

Montréal March 7, 2019

Email

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Objet : Tourist guide by-law G-2
N/ : 19657

Mr. King,

You have mandated us to provide you with a legal opinion on Montreal's G-2 by-law regulating tourist guides.

In particular you wished to know whether the by-law was unconstitutional; as restricting freedom of expression, and the lack of history regarding First Nations in the mandatory training program.

By-Law G-2

The first by-law to regulate tourist guides was by-law 2519 which was adopted on march 21, 1960. This by-law required tourist guides to hold a certificate of competency awarded by a tourism school in order to obtain a permit which could be renewed yearly. Maximum prices for tour guides to charge were laid out in articles 10 and 11. Contravention of any provisions would result in a fine of not more than 100 dollars and, failure to pay the fine could lead to a term of imprisonment as determined by the municipal court and no longer than 60 days.

By-law 6501, adopted in 1984, was fairly similar and a first ordinance stated the Institut du tourisme et de d'hôtellerie du Québec is authorized to issue tourist guide competency certificates. The second relevant ordinance stated the fees that a tourist guide may charge for a guided visit are \$27 at most, per hour.

Subsequently by-law 5568, replaced the by-law 5560 concerning permits and special or personal taxes on businesses, occupations and activities, and was adopted on December 9, 1980.

In August 1984, by-law 6501 was adopted, again stating that a tourist guide is anyone who holds a competency certificate issued by an institution recognized by the ministère de l'Éducation and designated by the Comité Exécutif. Article 2.1 specified that no-one could serve as a guide for remuneration without a permit, and this also

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applied to any benevolent guide who operates on a regular basis (at least once a month in accordance with article 4). The permit could not be issued to anyone who within the last ten years had been found guilty of a criminal act liable to imprisonment, except if they had obtained a pardon. A tourist guide could also not be under the influence of alcohol or drugs under article 6c).

Article 8 specified the tourist guide could not address passers by, make any promotions, or interfere with the free passage of pedestrians. Under article 9 the director of CIDEM may require that tourist guides who, before the coming into force of this by-law, had a permit, pass a requalification examination.

The Comité Exécutif had the power to designate the institutions authorised to issue tourist guide competency certificates, set conditions of admissibility and other terms for courses and examinations, establish regular retraining courses, establish a method to certify the competence of the guides, and require that guides declare the fee they charge. A first violation of the by-law resulted in a fine of not more than \$300, a second violation within twelve months to a fine of at least \$100 and not more than \$500, and subsequent violations to a fine of at least \$500 and not more than \$1,000.

Modifications were later made with by-law 7046 and several articles were replaced. "Tour" was defined as "a commented visit of historical sites, buildings, and monuments, of places which are picturesque or have a cultural character". In article 6 it was added that the tour guide "exclusively communicate information which strictly conforms to historic, geographic, economic, social and cultural facts and realities of the Ville".

By-law 9287 was later adopted on January 8, 1992, and article 73 amended the provisions concerning the amounts of fines. The subsequent by-law 95-085 adopted in 1995 amended the name "Commission d'initiative et de développement économiques de Montréal (CIDEM)" to "Service du développement économique". It was also amended by by-law 95-246 in 1995 which concerned special taxes.

The current consolidated by-law G-2 as it stands, was adopted on January 12, 1996.

Authority of the Municipality

According to Section 92(8) of the *Constitution Act, 1867*, in each Province the Legislature may exclusively make Laws in relation to a list of things which include "Municipal Institutions in the Province." Municipal governments have no constitutionally recognized existence and are creations of provincial legislation.

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The current *Charter of Ville de Montréal*, metropolis of Québec does not have any provisions regarding by-laws for tour guides, but includes a general power over economic and cultural promotion and development. Article 87 reads:

87. In addition to what is provided in section 84, the city has, to the extent provided by this Act or by the order of the Government made under section 9, special jurisdiction, obligations and powers in the following fields :

- (1) land use planning and development ;
- (2) economic promotion and community, cultural, economic, social, environmental and transportation development ;
- (3) recovery and recycling of residual materials ;
- (4) recreation and parks ;
- (5) social housing ;
- (6) the arterial system ;
- (7) water purification ;
- (8) police services ;
- (9) road service and vehicle towing ; and
- (10) the municipal court.

