

DEFAMATION: WHAT ARE YOUR RIGHTS?

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I. INTRODUCTION

Unlike the officers and employees of a private corporation, as an officer or employee of a local government, you are often in the public spotlight. Being in the spotlight can often be difficult as it exposes you to significant public scrutiny. You are, in many ways, seen as the face of the local government, and the public views you as being responsible for the decisions of the local government. Indeed, in some cases, the public views you as making those decisions. This public perception can sometimes be positive and rewarding. At other times, especially, for example, in the months immediately before and after an election or when your local government is considering controversial issues around land use planning, this public perception can be negative and feel like a personal attack.

At times, the difficulties associated with being in the public spotlight will engage the law of defamation; either through an allegation against you that you have defamed a member of the public or through an allegation by you that a member of the public has defamed you.

In this paper, we will discuss the basic principles of the law of defamation, and discuss the issues that law raises for you as a local government officer or employee.

II. THE LAW OF DEFAMATION: THE BASIC PRINCIPLES

To be successful in a defamation claim, the individual alleging that he/she was defamed must prove that the words, either spoken or written, were defamatory, in the sense that they would tend to lower his/her reputation in the eyes of a reasonable person, that the defamatory words referred to him/her, and that the defamatory words were published to at least one person other than the individual alleging that he/she was defamed.

While proving the latter two requirements for a successful defamation claim can be relatively straightforward, proving the first requirement for a successful defamation claim can be more difficult.

Proving that words, either spoken or written, were defamatory can be based on the plain and ordinary meaning of the words themselves or by virtue of external facts or circumstances, known to the person to whom the words were published, which give the words a defamatory meaning, by way of innuendo, different from that in which they would ordinarily be understood.

While the courts have said that there is a low threshold for establishing defamation at first instance, the courts have cautioned that, before defamation can be made out, there must be a realistic threat that the words, in their full context, would reduce a reasonable person's opinion of the individual alleging that he/she was defamed. In this regard, the courts have recognized that the full context not only includes the circumstances in which the words were published but

also the character of the person who published the words. For example, where words published in the context of a heated political debate are, for effect, very unflattering of the individual who alleges that he/she was defamed, and the persons to whom the words were published recognize this context, the courts will find that the words would not reduce a reasonable person's opinion of the individual alleging that he/she was defamed. Moreover, where the character of the person publishing the very unflattering words is questionable, the courts will again find that the words would not reduce a reasonable person's opinion of the individual alleging that he/she was defamed.

Once defamation has been established at first instance, the burden then shifts to the person who published the defamatory words to establish a defence in order to escape liability.

A defence commonly raised in the context of defamation claims relating to local government officers and employees is that of qualified privilege. Qualified privilege applies where the person who published the defamatory words had an interest or a duty (legal, social or moral) to publish them, and there was a corresponding duty or interest of the person to whom the defamatory words were published to receive them. The privilege attaches to the "occasion" upon which the publication was made, and not to the publication itself, and is intended to serve the interests of society generally, and not the interests of particular individuals or a class. It is not enough for the person who published the defamatory words to believe that the interest or duty existed. Rather, it is a question of law for the courts to determine whether the circumstances warrant a finding that the publication of the defamatory words was so protected. The defence is lost if the dominant motive of the person publishing the defamatory words was malice or if the limits of the duty or interest were exceeded. The latter circumstance can arise where the person publishing the defamatory words includes anything that is not relevant or pertinent to the occasion or where the manner and extent of the publication was excessive.

III. DEFAMATION CLAIMS AGAINST YOU

A. Personal Liability

Generally speaking, under section 287(2) of the *Local Government Act*, local government officers and employees are not liable for damages, and cannot be sued in their personal capacity, for anything said or done or omitted to be said or done by them, or for any alleged neglect or default by them, in the performance or intended performance of their duty or the exercise of their powers. However, their local governments are vicariously liable for damages that the officers and employees cause.

The most commonly spoken of exception to the immunity from personal liability for local government officers and employees is where the officer or employee has been guilty of dishonesty, gross negligence or malicious or wilful misconduct. While this exception is an important one, it is one that, in our experience, has rarely been invoked by the courts.

