

**DEFAMATION? SAYS WHO?
THE INS AND OUTS OF LIBEL & SLANDER FOR
ELECTED OFFICIALS**

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I. Introduction

The law of libel is fundamentally concerned with the protection of reputation – “the purpose... is to provide individuals with a remedy for the sting that a defendant’s false statement has caused to the plaintiff’s reputation in his or her particular community, and to the plaintiff’s feelings.”ⁱ The protection of reputation may restrict freedom of speech. Hence the law of defamation has traditionally and correctly been described as an attempt to balance these competing interests.

The tension between these competing interests is particularly evident in the political sphere. As will be discussed in this paper, many of the guiding principles of defamation law originate at the intersection of local government and the public interest.

The law of defamation is driven by the judge made common law that has evolved over the centuries. In many respects, it is the common law at its worst: difficult to discover, technical and archaic in its rules. It can also be one of the most colourful areas of the common law. If there is one certainty in defamation law, it is that people are exceptionally adept at discovering new ways to defame one another.

In British Columbia the Legislature, through the *Libel and Slander Act*,ⁱⁱ has codified a number of rules that either clarify or change common law rules. For the most part, these provisions deal with matters of defence and procedure and are outside the scope of this paper.

Time will not permit a coverage of all aspects of the topic of defamation; these are covered in texts that are readily available. This paper focuses on the elements of defamation, the common law defences, and the unique role of local politics in the development of the law of defamation.

II. The Elements of Defamation

A. What is Defamatory

Defamation is an untrue publication which tends to injure reputation in the popular sense; to diminish the esteem, goodwill or confidence in which the plaintiff was held; or to excite adverse, derogatory or unpleasurable feelings or opinions against him.

The torts of defamation are therefore fundamentally concerned with the protection of reputation – the purpose is to provide individuals with a remedy for the sting that a defendant’s false statement has caused to the plaintiff’s reputation in his or her particular community, and to the plaintiff’s feelings.

In its traditional formulation, the law of defamation rests upon a form of no-fault liability. The plaintiff need establish only three things to make out a *prima facie* cause of action, namely, that the words complained of:

- (1) are reasonably capable of defamatory meaning;
- (2) refer to the plaintiff; and
- (3) have been published.

Examples of defamatory allegations are easy to find: allegations that a person is of a cruel and sadistic nature,ⁱⁱⁱ that a person is “stupid”,^{iv} that a person was habitually drunk in the Legislature^v, that certain people are “nothing but a bunch of Shysters”,^{vi} that a person is a “sick son of a bitch”^{vii}, and countless others. In the interests of brevity, I have limited these examples to those arising out of local government.

Despite an abundance of examples, no universally accepted definition of what is defamatory has emerged. A variety of tests have been employed. In the case of *Sims v. Stretch* [1936] 2 All E.R. 1237 at page 1240, Lord Aitken stated the test for determining whether words were defamatory was:

Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

This test has been adopted by the Supreme Court of Canada^{viii} and in British Columbia Courts^{ix}:

For most purposes this test will be adequate, but it may not be satisfactory in some cases where the words do not allege morally reprehensible behavior or character but nevertheless will lower a person's estimation in the eyes of an ordinary person.

The hypothetical "ordinary person" (and therefore the judge or jury as trier of fact) determines whether a communication is defamatory by examining the "natural ordinary meaning" of words. The meaning will not be limited to the direct, literal interpretation, but can include also any legitimate inferences that flow from the words taken as a whole in their context, including, for example, a headline in a newspaper and general public knowledge on the matter in question.

By way of example, in *Vander Zalm v. Times Publishers*^x, the trial judge held that an editorial cartoon of the former premier (at the time the Minister of Human Resources) "gleefully pulling the wings from flies, with obvious enjoyment, with a tag reading "Human Resources"^{xi} upon his chest" was defamatory:

After consideration I have reached the conclusion that considered symbolically, allegorically or satirically, as it should be and would be by the viewing public, the cartoon was defamatory because in the natural and ordinary meaning that viewers would attribute to it, it meant and would be understood to mean that the plaintiff is a person of a cruel and sadistic nature who enjoys inflicting suffering on helpless persons, said false pictorial representation adversely affecting and lowering his reputation and standing in the estimation of right-thinking members of society generally by exposing him to hatred, contempt or ridicule, and disparaging him in his office as Minister of Human Resources.^{xii}

Where words are not defamatory in their ordinary natural meaning, they may nevertheless be actionable by way of an innuendo. An innuendo is a defamatory meaning, other than the ordinary natural meaning, that may flow from the words by reason of facts not stated. While it would not ordinarily be defamatory to state that X is engaged to Y and, it becomes defamatory to the plaintiff Z if the plaintiff and X have been living together as man and wife.

B. Reference to the Plaintiff

The plaintiff must prove that the defamatory words refer to him or her. As with the defamatory meaning of words, the test relies on the understanding of the hypothetical “ordinary person.”

