speech, which is essential to the role of an elected official, should not properly be the subject of discipline under a code of conduct. In *Montforts v. Brown*,[18] the Commissioner expressed this concept succinctly:

> … I wish to observe that not everything is an Integrity Commissioner issue. Not all issues need to be handled under the Code of Conduct.

[17] 2021 ONMIC 11.
[18] 2021 ONMIC 10.

> This is particularly true of issues related to political speech. As the Honourable Donald Cameron, a former Superior Court judge, wrote when he was the Integrity Commissioner of Brampton: "I cannot and will not be a referee of free speech in a political arena provided it stays within the bounds… of the Code."
>
> It has been said that if someone uses political speech to make unfair or misleading comments, then political speech itself offers a remedy… In a democracy, political speech offers the opportunity to call out, to correct, and to criticize inaccuracy and unfairness – usually in a manner that is direct, immediate, and proportionate to the original speech.

By and large, the decisions of Ontario's integrity commissioners deal with the issue of political speech without resort to a formal Charter analysis. This is perhaps to be expected, given the administrative context in which the decisions arise. Further, integrity commissioners do not actually issue any orders or remedies that would affect the legal rights of the elected officials who are under investigation. In Ontario, and in British Columbia, the power to issue a remedy lies only with the elected council or board.

Roughly speaking, codes of conduct make two kinds of remedies available to elected councils and boards. The first is censure. A censure is itself a form of collective speech. It consists in a council or board voting to tell the world that it strongly disapproves of the conduct of one of its members. Second, some codes allow more substantive sanctions, such as requirements that an elected official apologize for certain conduct, or prohibitions on entering certain areas of municipal buildings (e.g., staff offices).

It is unlikely that a court would find that a censure alone infringes the expressive rights of a subject person. They are free to continue their duties and to express their own disapproval of their colleagues. However, sanctions, to the extent that they purport either to put substantive limits on the ability of an elected official to carry out their duties and functions, or to compel the councillor to say certain things, are a different story. This point is illustrated in *Kaiser v. Rural Municipality of Baildon No. 131*.[19] There, the council sanctioned a councillor for what the Court described as "[his] confrontational actions, his recurrent demands, [and] his generally pugnacious behaviours". Council resolved to: (1) require him to make a public apology, (2) remove him from his committee assignments, (3) restrict his access to certain property and personnel, and (4) suspend him from his council position until he apologized. The councillor challenged the sanctions, arguing that they were outside of the council's power and that the apology resolution was an unlawful limit on his freedom of expression.

[19] 2023 SKKB 50.

Unfortunately (for our purposes at least), the Court did not consider whether the apology resolution was an infringement of freedom of expression because it found that by ordering the suspension, which in this case was contingent on the apology, Council had exceeded its jurisdiction:

> I determine here that the indefinite suspension until Mr. Kaiser takes the remedial steps demanded by council, effectively amounts to a removal from office. Such a power is at odds with the legislation and effectively leads to council thwarting the democratic will of the citizens and thereby determining those who actually sit on council will do so provided they abide by council's directions. This is not a power which is entrusted to council pursuant to the legislation. Council is not entitled to usurp the powers vested in the Lieutenant Governor in Council pursuant to the *Act*. [20]

Caselaw would suggest that, had the Court considered the councillor's section 2(b) challenge, he may have been successful. In *Slaight Communications v. Davidson,* the Supreme Court of Canada affirmed that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do". If a breach was made out, it seems likely that, on a section 1 analysis, a court would find an apology requirement, enforced by restricting council duties (assuming such limitation was lawful as a matter of administrative law), disproportionate to the objectives of the council in requiring that apology.

Local governments should be alive to issues around freedom of expression when drafting, administering, and enforcing codes of conduct. Political speech is inherent to the duties of elected officials. From time to time, that speech will, invariably, be poorly received by one segment of the population or another. While some circumstances will cross the line, constituents have a vested interest in hearing the good, the bad, and in some cases the ugly, from their elected officials.

## B. Defamation

Pursuant to section 8(1) of the *Community Charter*, "[a] municipality has the capacity, rights, powers and privileges of a natural person of full capacity". In theory, a municipality may sue and be sued, the same as any individual. But caselaw tells us a different story, at least as far as actions for defamation are concerned. A municipality may not sue for defamation because it is fundamentally at odds with the Charter's guarantee of free expression. A local government may, of course, be sued for defamation, but the nature of public democratic government plays a key role in defences to defamation, especially in light of more recent attempts by legislatures to shield public debate from private efforts to silence it.

[20] Council and boards in BC likewise lack jurisdiction to suspend their members. See *Paynter v. School District No. 61*, 2022 BCSC 1671.

