CANADIAN CIVIL LIBERTIES ASSOCIATION
ASSOCIATION CANADIENNE DES LIBERTES CIVILES

March 31st, 2025

Dear members of the Cities of Mississauga, Oakville, Ottawa and Brampton's legal teams:

Re: *Charter* Concerns Arising from Contemplated By-Laws Prohibiting Some Protests Near Community Gathering Spaces

The Canadian Civil Liberties Association (CCLA) is grateful for the opportunity we had on March 26, 2025 to meet with you to discuss our *Charter*-related concerns with respect to bubble zone by-laws. The purpose of this letter is to summarize the issues addressed by the CCLA during this meeting.

For more than 60 years, the CCLA has been fighting for the rights and freedoms of everybody in Canada—with a particular focus on the rights of marginalized and equity-deserving communities.

As mentioned during our meeting, one of the reasons we defend freedom of expression and peaceful assembly from overly broad restrictions is because these freedoms are often the tools that marginalized groups use to advocate for, and achieve, societal change. Broad laws initially passed in the name of protecting vulnerable communities can easily be co-opted by those with power to suppress marginalized voices striving to challenge the status quo. These are the principled considerations that inform CCLA's approach to laws restricting peaceful assembly and expression.

A. Freedom of Expression and Freedom of Peaceful Assembly Are Vital to Our Democracy

Freedom of expression[1] protects a wide range of expressive conduct, and individuals have a presumptive constitutional right to manifest their thoughts, opinions, and beliefs, however unpopular or distasteful[2]. While this right is not absolute,[3] Canada's highest court has recognized that speech that is repugnant, offensive, or humiliating is still constitutionally protected expression that should not be broadly prohibited in a free and democratic society.[4] The Supreme Court of Canada has also confirmed that there is no place in a democracy for a right not to be offended.[5]

Freedom of peaceful assembly[6] protects public gatherings such as demonstrations, protests and sit-ins, as long as they are peaceful—that is, up to the point of physical violence or threats of

[1] *Canadian Charter of Rights and Freedoms,* Schedule B to the Canada Act 1982 (UK), 1982, c 11 (*Charter*), at s 2(b).
[2] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, at p 968.
[3] See for instance *R v Keegstra*, [1990] 3 SCR 697; *Canada (Human Rights Commission) v Taylor,* [1990] 3 SCR 892, and *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (*Whatcott*).
[4] *Whatcott,* supra note 3, at para 41.
[5] *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at para 82.
[6] *Charter*, supra note 1, s 2(c).

physical violence.[7] By protecting collective expression, this fundamental freedom invigorates dialogue on issues of public interest. This right can have little meaning without broad access to public space for purposes of communicating a message. The exercise of this right is often disruptive in some way, as any gathering in public space is aimed at drawing the attention of the powerful or the broader public to a message. Disruption is one of the means of communication, and must generally be tolerated by the population to allow for a meaningful exercise of *Charter* rights.[8]

B. *Charter*-Rights Should Not Be Unreasonably and Unjustifiably Limited

We acknowledge that *Charter* rights are not absolute and that proper balancing of these rights might sometimes require carefully crafted, minimal, and proportionate limits[9]. Overly broad restrictions on *Charter* rights, however, are unconstitutional. In our view, bubble zone by-laws broadly prohibiting speech that is "lawful but awful" near community gathering spaces are not justifiable limits on freedom of expression and freedom of peaceful assembly.[10]

For instance, the City of Vaughan's by-law[11] provides that a "Nuisance Demonstration" can result from the public expression of views that are likely to cause a reasonable person to be intimidated. The by-law then specifies that "intimidation" can be caused by, *inter alia,* "expressions that incite hatred, violence, *intolerance or discrimination*" (emphasis added).[12]

Prohibiting the incitement of "intolerance or discrimination" captures a very wide range of expression that does not rise to the level of threats to human physical safety (i.e. direct threats or inciting violence). Peaceful protests against the actions of a foreign government, whether due to an ongoing armed conflict, reported human rights abuses, or the imposition of tariffs, could be said to incite intolerance or discrimination. The same could be said of protests against certain religious beliefs—for example a counter-protest targeting religious pro-life expression.

While we acknowledge how painful intolerant or discriminatory speech may be, it should not be censored in this way in a democracy. As stated by the Court of Appeal for Ontario in 2017, "[i]n a

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[7] See *Bracken v Fort Erie (Town)*, 2017 ONCA 668 (Bracken) at para 21, 28, 31, 49, 50, 51 and 52:

> [49] 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*).
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> …
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> [52] A finding that a person's expression is an act of violence or a threat of violence is, as explained above, determinative that their expression is not protected by the *Charter*. Once it is determined that an act is violent or a threat of violence, deliberation is at an end and the claim of a s. 2(*b*) *Charter* violation is defeated. Courts should therefore not be quick to conclude that a person's actions are violent without clear evidence. Here, there is no evidence that Mr. Bracken's protest was violent or a threat of violence, and the finding that it was constitutes a palpable and overriding error.

