





**CITY OF HAMILTON**  
**CITY MANAGER'S OFFICE**  
**Government & Community Relations Division**  
**and**  
**CORPORATE SERVICES DEPARTMENT**  
**Legal and Risk Management Services Division**

<b>TO:</b>	Mayor and Members General Issues Committee
<b>COMMITTEE DATE:</b>	August 9, 2021
<b>SUBJECT/REPORT NO:</b>	Hate Flags and Symbols (CM19006(f)/LS19031(e)) (City Wide) <b>(Outstanding Business List Item)</b>
<b>WARD(S) AFFECTED:</b>	City Wide
<b>PREPARED BY:</b>	Pauline Kajiura (905) 546-2424 Ext. 2567 Susan Nicholson (905) 546-2424 Ext. 4707
<b>SUBMITTED BY:</b>  <b>SIGNATURE:</b>	Morgan Stahl Director, Government & Community Relations City Manager's Office 
<b>SUBMITTED BY:</b>  <b>SIGNATURE:</b>	Stephen Spracklin City Solicitor Legal and Risk Management Services 

**RECOMMENDATION**

- (a) That signs or decoration, which include, but are not limited to, expressions and symbols associated with hate, such as the Confederate flag and the Nazi swastika, be banned from public property within the City of Hamilton, in recognition of the adverse power that such symbols can have on the psychology and well-being of community members;
- (b) That staff be directed to prepare an Amending By-law to By-law 10-197, being the Hamilton Sign By-law, to provide that the City of Hamilton may, at its sole discretion, remove, without notice, or order to be removed, any sign or decoration, which has been determined is for an unlawful activity, or contains

expressions and symbols associated with hate, profanity or obscenity or other message that is deemed offensive or discriminatory, as defined in the Ontario Human Rights Code, for Council's approval;

- (c) That the Mayor correspond with the Honourable David Lametti, Minister of Justice and Attorney General of Canada, in support of the Federation of Canadian Municipalities (FCM) resolution, respecting Strengthening Canada's Hate Speech Laws (attached as Appendix "A" to Report CM19006(f) / LS19031(e)), to request the Federal Government develop legislation that would clarify and strengthen the definition of hate speech and symbols, including explicit recognition of the psychological harm that can be caused by hateful symbols, and work with all levels of government in addressing the root causes of hate speech;
- (d) That the Mayor correspond with the Honourable Doug Downey, Attorney General of Ontario, to request that the Province enact legislation that would enable municipalities to make enforceable decisions regarding symbols deemed unacceptable by the local community, such consideration to also include a review of statutes where hate speech may be identified as illegal; and,
- (e) That a copy of this resolution be forwarded to the Association of Municipalities of Ontario, the Federation of Canadian Municipalities as well as local MPs and MPPs for their information.

## **EXECUTIVE SUMMARY**

Recommendations presented in this report are based upon consultation with Legal Services staff and research on the related activities of other municipalities.

**Alternatives for Consideration – Not Applicable**

## **FINANCIAL – STAFFING – LEGAL IMPLICATIONS**

Financial: There are no financial implications related to the recommendations of Report CM19006(f)/LS19031(e)

Staffing: There are no staff implications related to the recommendations of Report CM19006(f)/LS19031(e)

Legal: There are legal implications related to the recommendations of CM19006(f)/LS19031(e) as staff is recommending an amendment to the City of Hamilton Sign By-law as well as petitions to both Federal and Provincial governments on the development of legislation that clarifies and expands hate speech and symbols as well as legislation that enables municipalities to make enforceable decisions on these matters. Currently enforcement actions, beyond the Sign-By-law, are outside of the scope of municipal authority.

## **HISTORICAL BACKGROUND**

On September 23, 2020, staff provided Council with recommendations along with the two reports, submitted by the project consultant on research and public engagement. (LS19031(c)/PW19068(c)/CM19006(c) (City Wide) Recommendation (b) of the report indicated that City staff prepare a report on hate-related flags and symbols, which would enable City Council to consider options and actions that could be taken to address public display of any racist, hateful, offensive and insensitive emblems in Hamilton.

Council at its meeting of September 30, 2020, approved Item 13(b) of the General Issues Committee Report 20-014, which reads as follows:

That Community Initiatives staff be directed to prepare a report on hate-related flags and symbols, which would enable Council to consider options and actions that could be taken to address public displays of any racist, hateful, offensive and insensitive emblems in Hamilton, in consultation with Legal Services staff with respect to Section (2), Fundamental Freedoms, Canadian Charter of Rights and Freedoms, and report back to the General Issues Committee

This report provides recommendations for consideration and is presented to the General Issues Committee, August 9, 2021.

