COURT OF APPEAL FOR ONTARIO

CITATION: Thatcher-Craig v. Clearview (Township), 2023 ONCA 96
DATE: 20230210
DOCKET: C70128

Feldman, George and Copeland JJ.A.

BETWEEN

Laurie Thatcher-Craig, John Craig and Clearview Valley Farms Inc.

Plaintiffs
(Respondents)

and

The Corporation of the Township of Clearview

Defendant
(Appellant)

Sheldon Inkol and Nadav Amar, for the appellant

Gavin H. Leitch, for the respondents

Heard: June 29, 2022

On appeal from the judgment of Justice Joseph Di Luca of the Superior Court of Justice, dated November 5, 2021.

Feldman J.A.:

[1] In response to an action by the respondents for defamation, negligence and breach of fiduciary duty based on letters from the Township of Clearview (the "Township") residents that the Township posted on its website, the Township sought to have the action dismissed under s. 137.1 of the *Courts of Justice Act*,

R.S.O. 1990, c. C.43 ("*CJA*"), the anti-SLAPP (strategic lawsuits against public participation) provision. The motion was substantially dismissed.

[2] For the reasons that follow, I would allow the appeal in respect of the defamation action, based on the potential for the success of two defences: the defence of qualified privilege, and the indemnity signed on behalf of the respondents. I would not allow the appeal in respect of the breach of fiduciary duty claim.

Factual Background

[3] The respondents purchased a 74-acre property within the Township in October, 2011 where they started a hops farm. By 2015, they had received awards and were enjoying success. When they applied for a minor variance in order to build a permanent home on the farm property, they encountered some opposition from local residents in the form of three letters that complained about the respondents' farming practices, including that they were using a well that was tainted with arsenic. The application went to the Committee of Adjustment on December 14, 2015, where it was approved.

[4] In 2018 the respondents wanted to expand their operation with an on-site micro-brewery and a small retail space. In order to do that, the Township required them to seek a zoning by-law amendment to permit a brewery on their property.

However, the respondents took the position that a brewery was already a permitted use and therefore only a site plan application was required.

[5] The site plan application, submitted on September 26, 2018, was signed on the respondents' behalf by their planner, Mr. Michael Wynia. It 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. The Township's Development Application Guideline (the "Guideline") that accompanies the application form contained the following information that is acknowledged in the application:

> Public consultation and engagement is an integral part of the planning process. Public consultation is mandated by the Planning Act for most approvals processes, including for amendments to the Official Plan and Zoning By-Law, and for subdivision/condominium applications. At least one public meeting will be part of your approvals process.

[6] Instead of processing the application, the Township's planning department began to prepare a Report to Council that a brewery was not a permitted use. Ms. Mara Burton, the Director of Community Services in the Planning and Development Department of the Township, testified on the motion that this was done in the respondents' interests to save them wasting money on the application process. However, because the application was not processed within 30 days as required by the *Planning Act*, R.S.O. 1990, c. P. 13, the respondents launched an appeal to the Local Planning and Appeal Tribunal (the "LPAT").

[7] The Township then processed the application, and placed a report on its website and before the Township Council to be considered at a meeting scheduled for November 19, 2018. The report concluded that a brewery was not a permitted use and recommended that the respondents apply to the Superior Court of Justice for an interpretation of the by-law if they disagreed.

[8] At the Council meeting, the Council went *in camera* to consider the respondents' site plan application because of the pending LPAT appeal. Council ultimately adopted the recommendations in the planning report.

[9] On November 18, 2018, an article about the proposed brewery was published in a local newspaper, The Connection, 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 failure to provide the public with adequate notice of the site plan application.

[10] The Township provided all of the letters to the respondents and to their planner Mr. Wynia as they were received. Mr. Wynia responded but did not rebut the allegations contained in the letters.

[11] The Township then posted the site plan application to its online application database on its website on November 26, 2018, along with its report to council. The Township posted the letters to the online database on December 18, 2018, including one from Mr. Wynia on behalf of the respondents, and one received later

was posted on January 16, 2019. The Township posted the letters as received with no attempt to edit them.

[12] All of the comment letters were provided to the respondents, but they were not told that the comments were being posted on the website. The respondents discovered that on February 4, 2019. They believed that the publication of the letters caused a drop-off in their customer contract renewals.