C. Who May Sue

Both individuals and non-natural persons, such as corporations, may bring actions for defamation so far as they are capable of having a reputation.

A municipal corporation cannot sue for defamation. In *Dixon v. Powell River (City)*,^{xiii} controversy emerged over a proposal by the City of Powell River to seek approval for funding a harbour project. Certain members of the community expressed views in opposition to the steps being taken by the City, including letters to the editor and online comments that were sharply critical of the conduct of city council. One member of city council also published an email expressing her opposition to the proposal.

In response, the City of Powell River retained legal counsel and delivered letters to the objects, which stated in part as follows:

We have reviewed a copy of an e-mail you published and distributed over the internet on or about February 21, 2008 styled, "*North Harbour Vote Count*". The e-mail, over your signature as "president", was addressed to "*Dear Townsite Ratepayers*". Your e-mail contained the statement: "*Likely City Hall will be using the days between now next Tuesday trying to eliminate some of the forms*".

The City is a strong supporter of the right to engage in public debate about the conduct of government bodies and institutions. The City firmly supports individual rights to express ideas and to criticize the conduct and operation of civic institutions. However, as stated by the Honourable Mister Justice Wilson, "*freedom of speech is not a license to defame*".

Your statement conveys the false and defamatory imputation that the City will be conducting the present elector assent process in a corrupt fashion. That is false

and injudicious. More fundamentally, it is defamatory of the City and actionable against you.

In all of the circumstances, we must put you unequivocally on notice that you are to refrain and desist from defamation of the City.^{xiv}

In response to the letters, the plaintiff, the secretary of the British Columbia Civil Liberties Association, brought an action seeking a declaration that the City of Powell River does not have legal authority to institute civil proceedings or threaten to do so, for defamation of its reputation as a municipal government. Although there was earlier law that suggested a municipal corporation could be defamed^{xv}, the court held it was not bound by these decisions as these cases predated the *Canadian Charter of Rights and Freedoms*. Garson J. concluded at paragraph 32 that the importance of fostering free speech and discussion about government decisions meant that local governments could not sue for defamation to their governing reputation:

It seems clear to me on the basis of *Hill*, that common law causes of action must be applied in a manner that is consistent with the *Charter*. It is evident that the law of defamation and the constitutional law of freedom of speech ought not to develop in two separate streams incorporating different values. Rather, the two should accommodate each other. In this case, I agree with the judgments in the *Halton Hills* and *Montague* cases in which the justices decided that governments cannot sue for defamation for damage to their governing reputations. The *Charter* enshrined value of freedom of expression is paramount and local governments have resort to other means to protect their reputations from citizens who publish critical commentary about the government itself.

The decision in *Dixon v. Powell River* is consistent with the law in Ontario.^{xvi} These decisions do not prevent individual members of local government from suing for defamation to their individual reputation.

III. The Unique Characteristics of Defamation

Defamation contains two separate torts, libel and slander. Libel is defamation in written or permanent in form, which extends to pictures, statues, films, TV or even conduct implying a defamatory meaning. Slander is oral defamation.

To succeed in an action for either tort the plaintiff must allege and prove that the words complained of: (1) are reasonably capable of defamatory meaning; (2) refer to the plaintiff; and (3) have been published.

In libel, the common law presumes falsity, fault, and damages. In slander, special damages must be alleged and prove, subject to the following exceptions:

Where Slander is Actionable Per Se (Damage need not be proven)

1. Words imputing an action of a crime or general accusation of criminality.

It is defamatory to say “you are a thief” rather than “you have my property”. Although the crime itself does not have to be specified, the imputation that the individual is guilty of a crime has to be unequivocal. The crime has to be a serious one, punishable by prison term, and to be defamatory the words must be more than a suspicion or suggestion that the plaintiff has propensity to commit crime.

2. Words imputing existence of a loathsome or communicable disease

At common law this has been generally limited to diseases such as leprosy or venereal disease.

3. Words imputing unfitness to practice trade or profession

Slander is actionable per se if one imputes that a plaintiff has a general inability to do their paid job. This must be directed to the person in their professional capacity

4. Allegations of unchastity directed at a woman

Whether this common law exception survives the gender-equality provisions of the *Charter* is unclear.

IV. Defences to Defamation

Once a defamatory statement is found to be made, there are only a number of specific defences that a defendant may avail themselves of; namely, (1) truth; (2) fair comment, (3) absolute privilege (4) qualified privilege; and potentially (5) the defence of “responsible journalism.”

A. Truth

Justification, or truth, is an absolute defence to a defamation action. The burden of proving the “truth” of a defamatory statement falls upon the defendant, who must establish the truth of the defamatory words as a matter of fact. This does not entail proving all elements of the impugned publication or statement; “as long as the “sting” (the main charge) of the words is justified (true), the defendant does not need to prove justify statements or comments that do not add to the sting or introduce any new actionable matter.”^{xvii}

This defence rests upon the presumption that defamatory words are false – if they can be proven to be substantially true, then the plaintiff cannot have been defamed.

