April 28, 2025

Dear Mayor, Councillors and Staff,

Town of Oakville

I have already provided two sets of written submissions to the Oakville Council in support of proposed bubble legislation. The first submission was designed to explain why bubble legislation is necessary and is compatible with Charter-protected freedoms. The second submission specifically addressed the first draft of proposed bubble legislation and offered up alternative language for the Council's consideration. Today's submission is intended to complement my oral deputation on May 1, 2025 and respond to components of the April 15, 2025 Staff Report, particularly on legal issues raised. Thank you for your consideration of these submissions.

The April 15, 2025 Staff Report cites the Canadian Civil Liberties Association's submissions on several occasions, reproducing in some detail the points CCLA made. It is of importance for me to explain why CCLA's submissions are, on key points, unpersuasive in law. While CCLA's cautionary observations about unduly limiting freedom of expression and assembly are welcome reminders, its submissions fail to adequately address why carefully crafted bubble legislation survives Charter scrutiny. The jurisprudence establishes that speech or conduct that falls short of criminal hate speech or violence can be regulated in a minimally intrusive way. That is precisely what bubble legislation is designed to do.

In the context of criminal law, I agree with the CCLA that speech that is repugnant, offensive or humiliating is still constitutionally protected and should not be broadly prohibited. That explains the high threshold that governs the prohibition of criminal hate speech.

But here, we are not talking about the prohibition of speech. We are talking about whether governments may minimally intrude upon the exercise of freedom of expression and assembly by limiting the proximity of protests to vulnerable social infrastructure, thereby appropriately balancing the rights of all concerned. Eight provinces and a number of municipalities have enacted various forms of bubble legislation, without constitutional impediment, in recognition of the rights of those who are entitled to use and enjoy those social spaces without fear.

The CCLA "acknowledges that Charter rights are not absolute and that proper balancing of these rights might sometimes require carefully crafted, minimal and proportionate limits." The footnoted authority for that proposition (with which I wholeheartedly agree) is the decision of the British Columbia Court of Appeal in *R. v. Spratt*. The CCLA adds that "Overtly broad restrictions on Charter rights, however, are unconstitutional. In our view, bubble zone by-laws broadly prohibiting speech that is "lawful not awful" near community gathering spaces are not justifiable limits on freedom of expression and freedom of peaceful assembly."

The problem is that CCLA's position – advanced by the British Columbia Civil Liberties Association, was effectively rejected by the British Columbia Court of Appeal in the very case cited by the CCLA.

In *Spratt*, a unanimous Court of Appeal upheld the constitutionality of British Columbia's Access to Abortion Services Act, R.S.B.C. 1996, c. 1. The Act contains a prohibition against certain activities

but only when they take place within an "access zone" established by the Act. Some but not all of its language is similar to the language employed in Oakville's draft legislation. I will point out at least one significant difference below.

Under the British Columbia legislation, the regulated activities include **any** of the following:

Section 2(1)

(a) Engage in sidewalk interference
(b) Protest
(c) Beset
(d) Physically interfere with or attempt to interfere with a service provider, a doctor who provides abortion services or a patient
(e) Intimidate or attempt to intimidate a service provider, a doctor who provides abortion services or a patient.

In *Spratt*, the appellant, and several interveners, including the British Columbia Civil Liberties Association contended that ss. 2(1)(a) [engage in sidewalk interference] and 2(1)(b) [protest] were unconstitutional as infringements of freedom of expression.

The British Columbia Act defines "protest" under s. 2(1)(b) to include "any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means." This definition of "protest" is broader than the definition of "specified protest" contained in the Oakville draft.

"Sidewalk interference" means "(a) advising or persuading or attempting to advise or persuade, a person to refrain from making use of abortion services, or (b) informing or attempting to inform a person concerning issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means.

Please note that my proposed definition of "specified protest" for Oakville (see below) tracks the language of "protest" contained in the British Columbia legislation and upheld by the British Columbia Court of Appeal, despite a Charter challenge.

In *Spratt*, the trial judge found that the appellant was carrying signs within the access zone, was involved in an intentional act of disapproval (ie a protest) with respect to abortion services and also involved in sidewalk interference. The legislation and his conviction were upheld despite the absence of any proof of violence or intimidation.

The Court of Appeal engaged in a detailed analysis. It concluded that although the Act infringes freedom of expression, the infringements are justified under s. 1 of the Charter. The Court adopted, among other things, in its reasoning, the following points made in support of the legislation:

(a) "The line between peaceful protest and virulent or even violent expression against [in that case] abortion is easily and quickly crossed. To try to characterize each individual approach to every woman entering the clinic is too difficult a calculus when the intention of the legislation is to give unimpeded access to those entering the clinic. Therefore, a clear rule against any interference is the best way to achieve the ends of the legislation."

(b) The unwilling viewer or listener cannot avoid exposure to the protest outside the clinic [in that case] because they must enter the clinic from the area in which the protests occur. Women entering the clinic should not be hostage to the message the protestors wish to send them. The right of freedom of expression does not include the right to a captive audience. An important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question.

(c) The expressive activity is not banned in total by the legislation. Outside the access zone, citizens may picket, leaflet and otherwise propound their views.