Related to the recommendations of this report, City Council at its meeting September 30, 2021, within Item 8.8, approved the following:

That City Council write a letter to the federal Minister of Justice, requesting that the threshold of “hate crime” as defined in the Criminal Code be consistently applied across law enforcement agencies in Canada;

Also related to the recommendations of this report, at the Council meeting of June 23, 2021, the Mayor and Council endorsed Motion M-84 *Anti-Hate Crimes and Incidents* and Private Member’s Bill C-313 *Banning Symbols of Hate Act*, put forward by Peter Julian, MP. (City Council, 21-011, Item 4.9)

## **POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS**

The municipality only has the powers provided by applicable legislative authority, principally the *Municipal Act*, 2001, S.O. 2001, c. 25;

The municipality can ban a symbol or expression, such as the Confederate flag and Nazi swastika, from public municipal property under the Sign by-law;

There is no inherent ability on the part of the municipality to limit an individual's freedom of expression on private property unless such expression falls under the provisions of the federal Criminal Code (R.S.C., 1985, c. C-46) and Section 319, inciting hatred against an identifiable group which is likely to result in a breach of the peace.

The Ontario Human Rights Code, R.S.O. 1990, c. H.19 does not include a category that would cover discrimination where an individual displays such symbols on private property unless it was used to discriminate in any of the categories of employment, housing, services, unions and vocational associations and contracts.

## **RELEVANT CONSULTATION**

Legal Services Division:

Regarding staff recommendation on developing a report for Council on flags, symbols and emblems considered by many equity-seeking residents to be racist, offensive and discriminatory, which have been displayed in Hamilton and other communities.

## **ANALYSIS AND RATIONALE FOR RECOMMENDATION**

Like many communities across the country and around the world, Hamilton is also increasingly tested and challenged by incidents of hate, racism and discrimination. While these acts are perpetrated by a very few, their actions nevertheless affect all Hamiltonians by impugning the city's reputation and diminishing community sense of belonging for many equity-seeking populations.

As directed by Council, in November 2019 staff retained a consultant, Sage Solutions, through a procurement process, to assist the City in reviewing its existing draft hate-related policies, suggest other relevant policies, conduct community engagement and develop key recommendations. Between December 2019 and July 2020, the consultant completed the following project activities:

Best practices research from over 20 municipalities in Canada, United States, Australia and the United Kingdom.

Community conversations with over 300 residents and equity-seeking

groups, including Black, Indigenous, 2SLGBTQI+, racialized and faith-based communities. The engagement also included a citywide community survey.

A review of the City's existing draft hate prevention and mitigation policies, procedures, by-laws and related strategies. One of the key finding reads as follows:

Charter of Rights & Freedom as a cover for Hateful expressions -  
Flags, symbols and emblems viewed as racist, hateful and discriminatory by many equity-seeking groups and community advocates continue to be displayed in Hamilton and various communities in Ontario, such as the Confederate flag. While there is the belief that the Charter of Rights and Freedom protects these expressions, many municipalities are now exploring ways to ban and reinforce their own beliefs and values of community equity, diversity and inclusion. Broader municipal associations such as the Federation of Canadian Municipalities (FCM) and the Association of Municipalities of Ontario (AMO) can play key roles in these conversations.

Recommendation (b) of report (LS1903(c)/PW19068(c)/CM19006(c) (City Wide) required City staff to prepare a report on hate-related flags and symbols, which would enable City Council to consider options and actions that could be taken to address public display of any racist, hateful, offensive and insensitive emblems in Hamilton. The then being whether there is an ability for the municipality to regulate hate symbols or would this fall outside of municipal jurisdiction.

The legal analysis starts with the *Municipal Act*, 2001, SO 2001, c.25, the statutory authority that grants various rights and abilities to the municipality. It does not however include the ability to pass by-laws that are properly within the jurisdiction of the Province of Ontario or the Federal government. This is often referred to as higher order legislation and a by-law that operates in conflict with a higher jurisdiction is not sustainable. The topic of hate speech and symbols is one that also has to take into account federal legislation, in that the municipality must also acknowledge and not infringe on the rights and freedoms afforded to citizens in the Charter of Rights and Freedoms as set out in the *Constitution Act*, 1982. Section 2, Fundamental Freedoms, which provides the following:

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

There was considerable discussion and debate in Ontario municipalities in the summer of 2020 regarding the Confederate flag and the Black Lives Matter movement. Many articles have been written and concluded that the flag represents racial intolerance and oppression. While not data based, there is general commonality that this flag is a hate symbol as is the other notable symbol, the Nazi swastika.