B. Fair Comment

This defense to a libel action is often invoked by media defendants to defamation actions, although it is available equally to all defendants. In the recent case of *WIC Radio Ltd. v. Simpson*^{xviii}, the Supreme Court of Canada reinvigorated the fair comment defence. In the process it overturned its own 1979 decision in *Cherneskey v Armadale*^{xix}, so that media organizations can publish the opinions of others, without having to agree with those opinions themselves. Justice Binnie, on behalf of the seven member majority, made it clear that the traditional test for the defence does not include a requirement that a court must find "fairness" in the opinion or the person offering it.

If the opinion could honestly be held, fairness is in the ear of the beholder. While fair comment is most frequently invoked by media defendants in defamation actions, it is available equally to all defendants. The test for fair comment can be formulated as follows:^{xx}

- (a) the comment must be on a matter of public interest;

- (b) the comment must be based on fact;
- (c) the comment, though it can include inferences of fact, must be recognizable as comment;
- (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
- (e) even though the comment satisfies the objective test the defense can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

In *Vander Zalm v. Times Publishers*, while finding that the cartoon of the plaintiff pulling the wings off of flies was “coarse and unamusing,”^{xxi} a majority of the Court of Appeal held that the cartoon would be understood by the ordinary and reasonable person as a comment on the plaintiff’s ministerial capacity.^{xxii}

This defense arose out of a general recognition of the importance of free speech, and provides a forum for commentary on matters of public importance. The distinction between comment and fact is essential – to utilize the defense of fair comment, the defamatory statement must have a subjective element of opinion. While a comment may include statements of fact, “it must be apparent that the statement is a deduction or conclusion from facts otherwise stated or referred to, and thus (the statement) retains its fundamental subjective character.”^{xxiii}

Because of the requirement that the comment be (2) based upon true facts, this defence is limited, as the defendant is still required to establish that the facts upon which the statement were made are true. This element of the defence often proves to be the greatest hurdle in fair comment defences.

The third element, that the defamatory statement is on “a matter of public interest,” has been interpreted broadly by the courts,^{xxiv} and can often be met so long as the defamatory statements are outside clearly private dealings and concern an issue of some general importance or controversy to the public.

Fairness “for the purpose of a fair comment defence is judged by the objective standard whether any fair-minded person could honestly express the opinion in question,”^{xxv} given the truth of the underlying statements of fact. The comment need not be nuanced or intelligent, but simply reflect an opinion that *could* be expressed honestly by a person.

Finally, the comment must be without malice. If the defendant intended to damage the reputation of the plaintiff, made the comment out of spite, or had some other improper purpose, the defence of fair comment will fail. The onus on proving malice rests on the plaintiff.

C. Absolute Privilege

Absolute privilege arises in certain circumstances where it is recognized the strong public interest in hearing the potentially defamatory words is significant enough to outweigh any damage to reputation, and attaches to words spoken in Parliament, courts as well as statements by public officials to each other in the course of duty. English courts have gone so far as to attach absolute privilege to police investigative reports,^{xxvi} although this trend has not yet been adopted in Canada.

“However false and harmful to reputation, statements made in Parliament or in the courts simply cannot be sued upon; the public interest in unrestrained legislative debate and unconstrained evidence and submissions in the courts trumps the interest of protecting reputation.”^{xxvii}

In *Royal Aquarium v Parkinson*,^{xxviii} the English Court of Appeal held that absolute privilege did not extend to local government meetings. In this case, the plaintiff was applying for a license for music and dancing at a council meeting. The defendant, a city councillor who was opposed to the granting of the license, claimed that while attending the aquarium he witnessed a particularly indecent puppet/figurine show:

“And then I state there was the most indecent action of the female figure that you could possibly imagine. Now, I say that is just as bad as though the figures are living. It was done on the stage in the afternoon, when we are told that it is so respectable that we are to take our families there. I will tell any gentleman privately what it was; but so it was, and I consider that is an indecent performance.”^{xxix}

The performance complained of was figurines chasing butterflies. The plaintiff sued for slander, and the councillor pleaded the defence of absolute privilege for comments made at the council meeting.

The Court of Appeal held that, although a municipal council does have some quasi-judicial functions in the form of granting licenses, absolute privilege does not apply to local government meetings, but is limited to the Courts and the Legislature.^{xxx}

D. Qualified Privilege

Qualified privilege arises upon special circumstances where the defendant has a legitimate interest in communicating the statement and the recipient has a legitimate interest or duty to receive it. Reciprocity is essential.

The defence of qualified privilege is founded on private and public duty and interest. In *Baumann v. Tuner*,^{xxxi} the B.C. Court of Appeal considered whether the defence of qualified privilege was available for defamatory statements made in the context of a municipal council meeting.