[13] On February 11, the respondents asked the Township to withdraw the site plan application and requested the Township remove their farm from its marketing brochures. On February 19, Mr. Wynia asked the Township to remove the public comments from its website, stating that they were false and damaging and that the respondents had no ability to respond to them. The Township first took the position that the site plan application could not be withdrawn while the LPAT appeal remained outstanding, but allowed the withdrawal once the appeal was withdrawn by the respondents. The Township removed the letters from its website some time between March 1 and March 9, 2019.

[14] This action was commenced on December 9, 2020. The statement of claim does not identify the defamatory words complained of specifically. Rather it states that “the overwhelming majority of the public comments were negative. Some comments were defamatory, inaccurate and damaging.” Also, they “included

entirely inaccurate statements alleging that the land farmed by the plaintiffs was and remains contaminated with arsenic."

[15] In response to a demand for particulars, the respondents stated that they were "within the defendant's knowledge" and "part of the public record", and that "the whole of the public comments" were "defamatory, inaccurate and damaging."

[16] The Township then moved under s. 137.1(3) of the *CJA* for an order dismissing the action as a SLAPP lawsuit.

Findings by the Motion Judge

[17] While the respondents were self-represented litigants when they commenced the action, they had counsel for the argument of the motion. The motion judge appeared to believe that the statement of claim was drafted without the assistance of counsel. He was therefore prepared to "grant some latitude" in reviewing the pleadings, and in particular, he was prepared to consider the motion based on the whole record before him, which included the submissions of counsel and the specific comments that were posted on the website.

[18] In his reasons, the motion judge set out those comments taken from the factum of the respondents that identified the sting of the defamation claim in the following excerpts from the published comments:

November 25, 2018

“Now he wants to build a stinky beer brewery to contaminate the air of his neighbours, whom he clearly has no respect for”

Date Unknown

“…**by their bully techniques to land ownership… call it what it is! a trench meant to trap, injuring dogs, deer and other wildlife**…I know for a fact that these lands have **tested positive for apple spray residue**, again contrary to what the proponent has answered… this is also not accurate nor truthful!”

November 28, 2018

“…my question is where does **fraud and** deception come in to play with clearvalley hops. There pitch to clients its family run and family operated But in reality there wsib clams are high they pay flat rate for bus load of seeks and Pakistan workers who set up there farm for season…they store there products in freezer but infact it is in a barn all winter…its lie after lie from social media to newspapers…and are more a ware of the dangers from laurie and john and clearvalley hops…LAURIE AND JOHN have made **bully techniques** to anyone stepping foot on there property…WHERE DOES THIS **FAILING FARM** END…they are not skilled enough to run a farm and a brewery…the son is using it to pick up and drop of workers dropping off trucks and inclosed trailers having own c can for storage and dumping waste from jobsites…**BE AWARE OF WHAT CLEAR VALLEY HOPS IS REALLY LIKE.** WHERE THERE NOT HIDING BEHING FAKE AWARDS AND BLIND SIDED ARTICLES”

2015, Repeated and Published November 28, 2018

“…no one knows what he is spraying and animals have been sick and neighbours have had to go to the doctors….and the well that had arcnic in it that he has his sprinkler system hooked up to, to spray his crops at

> night….that to me says they don't know what they are doing and they spraying to much… water enters his property and exits his property and who knows what he is throwing or spraying round it"
>
> **November 30, 2018**
>
> "… it should be a major red flag that the applicant is trying to circumvent the due process (either through ignorance, arrogance, or both) by taking this to the LPAT prior to even having an amendment application. This raises the question of what the "real" motives are and always have been"
>
> **December 5, 2018**
>
> "…hopefully once this application is denied, the requirement for a qualified professional to attend the site and evaluate for the above notes issues should be properly addressed and confirmed for the heath of all the village and regulated areas"
>
> **January 16, 2019**
>
> "…further entrench this obnoxious operation is unacceptable…we have experienced nothing but an obnoxious operation run by an obnoxious operator" [Emphasis in original.]

[19] The motion judge described the framework for a motion under s. 137.1 of the *CJA*. He identified the purpose of the section to be "a judicial screening mechanism to weed out lawsuits that unduly limit expression on matters of public interest" known as SLAPPs: strategic lawsuits against public participation.