The *Municipal Code of Québec* is also silent on any specific power in the field of tourism. According to article 4 of the *Municipal Powers Act*, a local municipality has jurisdiction in the following fields:

- (1) culture, recreation, community activities and parks;
- (2) local economic development, to the extent set out in Chapter III;
- (3) power development and community telecommunications systems;
- (4) the environment;
- (5) sanitation;
- (6) nuisances;
- (7) safety; and
- (8) transportation.

The *Act respecting the Communauté métropolitaine de Québec* also mentions economic, cultural and tourism development as areas of jurisdiction:

112. The Community has jurisdiction, as provided in this Act, over the following matters:

- (1) (*paragraph repealed*);
- (2) economic development;
- (3) artistic or cultural development;
- (4) the development of tourism;
- (5) equipment, infrastructures, services and activities of metropolitan scope;
- (6) metropolitan public transportation;
- (7) residual materials management planning.

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In addition article 147 of the *Act* states "The Community may take any measure for the purpose of ensuring the harmonization of the action plans of the promotion or tourism development agencies in its territory."

The Montreal Guides

The APGT website states that it promotes, markets and networks the competence and integrity of the tour guiding profession. Various services for its members are organized including retraining, refresher courses, and conferences.

The website also sets out that the guides work with well-established tourism companies that offer guided tours within the territory of the city, who can animate a visit to a site, a building, a historical and/or cultural monument. The prices may vary depending on the agency, the time of year, the length and the type of guided tour that people are looking for, and some agencies also offer guided tours on a fixed basis.

As you know, only Montréal and Québec City have trained local licensed tourist guides in Canada, and the guides must renew their City permit each year, indicating they are licensed and have the legal right to conduct tours in Montréal.

While on duty, all Montréal guides must carry their license in a place that is visible, and a tour participant may, at any time, demand to see this license. In addition to the City of Montréal license, the APGT members also carry a badge in the colours of the Association, including photo and official logo.

All accredited guides in Montréal have successfully completed a mandatory training program recognized by the Québec Ministries of Tourism and Education, which costs \$2,259. This course is provided by the Institut de tourisme et d'hôtellerie du Québec and leads to an Attestation of College Studies (AEC), which grants its holder the right to obtain a license from the City of Montréal.

This training program consists of 240 hours of lectures and guiding exercises spread across various fields such as history, physical geography, Montréal society, urban studies, architecture and public art. The course is given in both in French and in English, and therefore bilingualism is necessary for admission into the program.

The top twenty-four candidates in each unit are then chosen by means of a selection process, including individual interviews, in which the main criteria are linked to the quality of communication, linguistic aptitude and the availabilities of aspiring guides. The final evaluations are composed of guided tours on foot and in a motor coach, in which the guests are representatives of the Montréal tourist industry.

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We have no access to a syllabus or further information on the content of the courses, and therefore cannot comment on the training program itself. It can be argued that this lack of information is a breach of natural justice.

With regards to the use of language in the courses, Canada's constitution sets out the official languages of Canada are English and French, which "have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada". In Quebec however, French has been the only official language since 1974, with *The Official Language Act*, or "Bill 22", and under article 1 of the *Charter of the French Language* it is still the official language of Québec. The law does however provide for limited services in English.

For College and university level institutions, the *Charter* states that every institution that provides college instruction, other than a private institution not accredited for the purposes of subsidies, must adopt a policy applicable to college-level instruction regarding the use and quality of the French language. There are however no guidelines on what the policy must be.

First Nations Representation

You were a member of the APGT, and as you have explained the association does not have a policy for members to acknowledge the territory or Indigenous people.

APGT has no policy on exactly what the guides will say on their tours, what could therefore result is a situation in which an experienced history teacher or First Nations Elder cannot give a tour, but a tour guide without a teaching license or Indigenous knowledge is permitted.

You have stated that in the industry, First Nations people rarely give tours of their own land, and the proportionally-low numbers of guides from marginalized communities greatly limits the diversity of represented perspectives on Montreal's history and culture. There may thus be some very one-sided representations.

It can therefore be argued that people should be allowed to decide who they want to listen to, rather than city officials deciding who is permitted to get paid to speak. The city of Montreal has stepped in between those who want to give tours and those who want to listen, and has chosen particular information that it finds important for guides to master and prove they know well.