The facts giving rise to the case were described by Southin. J.A. as follows:

... The Mayor and Council of the District of Squamish were of the opinion that Squamish was in need of an additional water supply. Among the sources under consideration was Mashiter Creek. The appellant, a resident of the area, by training a geological engineer and a member of the Association of Professional Engineers of British Columbia, the self-governing body of the engineering profession in this province, but at the time a teacher, was much opposed to Mashiter Creek. He believed that to choose that source was an act of egregious folly. Thus, he came into collision with the respondent Turner, then the Mayor, who believed with equal passion that to choose the Mashiter as that source was an act of municipal statesmanship.

The battle raged.^{xxxii}

During an in camera council meeting, the mayor presented to council a draft letter which accused the engineer of misusing his professional engineer's certification. Although this draft letter was never sent, this allegation was repeated in a letter to the Minister of Environment for British Columbia, which read as follows:

I have considered sending a letter of complaint to the B.C. Professional Engineer's Association regarding Mr. Baumann as I believe he has misused his Professional Engineer's certification in a political manner which is eroding my, and the community's, confidence in the competency and credibility of the Professional Engineer's Association of B.C. I took a draft of my letter of complaint to Council and they, although supportive of my concerns, felt that the consequences to Mr. Baumann may be too severe in that he could lose his job and ability to provide for his young family.

Mr. Baumann sued, alleging that the offending passage was defamatory of him. While the Court of Appeal agreed that the passage was defamatory in its natural and ordinary meaning, the majority of the Court of Appeal held that qualified privilege attached to the occasion of the publications.

Thus, it was part of the proper duty of the Mayor to see to the provision of water for the District, a duty which in the modern world can require for its carrying out the assent of other branches of government, both federal and provincial.

Apart from his duty as Mayor, the respondent Turner, in common with every other citizen, has a proper duty or interest in the maintenance of the standards of every self-governing profession and may make complaints concerning the conduct of a member of such a body to his professional governing body. To make such a complaint is to publish upon an occasion of qualified privilege.

When, therefore, the Mayor was minded to complain to the Association, his putting the draft before Council was carrying out his duty as Chief Executive of the District to the members of Council who had a corresponding duty to know what the Mayor was proposing to do. Had he sent the draft, he would have been

making a statement in pursuance of a duty, both private and public, to the Association which had a corresponding statutory duty to receive it.^{xxxiii}

Privilege a question of law, not fact for a judge to decide. Examples of qualified privilege include credit reports, complaints to police or regulatory bodies, employment references, and reportage on court proceedings or government functions. “On those occasions, the defendant will not be liable unless the plaintiff can prove the defendant acted with malice, as that term has been defined by law.”^{xxxiv}

In *Prud’homme v. Prud’homme*,^{xxxv} the Supreme Court of Canada discussed and further clarified the law regarding defamation as it applies to elected municipal officials. In this case, a councillor of the City of Repentigny in Quebec publicly criticized a decision of City Council during the course of a Council meeting. In a twenty-minute statement which was frequently interrupted by the Mayor, who tried in vain to end it, the councillor complained about the plaintiffs refusal to accept an offer for land that he considered to be reasonable. The meeting was broadcast on local television throughout the community.

The plaintiffs, landowners in the community, were offended by this statement, which was in their opinion full of malicious insinuations making them out to be bad citizens. The trial judge agreed, and awarded the plaintiffs nearly \$60,000 in compensation. The Quebec Court of Appeal overturned this decision and dismissed the claim, which was appealed by the plaintiff’s to the Supreme Court of Canada.

In upholding the dismissal of the claim, the Supreme Court of Canada recognized that councillors have an interest and a duty to provide information regarding matters of interest to citizens of the municipality, and that an occasion when this occurs will attract qualified privilege.

... Things done by municipal councillors acting in the course of the duties of their office fall into those privileged occasions where important public interest considerations call for them to be granted partial protection against the legal consequences that flow from words that would otherwise be regarded as defamatory. As noted earlier, the duties of office of municipal councillors require that they take public positions and make efforts to explain and persuade with respect to the numerous problems that arise in a municipality and in the running

of it. The councillor's freedom of expression is a crucial instrument for achieving effective participation in and transparent management of municipal affairs. Decisions that sometimes have a negative effect on individuals or on important interests not only must be made, but must also be justified to the public. Freedom of speech, when exercised in a manner that respects other persons but exercised freely, is an essential instrument for the proper performance of the duties of the office of an elected municipal official. For that reason, it is generally acknowledged that words spoken by a municipal councillor at a council meeting are protected...^{xxxvi}

[emphasis added]

This principle may also apply in the context of media interviews given by municipal councillors where the interview relates to matters affecting the interests or welfare of the citizens.^{xxxvii}

E. "Responsible Journalism"

This defence currently is only recognized in Ontario. In *Cusson v. Quan*,^{xxxviii} the Ontario Court of Appeal reviewed libel law throughout the Commonwealth and created a made in Canada public-interest responsible journalism defence for defamation.