[20] Referring to the Supreme Court of Canada decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at para. 18, the motion judge articulated the shifting burdens on the motion, mandated by ss. 137.1(3). The

threshold burden is on the defendant to prove, on a balance of probabilities, that the impugned expression relates to a matter of public interest. The onus then shifts to the plaintiff to establish, on the lesser burden of proof, “grounds to believe”, the following three factors: 1) the proceeding has substantial merit; 2) the defendant has no valid defence; and 3) the public interest in permitting the proceeding outweighs the public interest in protecting expression.

[21] The motion judge then turned to analyze each of these issues. The threshold issue is whether the proceeding arises from the impugned expression and whether that expression is on a matter of public interest.

[22] He first found that each of the causes of action in the statement of claim should be analyzed separately and not treated as one proceeding for the purpose of determining whether the claim arises from the impugned expression. He concluded that the defamation and the negligence claims both arose from the posted comments. However, the breach of fiduciary duty claim did not. As a result, that claim could not be dismissed on a s. 137.1 motion.

[23] He next found, on a balance of probabilities, that the impugned expressions, which he found included all of the postings identified by the respondents in their factum, and not just the accusation of arsenic contamination, which was specified in the statement of claim, were on a matter of public interest.

[24] In concluding that the posted comments were on a matter of public interest, the motion judge rejected a number of arguments made by the respondents. They argued that because the *Planning Act* did not require a public hearing for a site plan application, that meant it was a private matter. The motion judge noted that Mr. Wynia, the respondents' planner, who was a former Director of Planning for the Township, conceded on cross-examination that depending on the circumstances, all aspects of the planning process may give rise to issues of public interest. The motion judge also relied on the fact that the Guideline and site plan application form referred to public consultation as integral to the process. He also found that the fact that the letters were not solicited by the Township, and that no guidance was given on what should be included in them, did not undermine their public interest nature. Lastly, he rejected the argument that the fact that the Council heard the matter *in camera* because it was before the LPAT, undermined the public interest nature of the comments.

[25] Turning to the three issues that the respondents had to establish on the basis of "grounds to believe", the motion judge first found that there was no evidence that the negligence claim had substantial merit. That claim was therefore dismissed. There is no appeal of that finding or of the dismissal of that claim.

[26] Turning to the defamation claim, the motion judge was satisfied that there were grounds to believe that that claim had substantial merit and that the respondents had suffered damage. The next issue was the status of the defences

raised by the Township. In *Bent v. Platnick*, 2020 SCC 23, at para. 103, the Supreme Court of Canada described the onus on a plaintiff for this aspect of the test as requiring "a basis in the record and the law…to support a finding that the defences [the defendant] has put in play do not tend to weigh *more* in [the defendant's] favour" (emphasis in original).

[27] The Township raised four defences: justification, fair comment, qualified privilege and the signed release and indemnity. The motion judge found that the respondents had met their onus with respect to each of the four defences, i.e., there were grounds to believe that none of the defences had a real prospect of success.

[28] On justification, the motion judge specifically addressed the arsenic allegation and found that Mrs. Thatcher-Craig's evidence that their farm was not contaminated by arsenic was capable of belief.

[29] On the defence of fair comment, while he accepted that the comments, viewed as a whole, were on a matter of public interest, he viewed the impugned portions as "baseless attacks by openly disgruntled neighbours" and not honestly held opinions based on proven facts.

[30] The last two defences were qualified privilege and indemnity.

[31] The Township argued that posting the comments on its website constituted an occasion of qualified privilege. By doing so the public gained access to the

comments made by other members of the public, which would be considered by the Township. Posting them was part of the Township's commitment to transparency in the approvals process. The respondents argued that either qualified privilege did not attach to the comments in the first place, or the comments exceeded the scope of any privilege. The motion judge considered six factors in determining the prospect of success of the defence: 1) the Township did not solicit the comments; 2) the site plan application calls for a less formal planning process with no mandatory public meeting; 3) the Guideline does not say that comments from the public would be posted on line;[1] 4) the content of the posted comments was largely irrelevant to the issue of a micro-brewery; 5) the content was available to anyone using the internet; and, 6) the Township published the comments without giving any guidance to ensure that the information was appropriate.

[32] Based on those factors, the motion judge concluded that either qualified privilege did not arise, or its scope was exceeded.