The second exception to the immunity from personal liability for local government officers and employees is in relation to claims in libel or slander (i.e., defamation claims). The importance of this exception is that it exposes a local government officer or employee to personal liability. While the local government may still be vicariously liable for damages that the officer or employee causes, the individual who was defamed may choose only to sue only the officer or employee, and not the local government, and may choose to enforce any judgment that the individual is awarded against only the officer or employee, and not the local government. The likelihood of this exception being invoked by the courts is much greater than the courts invoking the exception from personal liability where the officer or employee has been guilty of dishonesty, gross negligence or malicious or wilful misconduct.

B. Indemnification

In light of the exposure of local government officers and employees to personal liability for defamation, the question of indemnification in regards to such claims is of great significance to local government officers and employees.

The indemnification of local government officers and employees is addressed by section 287.2 of the *Local Government Act*, which provides as follows:

Indemnification against proceedings

287.2 (1) In this section:

"indemnification" means the payment of amounts required or incurred

(a) to defend an action or prosecution brought against a person in connection with the exercise or intended exercise of the person's powers or the performance or intended performance of the person's duties or functions,

(b) to satisfy a judgment, award or penalty imposed in an action or prosecution referred to in paragraph (a), or

(c) in relation to an inquiry under the *Public Inquiry Act*, or to another proceeding, that involves the administration of the municipality or the conduct of municipal business;

"municipal official" means

(a) a current or former council member,

(b) a current or former municipal officer or employee, or

(c) a person who is or was a person referred to in section 287 (1) [*immunity for individual municipal public officers*], but only in relation to the exercise of powers or the performance of duties or functions for or on behalf of a municipality.

(2) A council may do the following:

(a) by bylaw, provide for the indemnification of municipal officials in accordance with the bylaw;

(b) by resolution in a specific case, indemnify a municipal official.

(3) As a limit on indemnification under subsection (2), a council must not pay a fine that is imposed as a result of a municipal official's conviction for an offence that is not a strict or absolute liability offence. ...

Under this section, a local government has the authority to indemnify its officers and employees in respect of the costs of defending a lawsuit based in defamation brought against them, and in respect of any judgment made against them out of such a lawsuit. However, this authority to indemnify is only available where the alleged defamatory statements made by the officers or employees were made in connection with the exercise or intended exercise of the powers of the officers or employees or the performance or intended performance of their duties or functions.

In order for the local government to exercise its authority to indemnify its officers and employees in respect of the costs of defending a lawsuit based in defamation brought against an officer or employee, and in respect of any judgment made against the officer or employee out of such a lawsuit, the local government must have adopted a sufficiently broad indemnification bylaw under section 287.2(2)(a) of the *Local Government Act* in advance of the lawsuit having been commenced or must pass a resolution under section 287.2(2)(b) of the Act to indemnify the officer or employee in relation to the specific lawsuit. In the latter case, on the issue of defence costs, the indemnification resolution should expressly provide that the officer or employee is to be indemnified both in respect of the costs to be incurred by the officer or employee moving forward but also in respect of any costs incurred by the officer or employee to the point in time that the resolution was passed.

C. The Availability of the Defence of Qualified Privilege

As discussed earlier, the defence of qualified privilege applies when the individual who publishes words, albeit defamatory, has a legal, social, or moral duty to publish the words, and the person to whom the words are published has an interest or duty to receive them.

Meetings of local government elected officials are generally occasions to which the defence of qualified privilege would be available. As such, words published by those elected officials in such meetings are generally protected from liability. In *Prud'homme v. Prud'homme*, the Supreme Court of Canada described it this way:

The English and Canadian courts, however, have held that words spoken at a meeting of a municipal council are protected by qualified privilege (J. P. S. McLaren, "The Defamation Action and Municipal Politics" (1980), 29 *U.N.B.L.J.* 123, at pp. 134-35). Accordingly, the fact that words spoken at a meeting are defamatory does not, in itself, mean that a municipal councillor will be liable therefor. In order to succeed in his or her action, the plaintiff must prove malicious intent or intent to harm on the part of the councillor (Brown, *supra*, at p. 13-4). The reason for that qualified privilege was eloquently stated by Diplock L.J. in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 152:

My Lords, what is said by members of a local council at meetings of the council or of any of its committees is spoken on a privileged occasion. The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter which they believe affects the interests or welfare of the inhabitants. They may be swayed by a strong political prejudice, they may be obstinate and pig-headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and so long as they do so honestly they run no risk of liability for defamation of those who are the subjects of their criticism.

