

Paul-Erik Veel
416-865-2842
pveel@litigate.com

January 23, 2015

No absolute privilege for city councillors' speech

In its recent decision in *Gutowski v. Clayton*, 2014 ONCA 921, the Ontario Court of Appeal provided helpful advice to two sets of professionals: municipal councillors and lawyers. First, the Court confirmed for municipal councillors that they do not enjoy absolute privilege for defamatory statements they make during municipal council meetings. Second, the Court signalled to litigators that a Rule 21 motion is not the "appropriate vehicle" through which to attempt to develop an area of law that is not fully settled.

Qualified Privilege Applies to Municipal Councillors

The core issue in the appeal was whether the Court should extend absolute privilege to allegedly defamatory statements made by municipal councillors in the course of council meetings.

On appeal, all parties and the Court accepted that the present state of law only affords a qualified privilege to municipal councillors for their remarks in council. That is, as Justice Blair noted, municipal councillors are not liable in defamation for statements they make during council meetings, unless the plaintiff is able to demonstrate that the statements were made with malicious intent on the part of the councillor.

However, the appellant councillors sought to extend further the protection afforded to their statements in council, by asking the Court to rule that such statements were subject to absolute privilege and, as a result, completely immune from suit, even if the statements were made maliciously. The Court rejected the appellants' argument.

The Court noted that in contrast to the statutory absolute privilege extended to members of the federal and provincial legislatures, no such statutory protection was extended to members of municipal council.

While the appellants emphasized the value Canadian society places on the right to freedom of expression in public disclosure, and the need for municipal councillors to be able to exercise that right in order to perform their role properly and effectively, the Court found it is "exactly that rationale which underpins the extension of qualified privilege to municipal councillors". Without any evidence to justify the need for a change in the law, the Court refused to extend absolute privilege to such

statements.

The Appropriate Use of Rule 21

The Court of Appeal's decision also provides helpful guidance to counsel considering different litigation strategies, particularly in cases where one of the parties is encouraging the Court to change existing law.

In this case, counsel for the appellants opted to move under Rule 21.01(1)(a) of the *Rules of Civil Procedure* for a determination of a question of law prior to trial. Many litigators would intuitively view such motions as an expedient way, in the absence of a full evidentiary record, of having a preliminary legal issue adjudicated by the Courts.

However, the Court of Appeal in *Gutowski* specifically rejected this approach. The Court instead held that where a party wishes to develop an area of the law that is not fully settled, "a Rule 21 motion is not the appropriate vehicle; such decisions should be based on a fully developed evidentiary record". How this reasoning squares with the Supreme Court's recent emphasis on the resolution of matters in an expedient and proportional manner without the need for a full trial is not clear.

- Research contributed by Laura Robinson, 2014/2015 articling student