[33] The indemnification defence was based on the agreement in the site plan application to fully release and indemnify the Township from "any responsibility or consequences arising from publishing or releasing the application and supporting or associated information." The site plan application states as follows:

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[1] I address this finding under the defence of indemnification. I conclude that the motion judge erred in his interpretation of the term "commenting letters" that forms the basis for the indemnity and that that term does mean letters from members of the public.

> …the information on this application and any and all supporting documentation provided by myself, the applicant, agents, consultants and solicitors, as well as commenting letters or reports issued by the municipality and other review agencies will be part of the public record, may be published and distributed by the municipality in any form, and will also be fully available to the general public.

[34] The motion judge found that the term "commenting letters" must be read as commenting letters from the municipality or other agencies and cannot be read as referring to any other commenting letters such as from the public. He therefore found that the indemnity did not extend to the consequences of posting commenting letters from the public.

[35] Having found that the respondents' defamation claim had substantial merit and that the Township's proposed defences had no reasonable chance of success, the final factor under s. 137.1(4)(b) was to weigh the public interest in allowing the claim to proceed against the public interest in protecting the challenged expression.

[36] The motion judge inferred from the record that the respondents had suffered substantial monetary harm in the form of lost sales from the publication of the comments on the Township's website and the fact that they were easily accessible through a Google search or another online search engine. He also found that the comments would have had a negative impact on the respondents' reputations. The motion judge was critical of the Township for failing to "guide, vet or review" the

comments that it placed online, and saw the issue to be "whether the Township acted appropriately in simply posting the unsolicited and unfiltered comments online, not whether it was wrong for members of the public to send their concerns to the Township." He viewed the comments as personal attacks intended to denigrate the respondents and that broadcasting them undermined the legitimacy of the process by sending the message to the public that the submissions were relevant and appropriate.

[37] He concluded that the proceeding was not aimed at undermining public debate on planning issues and that the public interest in allowing it to proceed outweighed the public interest "in protecting the specific expression in question."

Issues on the Appeal

[38] The Township raises the following issues on the appeal:

[39] Did the motion judge err in his approach to the statement of claim because he understood that the respondents prepared it without counsel;

a. Did the motion judge err in law by considering alleged defamatory statements that were not pleaded in the statement of claim or provided in response to the demand for particulars;
b. Did the motion judge err in finding that the claim had substantial merit by accepting the evidence of the respondent that the property was not contaminated with arsenic;

c. Did the motion judge err by finding that the Township's four potential defences had no real prospect of success;

d. Did the motion judge make a palpable and overriding error of fact in finding that the alleged defamatory statements likely caused damages in the form of loss of sales;

e. Did the motion judge err in his finding that the proceeding does not seek to limit public participation in the planning process;

f. Did the motion judge err by failing to dismiss the claim for breach of fiduciary duty; and

g. Did the motion judge err in his award of costs to the respondents when part of the claim was dismissed?

[40] Because in my view, the appeal turns on the availability and strength of the defence of qualified privilege to the defamation claim as well as the indemnity defence, it will not be necessary to address all of the issues raised.

Analysis

Framework for a motion under s. 137.1 of the *Courts of Justice Act*

[41] Section 137.1 of the *CJA* was enacted to allow the court, at an early stage, to dismiss a claim that will limit freedom of expression on matters of public interest. The four purposes of the section are set out in s. 137.1(1):

> The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) To promote broad participation in debates on matters of public interest;

(c) To discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) To reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[42] Subsections (3) and (4) describe the test the court applies to determine whether to dismiss the proceeding. Under s. 137.1(3), the proceeding shall be dismissed if the defendant satisfies the court that it arises from expression by a person that relates to a matter of public interest.

[43] However, under s. 137.1(4), the proceeding shall not be dismissed if the responding party then satisfies the court that, nevertheless, three criteria of the proceeding have been met: 1) there are grounds to believe that the proceeding has substantial merit; 2) there are grounds to believe that the moving party has no valid defence in the proceeding; and 3) the harm likely caused to the plaintiff by the impugned expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. It is important to note that all three criteria must be met for the motion to fail.