The defense rests upon the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defense even if it got some of its facts wrong....

...

To avail itself of the public interest responsible journalism test a media defendant must show that it took reasonable steps in the circumstances to ensure that the story was fair and its contents were true and accurate. This is not too much to ask of the media.^{xxxix}

The Supreme Court of Canada granted leave to appeal the decision in *Cusson* and the appeal was heard February 17, 2009. Further the Supreme Court of Canada on February 18, 2009 granted leave to appeal the Ontario Court of Appeal's decision in *Grant et al v. Torstar Corporation et*

al,^{xl} another case raising the public interest responsible journalism defense, and directed that the hearing be expedited.

How or even if such a defense is the law in Canada will be determined soon. Given the general trend of the court toward greater recognition of free speech, it is likely that this defense will be available to media defendants in the near future.

F. The Palliatory Defence of Apology

Under the *Libel and Slander Act*, the defendant in a defamation action may plead in mitigation of damages that they offered a full apology for the libel. An apology is not a complete defence, but may reduce damages.

V. What to do When Defamed

When defamed, the first step a prospective plaintiff should take is to contact a lawyer. From there, the inquiry turns to the basic question: should you sue?

Assuming that the potential defamation claim is valid and there are not applicable defences, the motivation behind a libel lawsuit is of significance. As noted by Roger McConchie and David Potts in *Canadian Libel and Slander Actions*:

If the real answer is vengeance or money, a libel action is probably not warranted. Usually, a libel action should only be instituted if the primary objective is to vindicate the plaintiff's reputation.^{xli}

There are a number of steps that can be taken to lessen the sting of defamation, either before or in lieu of commencing a lawsuit. These include letters to the editor, rebuttal statements, and requests for an apology or retraction.

Although a demand for an apology is not mandatory in British Columbia, such demands frequently precede defamation suits. If a defendant apologizes, this may bring the matter to a close, depending on the sincerity, prominence and effect of the apology. If a defamer refuses a request for an apology, this can go to damages at trial.

In some circumstances, threatening or commencing legal action can have the opposite of the intended effect, and do further damage to the reputation of the defamed. If the defamatory statement has received little carriage in the media, commencing an action could draw additional attention to the statement, and could be seen by some as an attack on free speech.

Considerations to be examined before commencing a defamation action include how serious the defamatory statements are, how widely disseminated the statements are, the impact on your reputation, and the cost of bringing an action.

VI. How to Avoid Defaming Others

It should always be remembered that truth is the best defence to a defamation action. However, it is not always possible to be entirely truthful, by way of carelessness, exaggeration, or ignorance, one may utter false words about another unintentionally. Be especially wary of exaggeration - while it may be non-defamatory to suggest that someone engaged in tricky behavior, it is defamatory to suggest that they are “a dishonest or unscrupulous man.”^{xlii}

For a communication to be defamatory, it must be "published." Publication occurs when the defamatory matter is communicated by the defendant to a third person intentionally or by a negligent act. Thus, while a letter sent only to one person by another is not normally a publication, an e-mail message may be considered a publication because of the electronic record created and the availability of the record to the system administrator or other system users.

Avoid repeating rumours. Even if you are contradicting a rumour, you should not repeat it. In *Syms v. Warren et. al.*,^{xliii} rumours had been circulating that the plaintiff, Chairman of the Manitoba Liquor Control Commission, had been charged with impaired driving but had arranged to have the proceedings quashed. On a radio call in show, the plaintiff appeared on the show to deny the allegations against him. Shortly thereafter, the radio host received a phone call from an anonymous woman. The conversation between the radio host and the woman went in part as follows:

- A. (Anonymous) “I just heard Frank Syms on the line this morning.”
- H. (Host) “I’m not dealing with rumours, madam.”
- A. “No, it’s not a rumour.”
- H. “What’s not a rumour?”
- A. “About Frank Syms being picked up for drunk driving.”
- H. “It’s a rumour.”
- A. “It’s not, it’s true... he does have a history of drunk driving.”

H. "He does not."

A. "Yes he does."

H. "No he doesn't."

Despite denying the rumours, the defendant was found liable for the defamation, because the radio station had a ten-second delay and could have censored the call. Adding "allegedly" is not enough to avoid libel difficulties.

In the event that you do inadvertently defame someone, there may be circumstances where it is appropriate to make a quick, full, and sincere apology. There are a number of considerations that go into the decision to apologize. If you do apologize, it becomes difficult to plead truth as a defence, which can limit your ability to obtain additional information in discovery or during cross-examination.

If the defendant does choose to apologize, the apology should be a full and frank withdrawal of the charges or suggestions conveyed, and should be as prominent as the original libel. A poorly crafted apology can exacerbate the libel.