In *Dixon v. Powell River (City)*,[21] the plaintiff asked the Court to declare that Powell River – as distinct from individuals associated with its government – does not have legal authority to threaten or institute civil proceedings for defamation. The City did not oppose the plaintiff's application. The case arose after certain residents published statements online, voicing their opposition to a City project and council's choice to seek alternative approval for it under s. 86 of the *Community Charter*, as well as council's general financial management. In response to the criticism, City solicitors sent letters alleging that the residents had defamed the city and threatening legal action.

The infringement, as framed by the plaintiff (who did not receive a letter himself), was to his "right not only to speak but to be the recipient of information in the public debate concerning the conduct of government affairs", which right was infringed by the letters that individuals received threatening defamation proceedings. The Court in *Dixon* concluded – following Ontario caselaw and overturning pre-Charter BC precedent – that a local government cannot sue in defamation. The common law must be applied in a manner consistent with the Charter. To permit a local government to threaten or bring actions for defamation would be "antithetical to the notion of freedom of speech and a citizen's rights to criticize his or her government concerning its governing functions", because the purpose and effect would undeniably be to chill expression related to participation in community.

*Thatcher-Craig v. Clearview (Township)*,[22] dealt with the opposite situation from *Dixon*; the municipality was alleged to have defamed the plaintiffs by posting unsolicited and unedited public comments in relation to the plaintiffs' development application. In response, the municipality sought to have the action dismissed under a provision of the Ontario *Courts of Justice Act* concerning "SLAPPs" (strategic lawsuits against public participation).[23] The plaintiffs were the owners of a hops farm and wished to add a micro-brewery and small retail operation to their property; the municipality informed them that adding a brewery required a zoning bylaw amendment. However, the plaintiffs argued that the zoning already permitted brewing and instead submitted a site plan application (addressing issues such as the location, access, and design of the proposed development). In the application, the plaintiffs gave consent to the municipality to release information to the public, and provided a release and indemnity to the municipality. They also acknowledged that most planning approval processes require public consultation under Ontario's *Planning Act*.

After the municipality processed the application, staff placed on its website a report, the recommendations of which council subsequently approved. The report concluded that the current zoning did not permit a brewery. The municipality subsequently received unsolicited letters from members of the public, commenting on the proposal, which it forwarded to the plaintiffs. Along with the site plan application, the municipality posted the unedited letters on its website, although it did not inform the plaintiffs it was doing so. Eventually, the plaintiffs

[21] 2009 BCSC 406.
[22] 2023 ONCA 96.
[23] A nearly identical provision is found in BC's *Protection of Public Participation Act*, SBC 2019, c 3.

brought their claim for defamation, alleging harm to their business because the municipality had posted public comments that were "defamatory, inaccurate, and damaging", containing various allegations about the development proposal and the plaintiffs' business practices and conduct towards neighbours.

The SLAPP provision in the Act aims to protect participation in debates on matters of public interest and requires a judge to dismiss an action related to an expression where the defendant can show that the expression relates to a matter of public interest. If the defendant does so, then the plaintiff must show that there are "grounds to believe" (1) the proceeding has substantial merit, (2) the defendant has no valid defence, and (3) the public interest in permitting the proceeding outweighs the public interest in protecting the expression, in which case the judge must not dismiss the action. There was no issue that the municipality's posting of the letters related to a matter of public interest in *Thatcher-Craig*. At issue was the validity of the municipality's defences, especially the defence of qualified privilege. Qualified privilege operates where a defendant has "an interest or duty" to publish the information in issue to a recipient with "a corresponding interest or duty to receive it",[24] and it operates only within the scope of a precise "occasion".

The Court decided that the municipality was obliged by statute to inform the public of its activities and the information it generates and receives, and that it could control its own processes to encourage community involvement. The public had an interest in being informed about land use matters, and the municipality did make available its policy on transparency in land use approval processes. The "occasion" to which the municipality's qualified privilege attached was not limited to council meetings "but to the entire public planning process including the material received in response to the respondents' application and posted on the Township's publicly available website". Nor was it exceeded because the letters were available to the world via the internet. The character of the letters did not exceed the privilege because, in spite of their tone, they provided "insight into problems with the current operation that affect[ed] the neighbours and the farming character of the community". The municipality could not rely on qualified privilege if it posted vitriolic comments with malice, but malice and bad faith were not evident here, and the scope of the privilege must be broad to foster goals of transparency, public participation, and democracy. The Court concluded that the defence of qualified privilege was available to the municipality and therefore dismissed the defamation action.

### C. Difficult People

The public's right to attend council proceedings is fundamental. Section 89 of the *Community Charter* imposes as a general rule that "[a] meeting of a council must be open to the public…" and "[a] council must not vote on the reading or adoption of a bylaw when its meeting is closed to the public". However, there are circumstances (set out in section 90) in which council is permitted, and sometimes even obligated, to hold a meeting behind closed doors, although it

[24] *Bent v. Platnick*, 2020 SCC 23.

must give notice and explain the basis on which it is doing so. Even where meetings are open to the general public, local governments have the ability to restrain access and participation by specific individuals who flout rules and disrupt their essential functions. Caselaw indicates that these restraining actions – and other steps taken to control individuals' ability to speak to council – are infringements of a right to communicate with elected officials, but these infringements can be justified. There is no corresponding right to receive a meaningful response.

