

Statutory immunity and qualified privilege protect City Councillor against night club's action

Litigation | Litigation & Dispute Resolution | Municipal Councillors | Political Law | Torts

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In the past few months, I have written a number of blogs about court decisions involving City Councillors. The courts and other processes available to hold politicians accountable, such as complaints to an integrity commissioner, have arguably become a weapon in the arsenal of those who disagree with the views of a politician. Although seeking a remedy from a court or having an integrity commissioner determine whether a politician has breached a Code of Conduct are proceedings worthy of merit where a wrong has been done, recent rulings show that politicians have strong defences to these proceedings, especially court proceedings, where the politician has acted in good faith and simply expressed a political opinion or advocated on behalf of his or her constituents.

In *1631561 Ontario Inc. v. Toronto (City)*, 2022 ONSC 4197 (CanLII), the court dismissed a claim brought by an after-hours dance/rave nightclub against former City Councillor Adam Vaughan and the City of Toronto on the grounds that he was protected against the action by the defences of statutory immunity and qualified privilege.

The nightclub operated in Toronto's popular Entertainment District. The nightclub was designated for restaurant use in a mixed commercial-residential area. Mr. Vaughan was the elected municipal politician for the area.

In 2008, Mr. Vaughan, various city officials and departments, and the Toronto Police became involved with the nightclub's operations. On 31 January 2008, Mr. Vaughan's office received a call from a Hamilton woman whose son had died from a drug overdose. Illegal drugs had caused the overdose. Although the drugs were bought at an unknown location, the woman contacted Mr. Vaughan's office seeking assistance into the investigation of her son's death.

Thereafter, Toronto Police allegedly began to investigate activities taking place at the nightclub and on 16 March 2008, executed a search warrant of the club. 90 police officers, the Emergency Task Force, the OPP Biker Enforcement Unit and an officer wearing an RCMP jacket were involved. A Toronto Sun journalist was also allegedly invited by the Toronto Police to witness the search warrant's execution.

From 6 April 2008 to 6 March 2009, City officials undertook various inspections of the nightclub. Among other things, *Building Code Act* and *Smoke-Free Ontario Act* violations and infractions were noted. Tickets and summonses were issued against the nightclub.

During this period of time, there were also various communications between Mr. Vaughan's office staff and city officials, and between Mr. Vaughan and the police about the nightclub. As well, Mr. Vaughan's office received complaints from area residents related to the general area in which the nightclub carried on business and about the nightclub specifically.

Four days after the police executed the search warrant, Mr. Vaughan sent an email to a residents association and constituents about activities in the area of the nightclub. Mr. Vaughan later spoke to the owner of the property where the night club was located. He also refused to meet with night club representatives and either personally or through his office staff wrote to various committees and others about the night club and a neighbouring tenant that wanted a variance for its outdoor patio.

The night club sued the defendants for misfeasance in public office, abuse of public office, unlawful interference with economic relations and/or alternatively conspiracy to defame and conspiracy to injure.

With respect to the defamation claim, the night club contended that Mr. Vaughan had committed this tort when he made statements to the night club's landlord that kids had died from drug overdoses at the club. The night club also alleged that Mr. Vaughan made defamatory comments about the club in his communication to the residents association and other constituents, and in a letter to the Committee of Adjustments about the patio variance application.

The night club alleged that Mr. Vaughan acted in bad faith and did everything he could to shut down the night club.

The night club was eventually closed when the owner demolished the building out of the which the club operated.

Statutory immunity defence

Mr. Vaughan succeeded in having the night club's claim against him dismissed under the statutory immunity defence because the court found that he did not act in bad faith.

The *Municipal Act, 2001* and the *City of Toronto Act, 2006* ("COTA") both contain a statutory immunity defence which protects, among others, members of city council, officers, employees or agents of the City from proceedings against them for damages where they have acted in good faith. [Section 391\(1\)](#) of COTA specifically states:

No proceeding for damages or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

The court found that throughout, Mr. Vaughan was acting in his capacity as a City Councillor and that he was legitimately representing his constituents, as he was entitled and expected to do.

The concept of bad faith by a public official has received judicial consideration.

In *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, the court said that the "...concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."

The evidence did not support either category of bad faith.

Qualified privilege defence

Mr. Vaughan also relied on the qualified privilege defence in connection with the night club's defamation claim. This defence protects a person against such a claim where he or she has an interest or a duty (legal, social or moral), to make a communication to a person who has a corresponding interest or duty to receive the communication.

At [paragraph 124](#), the court described that qualified privilege protects statements made by public officials, including communications between members and public officials on matters of a public interest, and is assessed on an objective basis.

Furthermore, the court explained that:

- public officials have a duty to keep each other, the government and the public informed on matters related to the public and on matters falling within their competence;
- a councillor's freedom of expression is crucial for achieving effective participation and transparent management of municipal affairs; and
- communications from constituents to city officials are protected where there is a personal, social and civic interest and that the city has a corresponding civil and civic interest in receiving it.

The Supreme Court of Canada in *Prud'homme v. Prud'homme*, 2002 SCC 85 (CanLII) has stated that a municipal politician's freedom of expression is important to the preservation of democracy. The court has recognized that Members of Council are the voices of their constituents and their right cannot be limited without negatively impacting democracy.



The court found that Mr. Vaughan was entitled to comment and communicate on the impact of the night club to the surrounding area and to voice his concerns about the patio variance that was being sought by a neighbouring business.

Although the defence of qualified privilege can be defeated by malice, the court held that there was no evidence that Mr. Vaughan acted with malice. Mr. Vaughan was found to have had a legitimate concern about the night club's activities and its impact on the community. He was also found to have a legitimate desire to take appropriate steps to address the issues.

Dismissal of misfeasance in public office and abuse of public office claims

With respect to the claims related to misfeasance in public office and abuse of public office, the court rejected these causes of action on the grounds that the plaintiffs had failed to prove that there was any link between the conduct of public officials and the Toronto Police or that the actions of Toronto Police, including their presence at the night club, was at the direction of the public officials or Mr. Vaughan.

Dismissal of the interference with economic relations claim

The tort of interference with economic relations is narrow.

To be successful in such a claim, a plaintiff must establish the following three elements:

1. that the defendant intended to injure the plaintiff's economic interests;
2. that the interferences must have been by illegal or unlawful means; and
3. that the plaintiff suffered economic harm or loss as a result.

This tort is also only available where:

- a. the defendant committed an unlawful act against a third party; and
- b. the unlawful act intentionally caused harm to the plaintiff.

The plaintiff did not meet its burden of proof against Mr. Vaughan or the City.

The court concluded that the defendants did not commit any unlawful act against a third party, and that, in any event, there was no evidence that it had suffered any loss because of Mr. Vaughan's conduct or the conduct of any public official. In determining whether any of the actions of the public officials caused damages to the plaintiff, the court applied the "but for" test.

Representing the public is not easy. Politicians are required to tackle important issues that often involve competing interests. Although this may sometimes result in the commencement of a lawsuit against a politician, this case demonstrates that politicians who act in good faith and simply do their job to represent the views of the public and to advocate on their behalf, without malice, will be able to emerge from a legal action unscathed. A PDF version is available to download [here](#).

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com