In *Bennett v. Stupich*,^{xliv} a MLA wrote in various publications suggesting that the Premier of British Columbia had, on occasion, been intoxicated during night sittings of the legislature. After receiving a demand from the Premier's lawyer to apologize, the defendant wrote an "open letter" to the plaintiff's solicitors containing an apology. At trial, he attempted to rely on sections 6 and 7 of the *Libel and Slander Act* to mitigate damages.

Unfortunately for the defendant, the letter was far from sincere. In the letter, the defendant first noted, with some irony that the solicitor's initial demand letter had named the wrong Bennett:

"Firstly, let me make it absolutely clear that I intended no reflection upon the habits or character of our former Premier, W.A.C. Bennett, deceased. Apart from the fact that this matter arose out of a remark made by the current Premier, W.A.C. Bennett was known by everyone to be a complete abstainer when it came to alcoholic beverages. From the content of your letter I think it is safe to assume

that your client is actually William R. Bennett, Premier of British Columbia, and I shall deal with it on that basis."^{xlv}

The defendant then, in most unconvincing tones, then offered a rather simple apology for an offence that might be taken from his defamatory words. The court held that, far from mitigating damages, the apology letter served to increase the libel.

This is not an apology to the plaintiff, it is a statement to the solicitor. In unnecessarily setting out the words in quotation marks, taken from the solicitor's letter, the defendant in so doing exacerbated the libel. By no stretch of the imagination can this be regarded as an apology.

...

The apology contemplated by sections 6 and 7 is not the parliamentary form of apology. By these sections is meant a full and unqualified apology and a full and fair retraction which would be understood by the average person to be such. The so-called apology contained in the "open letter", while it may pass as such in the Legislature, does not meet the basic requirements of the *Libel and Slander Act*.^{xlvi}

VII. Indemnification Against Proceedings

Under section 287.2 of the *Local Government Act*, R.S.B.C. 1996 c. 323, a council may:

- (a) by bylaw, provide for the indemnification of municipal officials in accordance with the bylaw; and
- (b) by resolution in a specific case, indemnify a municipal official.

“Municipal official” includes current former council members, municipal officers and municipal employees. This section of the *Local Government Act* allows a municipal council to indemnify municipal officers in respect of defamation claims that may arise out of a councillor or municipal employee attempting to carry out their duties as a public servant. The ability to indemnify is limited to actions 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 -- this provision cannot be used to indemnify a municipal officer for defamation unrelated to the exercise of their job.

As demonstrated by *Thomas v. McMullan*, 2002 BCSC 22, the costs that arise out of a municipal officer's intended performance of their duties can be significant. In the 1999 Municipal Election for Langley Township, councillor Heather McMullan was a mayoral candidate. She received a communication from a local businessman, Mr. Stewart, who told her that he had been "shaken down" for a financial contribution by one Gregory Thomas who was raising funds for the electoral organisation known as the Langley Leadership Team and its candidates.

Ms. McMullan in turn conveyed the allegations to reporters from various newspapers who published reports based upon the information given to them by Ms. McMullan.

Mr. Thomas sued Heather McMullan for defamation. Ms. McMullan filed a statement of defence pleading justification and made a third-party claim against Mr. Stewart and a number of persons associated with the newspapers which had published the reports, seeking contribution or indemnity from them. Prior to trial, there were contested motions over document discovery and particulars of pleadings.

At trial, the court accepted that Ms. McMullan believed the allegations to be true and felt she had a duty as a councillor in the Township of Langley to take steps in relation to Mr. Stewart's allegations.^{xlvii} Despite her intentions, the B.C. Supreme Court concluded that McMullan did indeed defame Mr. Thomas, and that the libel was quite serious. Mr. Thomas was entitled to damages from Ms. McMullan in the amount of \$70,000.

VIII. Local Government Defamation Cases

1. *Jones v. Bennett*, [1969] S.C.R. 277

The plaintiff was the Chairman of the British Columbia Purchasing Commission, and the defendant was, at the time, the Premier. In 1964, the Attorney General of British Columbia caused criminal charges to be laid against the plaintiff alleging his unlawful acceptance of benefits in his capacity as Chairman.

The plaintiff, despite significant pressure and publicity, refused to resign his position. Although he was acquitted of the charges, the government of the day introduced legislation to force him out of office, entitled “An Act to Provide for the Retirement of George Ernest Pascoe Jones.”

While the bill was still under debate in the Legislature, W.A.C. Bennett, who was at the time the Premier, addressed a meeting of the Social Credit Association. The Premier spoke on a number of topics, including the following brief mention of the plaintiff:

I’m not going to talk about the Jones Boy. I could say a lot, but let me just assure you of this; the position taken by the government is the right position.

The trial judge, applying the test of what the ordinary man would infer from the them, held that the words in their natural and ordinary meaning were defamatory and calculated to disparage the plaintiff in his office as Chairman of the purchasing committee. The Premier lead the defense of qualified privilege.