Freedom of Expression and Lawful Restrictions

Freedom of expression protects everyone's right to talk for a living, whether one is a comedian, journalist, or a tour guide. Speech is everywhere, and freedom of expression of one person or group must be balanced against the rights of others.

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Freedom of expression may be restricted where the person or group exercising it violates the rights of another person or group or the democratic values of society at large. Nevertheless, any restrictions to freedom of expression must be lawful and must be an exception made on individual cases.

Freedom of expression can be limited by places intended by the state to perform specific social functions. The interest which any person may have in communicating in a place suited for the purpose cannot have the effect of depriving the citizens as a whole of the effective operation of government services and undertakings. A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions: *Comité pour la République du Canada c. Canada* [1991] 1 RCS 139, *Ramsden c. Peterborough (Ville)* [1993] 2 RCS 1084, *R. c. Guignard* [2002] 1 RCS 472, *Montréal (Ville) c. 2952-1366 Québec Inc.* [2005] 3 RCS 141, *Greater Vancouver Transportation Authority c. Federation Canadienne des étudiantes et étudiants* [2009] 2 RCS 295

As explained in *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 968, "freedom of expression was guaranteed in the *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream". A complete prohibition on the communication of repugnant or offensive ideas, is not a minimal impairment of that right.

Freedom of expression is central to our democracy, but Canadian courts have consistently found that the right to freedom of expression is not absolute and limitations of freedom of expression may be justified under s. 1: *Irwin Toy Ltd.*; *Keegstra*, [1990] 3 SCR 697 and *R. v. Butler*, [1992] 1 RCS 452; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 (S.C.C.). Section 1 both "guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society" (*Canada (human Rights Commission) v. Taylor*, at p. 916, *per* Dickson C.J.).

Various Canadian laws have accordingly placed restrictions on freedom of expression, such as perjury, counselling suicide, threats, and creating child pornography which have been limited in the federal *Criminal Code* as criminal offences. The provincial and federal laws in Canada pertaining to defamation and libel are limited to protect the reputations of individuals.

Although freedom of expression is not absolute, it is a particularly strong right and cannot be set aside except with good reasons. The court in *Committee for the*

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Commonwealth of Canada v. Canada, [1991] 1 SCR 139, endorsed the importance of freedom of expression as set out in *R. v. Kopyto* [1987], ONCA176:

“.. it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.”

In *Montréal (Ville) c. Cabaret Sex Appeal inc.* [1994] QCCA 5918, Baudouin J.A. pointed out that it is rather the unpopular, controversial and hurtful expression that requires protection:

“Une société libre et démocratique comme la nôtre doit nécessairement faire preuve d'un haut degré de tolérance pour l'expression de pensées, d'opinions, d'attitudes ou d'actions qui, non seulement ne font pas l'unanimité ou ne rallient pas les vues de la majorité des citoyens, mais encore peuvent être dérangeantes, choquantes ou même blessantes pour certaines personnes ou pour certains groupes. La liberté d'expression ne doit pas être couchée dans le lit de Procuste du «political correctness». Ce n'est que dans l'hypothèse d'abus clairs et donc de danger pour le caractère libre et démocratique de la société, qu'au nom de la protection de certaines valeurs fondamentales, alors non négociables, on peut imposer l'intervention légitime de la loi.”

This conclusion that freedom of expression is a strong right is also clear from *R. v. Keegstra*, [1990] 3 SCR 697, *Jaggi Singh c. Sa Majesté la Reine* 2010 QCCA, and *R. v. Butler*, [1992] 1 RCS 452.

In *Québec (Procureur général) v. Drapeau* [1999] QCCA 13182, the issue was the constitutional validity of section 77 of the *Loi sur les permis d'alcool (LPA)*. The contested provision was worded as:

“Il est interdit aux membres du personnel du détenteur d'un permis de bar ainsi qu'à toute personne qui participe à un spectacle dans un bar, de se mêler aux clients, de boire ou de danser avec eux ou de prendre place à la même table ou au même comptoir qu'eux.”