The ability of the City to ban such flags and symbols from municipal property has been debated in other municipalities. A particular example is from the City of Peterborough, where Council unanimously approved a ban on Confederate flags and swastikas on city property in 2020 as follows:

That all actions, speech and symbols of hate and racism including but not limited to the Confederate battle flag and Swastikas be banned from all City of Peterborough property.

The City of Peterborough Council also sent a letter to the office of the Attorney General of Canada, the Prime Ministers Office and their local Member of Parliament to seek support for such bans.

Legal analysis has concluded that while a ban on municipal property is permitted such as the City of Peterborough example, to take a broader approach and that such a ban extend to private property would be beyond municipal jurisdiction as this freedom of expression 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. The Ontario Divisional Court has confirmed that while a municipality may create policies about the kinds of flags that may be raised on public property, presuming 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.

There is no inherent ability on the part of the municipality to limit an individual's freedom of expression on private property unless such expression falls under the Criminal Code (R.S.C., 1985, c. C-46) and the provisions of Section 319 which states that:

**“319 (1)** Everyone 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...”

The interpretation of Section 319 of the Criminal Code is such that the use of Confederate flag is only illegal if it is used to promote or incite hatred or violence against an identifiable group. The display of a Confederate flag on its own is not illegal, and no one is prohibited from purchasing one, owning one, or displaying it under the Fundamental Freedoms provision of the Charter on private property, unless it meets the test of Section 319.

With respect to provincial legislation, the Human Rights Code, R.S.O. 1990, c. H.19 addresses discrimination but not discrimination between ordinary citizens. Under the Human Rights Code, all individuals have the right to be free from discrimination in identified 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 under this legislation.

Note however that the Human Rights Code would apply if the Confederate flag or Nazi swastika was used as a tool of discrimination in employment, housing, services, unions or vocational associations and contracts.

The conclusion of the legal analysis is as follows:

The municipality only has the powers provided by applicable legislative authority, principally the *Municipal Act*, 2001, S.O. 2001, c. 25;

The municipality can ban a symbol or expression such as the Confederate flag and Nazi swastika from public municipal property under the Sign by-law;

There is no inherent ability on the part of the municipality to limit an individual's freedom of expression on private property unless such expression falls under the provisions of the federal Criminal Code (R.S.C., 1985, c. C-46) and Section 319, inciting hatred against an identifiable group which is likely to result in a breach of the peace.

The Ontario Human Rights Code, R.S.O. 1990, c. H.19 does not include a category that would cover discrimination where an individual displays such symbols on private property unless it was used to discriminate in any of the categories of employment, housing, services, unions and vocational associations and contracts.

### **The Federation of Canadian Municipalities resolution**

Resolution – Strengthening Canada's Hate Speech Laws

Meeting – Annual Conference – June 2021

Resolution Status – Adapted

Sponsor – Town of Collingwood, ON

Resolution:

WHEREAS Canadians generally recognize of the strength of community that is derived from embracing and appreciating all community members regardless of ethnic origin,

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OUR Vision: To be the best place to raise a child and age successfully.

OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

gender and sexual orientation, socioeconomic status, or faith – and in accordance with statements made by the Federal Government, individual Provinces, and The United Nations, that hate speech has no place in an inclusive society that seeks to empower its constituents; and

WHEREAS it is widely recognized that symbols can have a powerful and profound effect on the psychology and well-being of community members; therefore, be it

RESOLVED that FCM petition the Canadian Government to build on Parliament's 2019 Report Taking Action to End Online Hate and engage in the development of legislation that would clarify and strengthen the definition of hate speech, including explicit recognition of the psychological harm that can be caused by hateful symbols, and work with all levels of government in addressing the root causes of hate speech.

#### **ALTERNATIVES FOR CONSIDERATION**

None

#### **ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN**

##### **Community Engagement and Participation**

Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community

##### **Healthy and Safe Communities**

Hamilton is a safe and supportive City where people are active, healthy, and have a high quality of life.

##### **Culture and Diversity**

Hamilton is a thriving, vibrant place for arts, culture, and heritage where diversity and inclusivity are embraced and celebrated.

#### **APPENDICES AND SCHEDULES ATTACHED**

Appendix "A" to Report CM19006(f)/LS19031(e) - Resolution – Strengthening Canada's Hate Speech Laws