The defence of qualified privilege is not reserved exclusively to elected municipal officials. It applies whenever a person who makes a communication has an interest or a duty, legal, social or moral, to make it to another person who has a corresponding interest or duty to receive it (*Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334, approved by this Court in *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 321; *Hill, supra*, at paras. 143-46; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at paras. 78-81). This will be the case, for example, where an employer or professor provides references about his or her employee or student, or where a journalist publishes defamatory information in the public interest that he or she honestly believes to be true.

Given the public duties and powers of local government officers and employees, it is likely that the defence of qualified privilege would be extended by the courts to apply to the published words of those officers and employees, even where those words are defamatory.

D. Responses to a Defamation Claim

In considering how to respond to a defamation claim brought against you as a local government officer or employee, you are acting in two capacities. You are acting in your personal capacity and in protection of your personal interest; the lawsuit having been brought against you personally. You are also acting in your professional capacity and in protection of the public interest; your local government likely indemnifying you for the significant cost of defending the lawsuit and for any judgment made by a court against you, and likely being vicariously liable for your actions.

In these circumstances, it is important that you take a step back and thoroughly consider the implications of vigorously defending the lawsuit, or issuing an apology in respect of the allegedly defamatory words published by you. On the one hand, vigorously defending the lawsuit will likely be costly, and it will likely take some time for the matter to be resolved by the courts. On the other hand, you may strongly believe in the words published by you and find it difficult to apologize in the circumstances.

The decision on how to respond to a defamation claim brought against you as a local government officer or employee will largely depend on the context. One matter that you should pay particular attention to in considering how to respond is your personal state of mind at the time that the allegedly defamatory words were published by you. Were the words published in the heat of the moment or were they thought out in advance? Do you have any second thoughts about the specific words published by you (as opposed to the message that you intended to deliver)? If the answer to any of these questions is yes, you may want to seriously consider an apology or at least an explanation of the published words to minimize their impact on the individual who has alleged that you defamed him/her.

IV. DEFAMATION CLAIMS BY YOU

A. Were You Defamed?

Unfortunately, there is little doubt that, at some point in your career as a local government officer or employee, you will find yourself at the centre of a controversy in your local government. Whether it is part of a pre or post election campaign, or part of a controversial land use decision, one or more members of the public will take aim at you. In doing so, those members of the public will likely have little regard for your feelings, and it may very well seem to you that these members of the public have embarked on a personal attack on your character and reputation.

When considering how to respond to these perceived personal attacks on your character and reputation, you must first determine whether you have, in fact, been defamed. Has your

reputation been lowered in the eyes of a reasonable person. There are a number of considerations that you should take into account in determining this. Generally, these considerations relate to the context in which the personal attacks are taking place.

First, you must look at the nature of the circumstances surrounding the perceived personal attack on your character and reputation. For the most part, these attacks will be centred around matters that are politically charged. Unfortunately, in the exercise of your day-to-day duties and powers, you are surrounded by politics. In that context, you must ask yourself whether these attacks are truly personal, or are politically motivated. Are you simply a casualty of politics? If the attacks are clearly politically motivated, then the impact of the attacks on your character and reputation will be minimized; a reasonable person will see the attacks for what they are, political statements as opposed to statements personal to you.

Second, you must look to the character of the members of the public involved in the perceived personal attack. For the most part, such attacks will be by members of the public who are on the fringe of your local government's community. In that context, you must ask yourself whether the attack could have any impact on a reasonable person's view of your character and reputation. If the attack is from a member of the public whose character is suspect within your local government's community, then the impact of the attacks on your character and reputation will again be minimized.

Third, you must look to your ability to respond to the perceived personal attack. As a local government officer or employee, you likely already have a developed public profile. Where that public profile is a positive one, the likelihood of the attack impacting on a reasonable person's view of your character and reputation is again minimized. Moreover, you must consider your relative ability to put the record straight regarding the subject matter of the attack. If the attack occurs at a meeting of your local government, you have the opportunity to put the record straight. You may also have access to news media and other outlets to do so. Where you have ample opportunity to put the record straight, the courts will be hesitant to find that you were defamed.

B. Responses to Being Defamed

Where you have determined that you have been defamed by a member of the public, your response should be measured.