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The court found that the stated objective of which is consumer protection, is ancillary to this scheme and is safely anchored in a recognized field of provincial competence. However, the activities of conversation, flirtation, social interaction, which are prohibited affect the individual's personal autonomy and right to meaningful participation in society. The expression prohibited is deserving of the utmost protection, and does not allow for an elevated level of deference. The court noted that the provision in issue

“could be distinguished from the municipal by-law held ultra vires the city of Calgary in *Westendorp v. The Queen*, 1983 CanLII 1 (SCC), [1983] 1 S.C.R. 43, where the city purported to prohibit a person remaining on the street for the purpose of prostitution, or from approaching another person on the street for the purpose of prostitution. Speaking for the Court, Laskin C.J. found, at p. 52, that the by-law constituted “[...] so patently an attempt to control prostitution as to be beyond question”, and found that the prohibition was not firmly anchored in a provincial head of power, since it was manifestly different from the remainder of the by-law enacted to control streets and prevent a public nuisance. The situation was therefore distinguished from *Bédard v. Dawson*, 1923 CanLII 43 (SCC), [1923] S.C.R. 681, where provincial legislation authorizing closure of “disorderly houses” was upheld as in relation to the use of property, and *A.G. Canada and Dupond v. Montreal*, 1978 CanLII 201 (SCC), [1978] 2 S.C.R. 770, where a municipal by-law prohibiting all assemblies, parades or gatherings in parks and streets was upheld as a valid regulation of the municipal public domain.”

By-law G-2 outright prohibits anyone from giving tours even for free. This means that people cannot give friends or family a tour of their neighborhood, an architect student cannot show anyone around Montreal and convey what he has learned, licensed teachers cannot conduct field trips and Indigenous Elders are legally blocked from leading tours on their ancestral territory. The by-law is clearly overbroad and cannot be left in place because of the adverse effect this might have on legitimate speech: *Libman v. Quebec (Attorney General)*, [1997] 3 SCR 569, *Jaggi Singh c. Sa Majesté la Reine* 2010 QCCA, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, and *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712.

The city of Montreal has the power to regulate in the areas of economy and tourism, and may justify this limitation of expression and speech on the protection of the public. However there is no specific power allowing the city to create professional associations so an ultra vires argument is also possible.

The by-law is certainly not perfect, and it is also difficult to determine what “factual” means in the context of article 8 (4) requiring tourist guides to “convey information strictly in accordance with historical, geographic, economic, social and cultural facts.”

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Conclusion

By-law G-2 is the final consolidated by-law of past by-laws regulating tourist guides in Montreal. Section 92(8) of the *Constitution Act, 1867*, gives each Province the power to exclusively make Laws in relation to Municipal Institutions in the Province, and the *Charter of Ville de Montréal*, *Municipal Powers Act*, and the *Act respecting the Communauté métropolitaine de Québec* give municipalities jurisdiction to enact by-laws for economic, cultural and tourism development.

As there is limited information on the training program and courses, there is a lack of natural justice for those who wish to enroll. The fact that the courses are given in majority in French however is in accordance with the *Charter of the French Language*.

Freedom of expression is a particularly strong right and cannot be set aside except for good reasons. Canadian courts have made it clear that reasonable limits can be placed on our freedom of expression, but they have also carefully analysed such limits to ensure that they are minimal and balanced with other measures that protect free expression.

The by-law G-2 is overbroad and its limitation on freedom of expression extensive, as it prohibits anyone from giving gratuitous tours, even after it is understood they do not act as tour guides. In addition, there is no specific power allowing the city to create professional organisations so an ultra vires argument can be made.

Although this permit and training program currently imposes a burden on experienced history teachers and professors, Indigenous Elders, as well as individuals who want to give a tour of their neighborhoods that they have grown up in, there are improvements that can be suggested. The city will surely justify the by-law objective of protecting the public from inexperienced people acting as tourist guides.

The conclusion one can come to is that the by-law is contestable on both the freedom of expression, and to a lesser degree the absence of power.

By-law G-2 is also contrary to the goals of the Truth and Reconciliation of Canada, urging all levels of government to acknowledge Aboriginal language and culture.

In recent years the courts have adopted a policy of deference which makes success harder for challengers. For instance, it is not certain *Drapeau* would be decided the same way. That said, contesting the by-law is certainly worth while if you are prepared to assume the risk.

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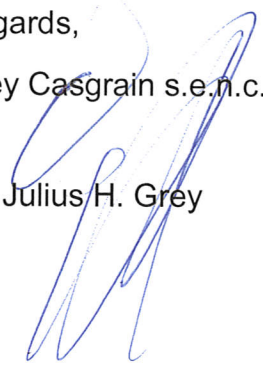
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Regards,

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