[44] The motion judge had no trouble finding that the impugned comments from members of the public that the Township posted on its website related to a matter of public interest. He explained:

> Municipal land use matters regularly raise issues of public importance. In this case, the use of the plaintiffs' property was the subject of on-going public concern from neighbours and other residents of the Township. The plaintiffs' plan to seek approval for an on-site brewery was newsworthy in the community and the subject of an article published in the local, and other, newspapers describing the nature of the Site Plan application. The newspaper article prompted unsolicited letters to the Township on the issue.
>
> …
>
> The letters, viewed as a whole, consist of public comments on proposed and current land uses by the plaintiffs. They are from Township residents who are clearly concerned with, *inter alia*, the reported plans to build a micro-brewery on the farm property. The Township received the letters and decided to consider them on the Site Plan application that had been submitted by the plaintiffs. The letters were then posted online along with the plaintiffs' Site Plan application, though the fact they were posted was not brought to the attention of the plaintiffs.
>
> Viewed in this context, I am satisfied that the posting of the letters on the website is an expression relating to a matter of public interest. The members of the community have an interest in issues relating to municipal planning and permitted land uses. The Township has an interest in maintaining an open and transparent planning process that is receptive and responsive to the needs of its residents. These interests go beyond mere curiosity. They extend to significant issues of safety, comfort, convenience and fair enjoyment of property. These are issues that members of the public would have a genuine

> issue in knowing about. They are also issues over which there exists a democratic interest in fostering wide ranging debate.

[45] This finding is not challenged on the appeal. In any event, I agree with the motion judge's analysis and his conclusion.

[46] The proceeding would therefore be dismissed unless the respondents satisfied the court, to the requisite standard, of the three matters in s. 137.1(4): that their case has substantial merit, that the defences raised by the appellant are not valid, and that the public interest in allowing the case to proceed outweighs the public interest in protecting the expression.

[47] In my view, the motion judge erred in law in his approach to and analysis of the qualified privilege defence. Because of that error, as well as a similar error regarding the defence based on the indemnity agreement, the three criteria are not met and the action in defamation must be dismissed.

Preliminary Issue: Did the motion judge err by treating the statement of claim as pleading the specific allegations of defamatory expression because the respondents were self-represented litigants?

[48] The appellants submit that the motion judge made two errors in his treatment of the statement of claim. First, he was under the misunderstanding that the statement of claim was not drafted by a solicitor when it was. The second was that he granted latitude to the respondents by reading into the statement of claim the specifics of the alleged libel that were not specifically pleaded, which had the effect

of undermining the intent of s. 137.1(6)(a) of the *CJA*, which prohibits amending the pleading without a court order to avoid dismissal under this section.

[49] The fact that a draft statement of claim was prepared by the respondents' former solicitor was part of the record before the court when the individual respondents sought to represent the corporate plaintiff. When the Township served a Demand for Particulars, the response was that the particulars were within the Township's knowledge. It was only when the factum for the motion was delivered that the specific words complained of were listed and articulated for the appellant.

[50] The motion judge stated more than once in his reasons that he was prepared to grant some latitude to the plaintiffs in respect of the statement of claim because they were self-represented when they commenced the claim, which was not drafted to the standard expected of counsel, and was in some respects deficient. The motion judge referred to s. 137.1(6) which prevents a party from amending its pleadings once the motion is brought, in order to avoid the dismissal of the action. Nevertheless, the latitude he granted was to base the analysis of the s. 137.1 motion to dismiss and in particular, the potential defences to the defamation claim, on the basis of the whole record before him rather than just the statement of claim.

[51] In my view, the motion judge erred in law by so doing. While it is within the discretion of a motion or trial judge to control the court process and in that context grant latitude to a self-represented litigant on procedural issues, that discretion

does not extend to rectifying substantive legal deficiencies: see Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons,* September 2006 (online: http://www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_eng.pdf), endorsed in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470.

[52] It is a requirement of a defamation claim that the words complained of must be identified, together with their alleged defamatory meaning and any alleged innuendo arising from them: Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* loose-leaf, 2nd ed., (Toronto: Thomson Reuters, 2017), at para. 19.4; see also Peter A. Downard, *The Law of Libel in Canada,* 5th ed., (Markham: LexisNexis Canada, 2022), at para. 3.02. The prohibition against amending the claim once the motion is commenced arises from the strict pleading requirements of a defamation claim.

[53] The effect of what the motion judge did by looking past the actual statement of claim to the allegations more fully set out in the factum on the motion was to circumvent the prohibition in s. 137.1(6) and allow the respondents to effectively amend their claim. The claim therefore included not only the arsenic allegation that was specifically pleaded, but the other negative comments about the respondents that were listed in their factum on the motion, set out above at para. 18.