First, before responding to having been defamed by a member of the public, consider the implications of responding at all. In many circumstances, responding to the defamatory publication will simply have the effect of prolonging the publication of the defamatory material. You should consider whether the better response to having been defamed is to do nothing, and allow the issue to extinguish itself, or to respond vigorously, and add fuel to the issue. In this regard, rather than reacting at the first instance of publication of defamatory words by a member of the public, it is more often than not prudent to adopt a wait and see approach.

If you have determined that it is necessary to respond to having been defamed, you should, at first instance, demand an apology and retraction of the defamatory words from the members of the public that published them. Your demand should be copied to local news media and other outlets for the purpose of making known to the public that you believe the published words to be defamatory and that you take offence to them. In this manner, while you may not receive the apology and retraction that you demand, you will have gone a long way to minimize the impact of the defamatory words on your character and reputation. In demanding the apology and retraction, we recommend that you not threaten legal proceedings if the apology and retraction is not received. Including a threat of legal proceedings if the apology and retraction is not received will likely only be perceived by the members of the public who published the defamatory words as being oppressive, and will provide them with further ammunition on which to prolong the matter and potentially gain broader public support. Of course, if the apology and retraction is not received, you can resort to legal proceedings even if you have not threatened in your demand that you will do so.

Where the foregoing has failed, and you believe that you must take further steps to protect your character and reputation, you should consult legal counsel and, if recommended, commence a defamation action against the members of the public who published the defamatory words about you.

C. Funding Your Defamation Claim

If, after taking into account all of the above considerations, you have determined that you must respond to perceived personal attacks by members of the public on your character and reputation, and have determined that you will bring a defamation claim against the members of the public involved in the attacks, you must then determine how you will fund the litigation.

Of course, you have the absolute right to spend your personal resources on pursuing such a claim.

The real question is whether local governments may fund defamation claims commenced by their officers and employees. In several decisions of the courts, the courts have contemplated that defamation claims brought by local government officers and employees may be funded by their local government employer.

In British Columbia, there is no express authority in the *Community Charter* or the *Local Government Act* that authorizes local governments to fund legal proceedings commenced in the names of their officers and employees. The authority of local governments to indemnify their officers and employees being limited to the defence of legal proceedings brought against the local government's officers and employees.

However, local governments do have the broad authority to provide benefits and remuneration for their officers and employees. In the context of this authority, it is reasonable to conclude that local governments may provide legal funding to their officers and employees to pursue a claim in defamation as a general or employment benefit.

In saying the foregoing, we recognize that there is a risk that the provision, as a benefit, of legal funding by a local government to its officers and employees to pursue defamation claims may be characterized by the courts as an indemnity, which is not within the scope of section 287.2 of the *Local Government Act* and, as a result, is unlawful. To avoid such a risk, it would be advisable to take all steps possible to characterize the funding as a benefit, not an indemnity. For example, consider the following: establishing a cap on the funding; requiring that the officer or employee repay the funding to the local government from any damages he or she is awarded; and establishing terms and conditions for eligibility (e.g., that the alleged defamatory words be about the officer or employee's professional or job-related reputation, not about the officer or employee's "personal" reputation).

We also recognize that there is a risk that the authority to provide, as a benefit, legal funding by a local government to its officers and employees to pursue defamation claims may be characterized by the courts as being contrary to the right to freedom of expression under the *Canadian Charter of Rights and Freedoms*. It is arguable that, for the very same reasons that the courts have held that local governments cannot sue in defamation (e.g., that expression about public affairs in general, and government in particular, lies at the core of freedom of expression, and the use of public funds to impede such expression is undesirable), the courts could find that local governments cannot fund the pursuit of defamation claims by their officers and employees. On balance, we believe that these concerns would be offset by the concern that requiring the officers and employees of local governments to fund such claims themselves would have the impact of reducing the availability of qualified individuals willing to take employment with local governments.

V. CONCLUSION

Having gone through the process of preparing this paper, it reinforced in my mind that the interaction between local governments and the law of defamation stems inextricably from the fundamentally political nature of the environment within which local government officers and employees work. When you chose to work in this environment, you exposed yourself to the public spotlight, and the significant public scrutiny that spotlight exposes you to. Unfortunately, it is a part of the job, albeit unwanted and undeserved.

NOTES