It is legally unsustainable to say that freedom of expression and assembly can only be protected by allowing protests to take place in close proximity to places of worship and other vulnerable social infrastructure. Indeed, across this country, we see examples of protestors targeting Canadian Jews and their vulnerable infrastructure in an attempt to hold them collectively responsible for the actions of a foreign state. This is not a concern confined to the Jewish community but finds common ground with others, including the Hindu community in Oakville.

CCLA also places heavy reliance on a decision of the Ontario Court of Appeal in *R. v. Bracken*. The CCLA says that *Bracken* stands for the proposition that "in a 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." CCLA also cites in footnote 7 of its submission passages from the *Bracken* decision that limit the circumstances in which expression can be characterized as acts of violence or threats of violence that are unprotected by the Charter. With respect, a full reading of the decision shows that it does not support CCLA's opposition to proposed bubble legislation.

Mr. Bracken was served a trespass notice while protesting outside the Town Hall in Fort Erie, Ontario. The notice was issued because Mr. Bracken was purportedly engaged in violent protest. Charter jurisprudence is clear that acts of physical violence or threats of violence do not come within the scope of s. 2(b) [freedom of expression] protection under the Charter. The Ontario Court of Appeal concluded that the trial judge erred in describing Mr. Bracken's conduct as violent. It was in that context that the Court stated that "violence is not the mere absence of civility" and that "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)."

Simply put, the Court confirmed that violent expression defeats any Charter claim. It warrants no further consideration. The Court went on to say that if expression is not violent, then the government's actions, if prescribed by law, are subjected to a s. 1 Charter analysis to determine if the infringement is justified. That is precisely what happened in the *Spratt* decision when the Court upheld the bubble legislation. In *Bracken*, the constitutionality of legislation was not even in issue. The issuance of a trespass notice to Mr. Bracken could not be justified under s. 1 of the Charter. It was based on factual errors and was not minimally intrusive. For example, according to the Court, Mr. Bracken could have been asked to keep a respectful distance from the Town Hall. Instead, he was banned from attending every Town property for one year. It was also significant that he was

protesting in the town square, the place traditionally utilized for protest activities. The decision does not support an argument that a municipality is unable to place reasonable limits on the proximity of protests to vulnerable social infrastructure. Indeed, it implicitly says the opposite.

In Oakville's current draft legislation, the definition of "specific protest" does not include the language I earlier referred to that is found (and was upheld) in the British Columbia legislation. My analysis in an earlier submission bears repetition:

> "…The Municipal Act (s. 128(1)) enables municipal governments to prohibit and regulate public nuisances, including **matters that are, could become or cause** public nuisances. Excluding from such legislation lawful labour strikes (which necessarily target places of employment), it is the close proximity of protests to vulnerable community institutions, such as places of worship, day schools and community centres that is likely to cause intimidation. There should be no need for a prior showing of actions or expressions that intimidate (or otherwise constitute criminal offences) before the legislation can be invoked. The objective is to **prevent** exposure to incitements to hatred, violence, intolerance, discrimination or similar acts or expressions of intimidation, not address such incitements after they have already taken place. Limits on protests within close proximity to vulnerable institutions minimally impair protected freedoms by preventing, not responding to intimidation."

This is why I propose that Oakville's bubble legislation include, as one part of the definition of a "specified protest" the following:

> **"Any act of disapproval or objection, by any means, including, without limitation, graphic, verbal or written means, with respect to issues perceived to relate to vulnerable social infrastructure or those who primarily use such infrastructure."**

It accords with language already held to be constitutionally valid.

The Staff Report makes extensive reference to existing police powers to arrest for various offences or to the ability to seek injunctive relief. With respect, these are of limited assistance. The goal of bubble legislation is to **prevent** exposure to activities, including criminal, that interfere with the lawful use and enjoyment of places of worship and other social infrastructure. This is done through minimally intrusive regulation of the location, not the content, of protests. Preventative (as opposed to punitive measures) are well-recognized in our laws and are particularly apt here.

The Staff Report points out that the option of provincial legislation exists. That is true, but this does not relieve Town Council from its obligations to protect its citizens through a well-established type of legislation that minimally intrudes upon protest rights. Indeed, in a legislative environment in which some municipalities enact bubble legislation, but not others, the citizens in unprotected municipalities are more likely to reasonably fear for their safety and security. Nor should Council make a decision based on the more limited exposure to protest activity in Oakville as opposed to other municipalities. The necessity of the legislation is rooted in what is happening across the Canada and in this province, and its impact on those entitled to use and enjoy vulnerable social infrastructure without fear.

One final point. I respectfully disagree with the position that the proposed legislation should not contain a street closure provision similar to that adopted by the City of Vaughan. The town's Temporary Road Closure By-law 2007-135 is unlikely to be applied or applicable in this context. It is important to situate a street closure provision within the relevant legislation as another minimally intrusive tool to address the issues identified. Indeed, its use to advance public safety may obviate the need for enforcement of access zone violations.

Thank you again for your consideration of these submissions.

Mark Sandler

Mark Sandler, LL.B, LL.D (honoris causa)