[8] *Id.*, at para 81.

[9] *R v Spratt*, 2008 BCCA 340.

[10] That is even more so when these by-laws create (i) broad bubble zones around (ii) various types of communal spaces and provide for (iii) extreme and disproportionate penalties which (iv) can be enforced without any prior notice that would give protestors reasonable opportunity to leave.

[11] *Protecting Vulnerable Social Infrastructure By-Law*, City of Vaughan, By-Law No. 143-2024, online: https://www.vaughan.ca/sites/default/files/2024-06/143-2024.pdf?file-verison=1743176412881.

[12] *Id*., at s 4, "Nuisance Demonstration".

free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes".[13]

You mentioned that some people describe bubble zone by-laws as preventative measures which would rarely, if ever, be enforced by the municipality or the police, and which would simply discourage people from engaging in offensive behavior. This perspective is problematic for at least two reasons. First, a by-law must comply with the *Charter*, regardless of whether the authority that adopted it intends on enforcing it or not.[14] In the freedom of expression context, the Supreme Court of Canada has repeatedly held that a broad prohibition on speech can place a "chill" on a wide range of expression, thus infringing s. 2(b) of the *Charter*.[15] Second, one certainly cannot count on the state or law enforcement not to enforce laws. Once broad limits on expression and protest are on the books, they are often used to stifle the peaceful expression of marginalized communities.[16]

C. Police Already Have Broad Powers

As mentioned during our meeting, we also believe that there is a misconception within a part of the population with respect to the state of the existing laws in Canada and an alleged need for additional legal tools targeting conduct that is not physically violent during protests.

Individuals and groups negatively impacted by protests have recourse to the courts, and can seek injunctions if safe access to their property is illegally hindered.

Police using their common law police powers can, when necessary, create and enforce space between two groups that are protesting against each other or allow for appropriate access to community buildings or private property.[17]

Criminal laws are also available. While the *Criminal Code* does target a wide range of physically violent conduct, it also prohibits a host of other conduct that does not involve physical violence. For instance, the *Criminal Code* prohibits uttering threats of damage to property, bodily injury, and death,[18] as well as criminal harassment[19] and intimidation.[20] Aiding, abetting, or counselling others to commit these offences is also criminal conduct.[21] In appropriate circumstances, individuals may also be charged with mischief[22] or arrested for breach of the peace.[23]

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[13] *Bracken,* supra note 7*,* at para 81. See also at para 76 and 80.
[14] Similarly, the Supreme Court of Canada has held that the state cannot rely on prosecutorial discretion to remedy an unconstitutional mandatory minimum sentence. In other words, the constitutionality of a statutory provision cannot rest on an expectation that the Crown will act properly. See *R v Nur*, 2015 SCC 15, at para 91-98.
[15] *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22, at para 80; *Whatcott*, supra note 3, at para 107-109; *WIC Radio Ltd. v Simpson*, 2008 SCC 40, at para 15; *R v. Keegstra*, [1990] 3 SCR 697 at page 860 (McLachlin, J (as she then was) dissenting).
[16] *R v Zundel*, [1992] 2 SCR 731, at p 766.
[17] *Knowlton v R*, [1974] SCR 443; *R v Fleming*, 2019 SCC 45, at para 10, 13, 44-56, 81-86.
[18] *Criminal Code*, RSC 1985, c C-46, s 264.1.
[19] *Id.*, at s 318-319.
[20] *Id.*, at s 423.
[21] *Id.*, at s 21(1)(b), (c).
[22] *Id.*, at s 430.
[23] *Id.*, at s 31.

Naturally, criminal law is a blunt instrument, and law enforcement must be discerning in its use of the powers that flow from it. The fact remains that the abovementioned infractions and powers exist.

D. Conclusion

Reconciling and balancing multiple rights, freedoms and interests lies at the core of our mission. Vaughan's by-law, and other similar regulatory regimes limiting intolerant—yet constitutionally protected—speech near community gathering spaces, are not reasonable and justifiable frameworks. CCLA is deeply concerned that these broad, punitive provisions will be used, and abused, if they remain unchallenged.

CCLA will continue to advocate for a safe, inclusive, and vibrant democracy that allows people to speak up freely about the issues they care about, and to peacefully protest for their vision of a better world. In a democracy, there will be speech that makes individuals and communities feel offended and unwelcome. CCLA denounces hateful speech and intolerance, and is committed to working towards a more inclusive, equal society. In our view, however, passing punitive laws that give municipalities and the police the discretion to broadly restrict peaceful expression is not a rights-respecting way of achieving this goal.

We thank you again for taking the time to hear our perspective on this important issue.

Sincerely,

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Director, Fundamental Freedoms Program
Canadian Civil Liberties Association