[54] While this was an error by the motion judge, because the motion judge's decision relates to all of the impugned public comments, in my view it is appropriate to consider all of the impugned comments in the context of the defence of qualified privilege for the purpose of the appeal.

The Defence of Qualified Privilege

[55] The basic principles that constitute the defence of qualified privilege were recently restated by the Supreme Court of Canada in *Bent v. Platnick*, at paras. 121-122:

> 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". Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself". Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff". However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded.
>
> For this reason, a precise characterization of the "occasion" is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused. [Citations omitted.]

[56] To assess the potential viability of the defence in this case, the court had 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.

[57] The motion judge erred in law by failing to determine whether the required reciprocal duty or interest by the Township to its constituents existed and by not precisely defining the occasion of qualified privilege, in order to then address whether it was exceeded by the publication of any of the impugned letters.

Does qualified privilege apply? What is the scope of the privileged occasion?

[58] "Canadian and English authorities have long applied the concept of qualified privilege…to speech uttered during the course of a municipal council meeting": *Gutowski v. Clayton*, 2014 ONCA 921, 124 O.R. (3d) 185, at para. 6, citing *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Ward v. McBride* (1911), 24 O.L.R. 555, 20 O.W.R. 93 (Div. Ct.); *Baumann v. Turner* (1993), 105 D.L.R. (4th) 37, 82 B.C.L.R. (2d) 362 (C.A.), at p. 53; *Wells v. Sears*, 2007 NLCA 21, 264 Nfld. & P.E.I.R. 171, at paras. 13 and 16, leave to appeal refused, [2007] S.C.C.A. No. 233; *Leger v. Edmonton (City)* (1989), 63 D.L.R. (4th) 279, 100 A.R.

196 (K.B.), at p. 284; *Horrocks v. Lowe*, [1975] A.C. 135, [1974] 1 All. E.R. 622 (H.L.), at p. 152 A.C. That privilege has been applied not only to municipal councillors but also to communications to council from a constituent: *Lemire v. Burley*, 2021 ONSC 5036, at para. 100; *Niagara Peninsula Conservation Authority v. Smith*, 2017 ONSC 6973.

[59] The issue in this case is whether the occasion of the privilege extends beyond a council meeting to the entire public land use planning process conducted by the Township and mandated by both the *Planning Act* and the *Municipal Act*, *2001*, S.O. 2001, c. 25 and if so, whether it extends to the posting of the public information on the Township website.

[60] Examples of the municipality's mandate from the *Planning Act* include the following ss. 1.0.1 and 1.1(d):

> 1.0.1 Information and material that is required to be provided to a municipality or approval authority under this Act shall be made available to the public.
>
> 1.1 The purposes of this Act are,
>
> …
>
> (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient.

[61] In addition, numerous provisions of the *Planning Act* set out the requirements for notice, standing, opportunity to make submissions to council, public access to information filed, public consultation and meeting requirements,

and council's obligation to identify the effect of public representations on its decisions, all of which speak to the duty of the municipality to keep the public informed of its activities and the information that it generates and receives, together with the public's interest in receiving that information: see e.g., *Planning Act*, ss. 22, 34 and 51; see also O. Reg. 545/06, s. 5.

[62] In addition, s. 8 of the *Municipal Act* confers "broad authority on the municipality… to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues". It can enact by-laws respecting "accountability and transparency of the municipality and its operations and of its local boards and their operations": *Municipal Act*, ss. 10 and 11. These provisions give a municipality flexibility to tailor its processes to encourage community involvement.

[63] In this case, the Township gave itself authority to go beyond the *Planning Act* requirements for community involvement in its site plan control by-law enacted under the *Municipal Act*. This was explained in the affidavit filed by Ms. Mara Burton, the Director of Community Services in the Planning and Development Department of the Township:

> The Township generally follows the following process for site plan applications. Each site plan application is reviewed by the Planning and Development Department, which then submits a planning report with recommendations to Council. The application is placed on the agenda for the next Council meeting, which is

posted online so the public has advance notice of the matters to be raised at the meeting.