In *Port Coquitlam (City) v. Osberg*,[25] the City sought an injunction to prevent the defendant from going past city hall's reception desk. At the time of the decision, issues between the City and the defendant were longstanding: the defendant had been attending council meetings for years, frequently causing so much disruption as to bring proceedings to a halt. The City had previously obtained injunctions prohibiting the defendant from attending and disrupting council meetings and permitting the RCMP to arrest and remove her if she tried. The defendant repeatedly breached these orders and was consequently found in contempt. The application for the 'reception desk order' arose following three further incidents in which the defendant forced committee meetings to adjourn and refused to leave a private office when requested to do so.

In deciding to grant the order requested by the City, Chief Justice Esson made the following remark, emphasizing that an outright ban on attendance at a democratic forum is an extraordinary measure, not lightly granted or injudiciously to be sought:

> If [the] three incidents stood by themselves, they might not justify an order such as that now being sought. The court will not lightly interfere in that way with a citizen's right to express herself, to be present at meetings and to have access to the offices of the municipality. … Neither the defendant nor anyone else has the right to deliberately obstruct the workings of our institutions and that clearly has been the purpose and effect of many of Mrs. Osberg's activities over that period of time… The plaintiffs, not only for the benefit of the Mayor and other officers of the City, but of the general body of ratepayers to whom they are responsible, have a right to protect civic government from conduct such as that in which the defendant has indulged herself since 1987.

More recently, in *Mann v. Saugeen Shores*,[26] 2023 ONSC 1025, a court grappled with the question of whether the Charter protects a right to speak to council. The applicant challenged certain sections of the Town's procedure bylaw, alleging, among other things, a breach of section 2 of the Charter. Several times, the applicant attempted to make delegations to town council to share his opinion on a development project. The Town conceded that it had denied the applicant's delegations 11 times, for various reasons permitted by the bylaw, such as because the proposed delegations did not provide new information and the subject matter involved litigation or the threat of litigation. It denied other delegations because of the

[25] [1993] BCJ No. 1005.
[26] 2023 ONSC 1025.

applicant's inappropriate and defamatory language. However, the Town did permit the applicant to address council 13 times (in person or in writing) regarding the development. The applicant alleged that the Town, by preventing him from speaking to council, violated his right to "meaningful communication", including his right to have councillors respond to his question and inquiries.

As with section 124 of the *Community Charter*, section 238 of Ontario's *Municipal Act* requires a municipality to enact a procedural bylaw governing council and committee meetings. Subject to certain exceptions – such as where the subject matter concerns litigation, potential litigation, or privileged advice – council meetings must be open to the public. Under the Town's bylaw, council meetings included an "Open Forum" lasting a maximum of 15 minutes, during which time individuals could speak; council members could only ask questions through the chair and could not provide substantive comments or engage in debate. Individuals could speak only to certain items on the council's agenda, and individuals speaking on the same topic on which they had previously spoken could only present new information. Individuals had to refrain from disrespectful and insulting language and conduct, and they could not speak regarding requests for proposals and litigation or potential litigation. Similar rules controlled delegations.

The Court readily accepted freedom of expression under section 2(b) to include a right to address elected officials, but not to receive meaningful responses from them, which would surely implicate elected officials' own right to expression or non-expression. Even though the Town permitted the applicant to address council in many instances, the limitations contained in the procedure bylaw limited the right to free expression. However, procedural restrictions on when and how long individuals may speak, as well as restrictions on repetitious content, are justified under section 1. Governments' need for controlled procedures to conduct business, "including limitations as in issue here, is to a large degree, self-evident". Procedural bylaws serve a vitally important purpose in allowing local governments to hold effective meetings, pass bylaws, and govern in a timely manner. Effective procedures are of pressing and substantial concern, in that they allow local governments to act in relation to other matters of pressing and substantial concern. The Town's procedure bylaw was rationally connected to the objective of allowing it to conduct business, and the limitations were minimally impairing, especially in light of its provision of an "Open Forum" it was not obligated to provide. The limitations were proportional to the – again, "self-evident" – need to prevent repetitive submissions and maintain a respectful atmosphere.

## V. CONCLUSION

As we have attempted to demonstrate, there are many ways in which local government decisions can implicate freedom of expression. Whether actions that limit the constitutional right will be justified depends on the specific facts. In all cases, careful consideration at the earliest stages is important for ensuring that actions are consistent with the *Charter of Rights and Freedoms.*

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