

KEEPING CURRENT

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Defence of qualified privilege available to Township for posting letters from public

By James R.G. Cook

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Municipal site plan applications have a public component that may expose an applicant to complaints from people who are opposed to their plans. As part of the application process, comments from the public may be made widely available through the municipality's website or other online sources. In *Thatcher-Craig v. Clearview (Township)*, [2023 ONCA 96](#), the Ontario Court of Appeal determined that a municipality may be exempt from claims for defamation as the entire occasion of the application process is subject to the defence of qualified privilege.

The plaintiffs owned and operated a hops farm on property within the Township of Clearview, Ontario. In 2015, they applied for a minor variance in order to build a permanent home on the farm property, which was approved despite some opposition from local residents.

In 2018, the plaintiffs wanted to expand their operation with an on-site micro-brewery and a small retail space. The Township required them to seek a zoning

by-law amendment to permit a brewery on the property. However, the plaintiffs took the position that a brewery was already a permitted use and therefore only a site plan application was required.

The site plan application, submitted by the plaintiffs' planner, included a consent provision that allowed the municipality to make certain information related to the application public, as well as a release and indemnity of the Township for so doing. Further, the Guideline for the Township's development application expressly stated that public consultation and engagement were an integral part of the planning process.

The Township processed the application and placed a report on its website to be considered at a meeting of the Township council. The report concluded that a brewery was not a permitted use and recommended that the plaintiffs apply to the Superior Court of Justice for an interpretation of the by-law if they disagreed. Council ultimately adopted the recommendations in the planning report.

In November 2018, an article about the proposed brewery was published in a local newspaper, as well as in other newspapers, following which the Township received letters from the public commenting about the proposal as well as about the Township's alleged failure to provide the public with adequate notice of the site plan application.

The Township provided all of the letters to the plaintiffs and their planner as they were received with no attempt to edit them. The Township also posted the site plan application to its online application database on its website along with its report to council.

When the plaintiffs discovered that the letters had also been posted on the web site they asked the Township to withdraw the site plan application and remove their farm from its marketing brochures. The plaintiffs claimed that the publication of the letters caused a drop-off in their customer contract renewals.

The Township removed the letters from its website in March 2019, after the plaintiffs' site plan application was withdrawn.

In December 2020, the plaintiffs sued the Township for defamation, negligence, and breach of fiduciary duty. The statement of claim did not specifically identify the defamatory words complained of but stated that "the overwhelming majority of the public comments were negative. Some comments were defamatory, inaccurate and damaging." The claim also alleged that the comments "included entirely inaccurate statements alleging that the land farmed by the plaintiffs was and remains contaminated with arsenic."

The Township then sought to have the action dismissed under [137.1](#) of the Ontario [Courts](#)

[of Justice Act \(CJA\)](#), the anti-SLAPP (strategic lawsuits against public participation) provision. The motion was substantially dismissed. The Township appealed the decision to the Court of Appeal for Ontario.

Under section [137.1\(3\)](#) of the [CJA](#), the party seeking to dismiss the action has an initial onus of showing that the proceeding "arises from an expression made by the person that relates to a matter of public interest."

The Court of Appeal agreed with the motion judge that the impugned comments from members of the public that the Township posted on its website related to a matter of public interest since they consisted of public comments on the proposed and current land uses by the plaintiffs.

As the Township met this initial onus, the plaintiffs had to establish three matters required by section [137.1\(4\)](#): (i) that their case had substantial merit; (ii) that the defences raised by the Township were not valid; and (iii) that the public interest in allowing the case to proceed outweighed the public interest in protecting the expression.

With regard to the validity of the Township's defences, the Court of Appeal disagreed with the motion judge regarding the availability of the defence of qualified privilege. In that regard, the Court of Appeal referred to the following statement from the Supreme Court of Canada decision in *Bent v. Platnick*, [2020 SCC 23](#), at paragraph [121](#):

An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information

in issue to the person to whom it is published” and the recipient has “a corresponding interest or duty to receive it”.

The key factor is the “occasion” in which the impugned statements are made since “[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself” (*Bent v. Platnick*, at paragraph 121). Qualified privilege can be defeated where the dominant motive behind the words was malice or where the scope of the occasion of privilege was exceeded.

In the case at hand, the Court of Appeal stated that the correct approach to assessing the potential viability of the Township’s defence was to:

- 1) Determine whether the Township had “an interest or duty, legal, social, moral or personal”, to publish the impugned letters from members of the public on the portion of its website that contained the respondents’ site plan application, and that interest or duty was to a person or constituency that had a corresponding duty or interest to receive it;
- 2) If so, provide a precise characterization of the occasion of qualified privilege; and
- 3) Determine whether the privilege was defeated by malice or because the scope of the occasion was exceeded or abused.

Based on the Township’s mandate under the [Planning Act](#), the [Municipal Act, 2001](#) and the Guideline for the development application, the


Court of Appeal determined that the Township had an interest and duty, both legal and social, to make the planning process transparent and accessible to its residents, along with a duty and interest in accessing the information related to the process. The Township’s mandate included providing access to all information and all comments that would form part of the record to be considered by council, including comments from the public.

The Township made all of the information and comments publicly available online on its website, consistent with how information is typically communicated and accessed in current times rather than the obsolete expectation that citizens would attend at the municipal offices during business hours to view documents.

The Court of Appeal therefore concluded that qualified privilege attached not only to council meetings but to the occasion of the entire public planning process, including the material received in response to the plaintiffs’ application and posted on the Township’s publicly available website. While the Township was required to exercise some prudence in the operation of its website, the scope of qualified privilege is broad in order to foster the goals of transparency, public participation, and the exercise of democracy, and to protect free expression on matters that affect the public interest. Where relevant comments are made in good faith and not with malice, they should not exceed the privileged occasion.

Since the potential for the Township’s defence to be successful weighed more in its favour and had a real prospect of success, the plaintiffs failed to satisfy the conditions for not dismissing the defamation claims under [s.137.1\(4\)\(a\)\(ii\)](#) of the anti-SLAPP provisions.

The decision shows that an applicant should be



prepared for some public blowback to occur as part of the site plan approval process. Blaming a municipality for publishing comments that it receives from the public during the process will not likely result in a tenable claim for damages.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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