The Supreme Court of Canada held that qualified privilege did not apply, as the Premier was aware that there were members of the media present at the meeting and that whatever he did say would be communicated to the general public.

2. *Loan v. MacLean et al.*, [1975] 58 D.L.R. (3d) 228 (B.C.S.C.)

The defendant radio station broadcast an interview with the Mayor of Peachland in which the mayor commented as follows on the competence of a local high school teacher and alderman:

"He's about -- eh -- eh -- He's got to be one of the biggest jokes Peachland has had for a little while. It's too bad that he -- He annoys people -- It's too bad he's -- he's

-- he's quite so stupid -- eh -- eh -- He can't understand, I don't, He doesn't understand what's goin' on, this is the problem. He's out of his depth. It's most regrettable that the citizens of Peachland -- eh -- saw to elect him because he's nothing but a bother, he doesn't understand, he may be good in, in Teachin' -- eh -
- six or eight year old children,"

The interview was given after a council meeting which the Mayor and alderman had a difference of opinion and, accordingly, the Mayor sought to rely on the defense of qualified privilege. The Court was brusque in its disposal of this defense:

The words complained of were spoken not at, but after, the Council meeting; there was neither a public nor a private duty on Mr. Thwaite to repeat for publication to the entire area his childish and derogatory personal views of Mr. Loan as an individual. The words constitute a gratuitous voluntary insult; and for publication of that insult throughout the South Okanagan area the defendant, Mr. Thwaite, is liable.

The mayor also relied on the defense of justification, although he did not adduce supporting evidence at trial. The Court noted that the fact of the putting forward of such a defense in the absence of any supporting evidence was a fact to be taken into consideration in the assessment of damages. For its part, the radio station relied on the defense of fair comment. The Court held that the words were not comment at all, but mere personal insult.

3. *Bennett v. Stupich*, [1981] 125 D.L.R. (3d) 743 (B.C.S.C.)

In response to the Premier's widely quoted comments as to the drinking habits of M.L.A.'s, Stupich had published in various newspapers his own comments which included, inter alia, the following:

So now the House in Victoria will be sitting mornings as well as afternoons. The Premier told reporters that he favours morning sittings because MLA's are less likely to have liquor with breakfast than they are with dinner.

It is a fact that he was having trouble with his cabinet members. Earlier in this session when we had evening sittings, a number of the cabinet members were

showing up in a state that led to some serious altercations in the chamber and in the corridors outside the chamber. There were times when the Premier himself seemed to be in no state to attend evening sittings of the legislature.

As I have previously stated, the Premier, in response to a question as to just how long it would take him to control the Opposition members in the House, said that it took him only two weeks to train his dogs. Apparently he is finding it much more difficult to train himself and his cabinet members when it comes to pouring Scotch with their dinners."

The Premier brought action against Stupich but apparently not against any of the newspapers. Stupich unsuccessfully raised two branches of the defense of qualified privilege:

- (a) He argued first that the comments were written and published in the performance of a public duty;
- (b) He argued second that they were written in defense of the defendant's own reputation and the reputation of other members of the Legislature.

The Court held that Stupich could not avail himself of either of these branches and that, in any event, if they were available they were defeated by the presence of malice.

4. *Wells v. Puddister*, 2007 NLCA 25

A city councillor in St. John's led the opposition to an application by Loblaws to develop a supermarket. In dismissing Loblaws' proposal to conduct a feasibility study on the site, the councillor expressed his view that he did not believe Loblaws' offer to fund the study was "genuine or sincere."

Following debate, council voted to reject Loblaws' offer to fund an independent feasibility study.

The mayor of St. John's, who supported Loblaws' application, was interviewed the next day on local radio, where he made the following comments:

[Mr. Wells]: "Plus, Puddister's attitude, Puddister's comments towards Loblaws the other day, you know, were disgraceful. Loblaws is a company that pays

substantial taxes in this city, employs a thousand people and is an honest corporation, an honest company, a decent company that wants to make a, \$10 million, I think, it has invested in this city. Puddister basically said they're a bunch of crooks."

COMMENTATOR: "So what are you going to be asking people like Loblaws and the Board of Trade to do in the letter?"

[Mr. Wells]: Well, I think it's time for people to understand how, what, how the, what this crowd of councilors are up to. They're nothing but a bunch of shysters and it's, it's just a very, very poor way ..."

...

[Mr. Wells]: "Puddister said, oh, Loblaws is just a bunch of crooks playing games. I mean [this] is the kind of nonsense that permeates the way this council operates and I think it's disgraceful."

The defendant attempted to rely on *Prud'homme v. Prud'homme*, arguing that his comments were part of the "qualified privilege" associated with municipal council meetings.

In rejecting this argument, the Newfoundland Court of Appeal held that malice was the dominant motive in making the statements, therefore the defense of qualified privilege was not available to the Mayor.

