



RESPOND TO: 151 FERRIS LANE, SUITE 202, BARRIE, ON L4M 6C1

June 15, 2020

BY EMAIL ONLY: PFETTES@CLEARVIEW.CA

The Corporation of the Township of Clearview
217 Gideon Street
P.O. Box 200
Stayner, ON L0M 1S0

Attention: Mayor Measures and Members of Council

**RE: TOWNSHIP OF CLEARVIEW BY-LAW LIMITATIONS – CONFEDERATE FLAG
OUR FILE NUMBER: 94248**

A request has been made to the municipality to develop a by-law that prohibits the display of the confederate flag as a symbol of hate.

ISSUE

May the Township pass a by-law prohibiting symbols of hate, namely the confederate flag?

ANSWER

The Township does not have jurisdiction to prohibit the flying of the Confederate Flag as this freedom of expression is protected by the Charter of Rights and Freedoms. A by-law passed with the intention of limiting freedom of expression would be quashed by the court for being outside its jurisdiction and found invalid for being in conflict with the Charter.

It is recommended that Council refer the requestor to the local Member of Parliament to address at the federal level. Alternatively the Township may pass a resolution to petition the federal government.



ANALYSIS

A municipality may only pass by-laws for matters under which it has been granted statutory authority. Pursuant to s. 11(3) of the *Municipal Act, 2001*, a municipality may pass by-laws related to the following matters:

By-laws re: matters within spheres of jurisdiction

(3) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

1. Highways, including parking and traffic on highways.
2. Transportation systems, other than highways.
3. Waste management.
4. Public utilities.
5. Culture, parks, recreation and heritage.
6. Drainage and flood control, except storm sewers.
7. Structures, including fences and signs.
8. Parking, except on highways.
9. Animals.
10. Economic development services.
11. Business licensing.

Most importantly, a municipality must not infringe on the rights and freedoms afforded to citizens in the Charter¹.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Flying, erecting and carrying flags is a form of expressive activity that falls within section 2(b) and is protected by the Charter. The Ontario Divisional Court has confirmed that while a municipality may create policies about the kinds of flags that may be raised on *public* property² (so long as it is for a legitimate policy reason) it may not ban private flags by creating a by-law or policy that suppresses or denies this fundamental freedom of expression.

If a by-law is found to infringe the Charter, a municipality must meet the test under section 1 to justify the infringement. Without providing an analysis, we can advise that restricting the flying of the confederate flag would not meet the requirements of this test and would not be reasonably justified.

¹ *Canadian Charter of Rights and Freedoms*, s.2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

² *Vietnamese Association of Toronto v. The City of Toronto* [2007], 85 O.R. (3d) 656



A municipality may not create by-laws or regulations that are within the provincial or federal sphere of jurisdiction or conflict with higher-order legislation. While a municipality may not regulate morality, the federal government may. Hate speech is covered federally within the Criminal Code³:

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Through the Criminal Code, the use of hate speech and symbols is enforced through police officers. Flying the confederate flag is not considered to be an act that is inciting hatred where such incitement is likely to lead to a breach of the peace or a wilfull promotion of hatred.

Being racist or displaying offensive symbols is not illegal on its own. The federal government would need to add or amend the Criminal Code to include the flying of a confederate flag as a crime. It is recommended that the requestor be referred to the local MP Terry Dowdall to address at a federal level.

Alternatively, the municipality may pass a resolution to petition the federal government to deem the flying of the confederate flag a hate crime or a symbol of terrorism. The federal government would need to justify the infringement on the freedom of expression through a section 1 analysis. We have not examined whether or not this initiative would be successful.

OTHER MUNICIPALITIES

Other municipalities in Ontario have by-laws which attempt to prohibit hate speech and symbols. It is our opinion that these by-laws would not be effective in prohibiting the display of the confederate flag. A decorative flag does not fall under the definition of sign in the Orillia and Owen Sound by-laws and it is highly unlikely that the Barrie by-law could prevent the flying of the confederate flag and stand up to a charter challenge.

³ Criminal Code, R.S.C., 1985, c. C-46, s. 319



Orillia

The Orillia Sign By-law “Property Maintenance By-law, Chapter 832 Signs” addresses lewd or indecent symbols. Section 832.6.2 prohibits a sign that is lewd or indecent in any word, picture, symbol or the like.

“Lewd” includes foul, profane or abusive language or derogatory and ethnic references. However, “Flag” is defined to only include advertising devices and a flag for decoration or expression would not be captured by this by-law.

Owen Sound

Owen Sound Sign By-law 2014-001 does not permit signs that display a hate message or symbol.

21. No Person shall Display or cause to be Displayed a Sign:
 - i. that bears a hate message or a logo, crest or graphic that would convey such a message;

Flags are given their own definition in the by-law and would therefore not necessarily fall into the category of a sign. Further, the definition of “sign” requires that the medium be used or capable of being used for identification, information or advertising. It is our opinion that a decorative flag would not meet this definition.

“Flag” means a flexible material intended to be hung from a pole displaying emblem for a country, province, territory, municipality, corporation, organization or association or of a decorative nature.

“Sign” means any device, surface, structure and other component part which is used or capable of being used as a visual medium to attract attention to a specific subject matter for identification, information or advertising purposes.

Barrie

Barrie Sign By-law 2018-029 has prohibited signs on public lands that are offensive, discriminatory as defined in the Ontario Human Rights Code. Unfortunately these are not defined terms in the Human Rights Code.

11.1.12.0.0 signs which advertise, or are deemed by the City Clerk or designate to portray an unlawful activity, or which contains any profanity or obscenity or other message that may be offensive or discriminatory as defined in the Ontario Human Rights Code.

20.2.1.0.0 The City may, at its sole discretion, remove without notice, any poster sign which has been determined is for an unlawful activity, or contains profanity or obscenity or other message that may be offensive



or discriminatory as defined in the Ontario Human Rights Code or is otherwise posted contrary to section 20.0.0.0.0.

The definition of a sign in this By-law includes decorations by any visual medium which would encompass flags. While the Township may wish to include a similar section in a by-law, it is unlikely that it would withstand a Charter challenge for infringing on freedom of expression in the case of an individual flying a confederate flag.

The Ontario Human Rights Code does not define the words “offensive” or “discriminatory”/“discriminate”/“discrimination”. It does set out a list of grounds under which certain individuals and organizations may not discriminate against individuals: citizenship, race, place of origin, ethnic origin, colour, ancestry, disability, age, creed, sex/pregnancy, family status, marital status, sexual orientation, gender identity, gender expression, receipt of public assistance (in housing) and record of offences (in employment).

The Ontario Human Rights Code addresses discrimination but not discrimination between ordinary citizens. Under the Code, all individuals have the right to be free from discrimination in five social areas: employment, housing, services, unions and vocational associations and contracts. The relationship between an individual flying an offensive flag and another individual would not fall under one of those categories and no remedy would be available at the provincial level.

ADDITIONAL REMARKS

Although the municipality may not pass a by-law to address the concerns regarding the flying of the confederate flag, Council may pass a resolution or make a public statement in support of inclusivity and against racism. This would respond to the request letter asking Council to ‘prioritize the significance of inclusivity of all peoples, residents and tourists alike, to know that they are welcome, and safe in our communities’ and would send a clear message about the Township’s values.

Please be in touch should you wish to discuss this opinion.

Yours very truly,
BARRISTON_{LLP}

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