5. *Wells v. Sears*, 2007 NLCA 21

Arising out of the same dispute over the construction of the Loblaws, Mayor Wells successfully sued Mr. Sears, a city counselor over remarks made during city council meetings. As noted by the Newfoundland Court of Appeal, there were numerous conflicts arising out of the proposed redevelopment:

The issue of redevelopment of the Memorial Stadium site, and particularly the Loblaws' application, engendered a high degree of animosity within city council. The same issue resulted in a successful action in defamation by another councilor, Mr. Puddister, against Mr. Wells, (2004), 242 Nfld. & P.E.I.R. 254 (NLTD),

currently under appeal). Further, both Mr. Wells and Mr. Sears testified at trial as to the animosity between them. For example, prior to the impugned comments being made by Mr. Sears at the December 1st meeting, Mr. Wells had called Mr. Sears “a complete liar”, to which Mr. Sears replied, “I have been called worse things by you”.

At issue were a number of comments made by councilor Sears suggesting that Mayor Wells was “owned by developers”, including the following:

Councillor Sears:

You're owned by developers, that's a fact, you're owned by developers and you will do what they want and you do have people in this town who listen to you unfortunately, it's unfortunate that you got a beautiful piece of property and you want to put a Super Market on it.

...

Councillor Sears:

You are easy to sell, easy for sale, you're too cheap, boy.

Mayor Wells:

Give me a list of who owns me.

Councillor Sears:

I can't give you one now, but I'll tell you what, I'll bring a list in. I would gladly bring your contributors in next week and I will table them.

Mayor Wells:

So they bought me.

Councillor Sears:

You're bought.

Mayor Wells:

I'm bought.

Councillor Sears:

You're bought.

Mr. Sears made similar suggestions at three successive council meetings. At issue before the Newfoundland Court of Appeal was whether these statements exceeded the qualified privilege attaching to municipal council meetings.

Perhaps surprisingly, the Court of Appeal held that because the propriety of tax write-offs by the Mayor were under debate at council, the statements did not exceed the protection afforded by qualified privilege:

Given that the issue of tax write-offs, including any alleged connection to election campaign contributions, was properly being debated by council, it follows that Mr. Sears' responses were relevant and reasonably appropriate in the context of the circumstances of the occasion. Further, the question of tax write-offs, together with the supervisory responsibilities of the mayor and councilors, and questions of possible conflicts of interest, are matters pertinent to the discharge of Mr. Sears' duty and interest as a councilor, and the members of city council and the citizens have a corresponding interest in receiving that information

The Court of Appeal held that the dominant motive of the councilor in the exchange had not been malice, but rather criticism of lax administration, with the finger pointed particularly at Mayor Wells. In the result, the defense of qualified privilege was found to apply.

6. *Ralston v. Fomich*, [1992] B.C.J. No. 463 (B.C.S.C.)

The plaintiff, a municipal alderman, brought an action in defamation stemming from comments made during a meeting of the Surrey Council. There was debate and some procedural dispute about an important matter of land use.

As set out in the minutes of the meeting, the following exchange occurred:

"Ralston was further attacked after he said there is no length (sic) to the contortions some council members are willing to do to push a project through the system because of the applicant's "financial standing in the community".

Replied Fomich, "You're a sick son of a bitch".

Fomich apologized at the urging of Bose, but later approached reporters after the meeting:

"You can quote me that in my personal opinion Ralston is a sick son of a bitch".

Because the statements were made to reporters outside of council, qualified privilege was not applicable. The task fell to the Court to determine whether the words complained of were, in the context used, defamatory. Spencer J. held as follows:

In my opinion the words "son of a bitch" by themselves are not capable of any defamatory meaning. They are peculiar, in that they take their meaning either from the tone of voice used or from whatever adjective accompanies them. They are a translucent vessel waiting to be filled with colour by their immediate qualifier.

Thus, one has sympathy for a poor son of bitch, admiration for a brave son of a bitch, affection for a good old son of a bitch, envy for a rich son of a bitch and, perhaps incongruously, dislike for a proper son of a bitch. Why right thinking people should dislike anything that is proper is rather a mystery unless proper is used to mean "real", but I am confident that is the colour that adjective gives to the expression. It is perhaps a throw-back to an earlier use of the expression when the mere words themselves carried an opprobrious meaning, see for example Kent's apostrophe to Oswald:

"(thou) art nothing but the composition of a knave, beggar, coward,
pander and the son and heir of a mongrel bitch:"

(Shakespeare, King Lear, Act 2, Scene 2)

There are other early examples to be found of a stand alone meaning of the phrase, but in modern times the bare words are not capable of bearing a defamatory meaning. At most they insult.

...

That brings me to the qualifier in this case, the adjective "sick".

The court determined that, in its plain and ordinary meaning, the use of the modified "sick" before "son of a bitch" rendered the phrase defamatory.

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