The Planning and Development Department's recommendations are considered at the Council meeting, which is an open public forum. Anyone who wishes to do so is allowed to comment on any matter that is before Council. The Minutes of the meeting typically summarize the discussions held on the issues, and the Minutes are posted on the Township's website.

Comments provided by members of the public become part of the application file and are attached to the planning report, so the public can see what information was available to Council when making its decision. All planning applications are open and available to the public for viewing at any time. The Township's online application database is the place where we post applications. Even without the database, anyone interested in receiving information about a specific application would be entitled to make a request and receive the same information, whether by e-mail or over the counter. This is all part of the Township's commitment to transparency in decision making.

When the Township receives comments from the public, it is a requirement to ask for the names and address of each commenter. This is important not only for reasons of transparency, but also so the Local Planning Appeal Tribunal can notify persons who may want to become a party to a particular appeal.

Comments from the public are without a doubt an important part of the planning process, and this is why it is a public process. On occasion, long-time residents have made the Township aware of a previous use for certain lands that we would not otherwise have been aware of, such as use as a gas station or a landfill site. Without an opportunity for the public to provide such information, the Township might make planning decisions that could turn out to be hazardous to the public.

[64] In addition, the Township created a Guideline, posted on its website, which explains the Township's public consultation process, and which was signed and acknowledged by the respondents' planner. That Guideline provides:

> CONSULTATION WITH THE PUBLIC & OUR COMMENTING PARTNERS
>
> Public consultation and engagement is an integral part of the Planning process. Public consultation is mandated by the Planning Act for most approvals processes, including for amendments to the Official Plan and Zoning By-law, and for subdivision/condominium applications. At least one public meeting will be a part of your approvals process.
>
> …
>
> It is a Planner's responsibility to ensure transparency in the approvals process for all applications for the public good. As part of this ongoing effort, we have created an online application database: http://CleaviewApplications.org
>
> The database is intended to provide information about all formal applications and is continually updated throughout the approvals process. At any time, a member of the public, an agency, or Township staff member can go to the database to get all the information they need on a given application.

[65] As discussed above, in the context of considering the threshold issue under s. 137.1, whether the proceeding brought by the respondents arises from an expression relating to a matter of public interest, the motion judge explained in detail why municipal land use matters raise issues of public importance, and why the planning process must be open and transparent as well as "receptive and

responsive to the needs of its residents." He focused on the public's genuine interest in knowing about local planning issues because they are affected by them. He also recognized the importance to the democratic process of fostering wide-ranging debate.

[66] He concluded that the impugned letters posted by the Township on its website were public comments on the proposed land use by concerned Township residents who have an interest in municipal planning and land use, and that the Township has an interest in maintaining an open and transparent planning process receptive to the needs of its citizens. I agree with his observations and his conclusions on this issue.

[67] In my view, it is clear based on the statutory structure and the approach of the municipality to the public's role in the planning process, that the Township has an interest and duty, both legal and social, to make the planning process transparent and accessible to its residents and that they have a similar duty and interest in accessing the information related to the process. That includes providing access to all information and all comments that will form part of the record to be considered by council, including comments from the public.

[68] Consistent with how information is typically communicated and accessed in today's society, the municipality made all of the information and comments publicly available online on its website. The expectation that citizens will attend at the

municipal offices during business hours to view documents as the sole method for such access is obsolete. People now expect to be able to access publicly available information online. Particularly after the Covid 19 pandemic, which kept people in their homes, that expectation became a necessity.

[69] The motion judge referred to three factors that he said indicated that the defence of qualified privilege did not arise. The effect of these factors is to reject the publication of all documents relating to the site plan process on the Township's website as part of the occasion of the privilege. The three factors were that the Township did not solicit comments on the site plan application, no public hearing is required for a site plan application, and the Guideline does not say that public comments will be posted on the website.

[70] In my view, the motion judge erred in his approach by improperly narrowing the occasion from one grounded in public participation and municipal transparency in local land use planning to one defined by technicalities of the particular process. In *Bent v. Platnick*, the court focused on the principle that the privilege, based on the reciprocal duty or interest of communicating and receiving information, is grounded in "the social utility of protecting particular communicative occasions from civil liability": at para. 124. Similarly, in *RTC Engineering Consultants Ltd. v. Ontario* (2002), 58 O.R. (3d) 726, 156 O.A.C. 96 (C.A.), at para. 16, this court explained that the reciprocal duty or interest "should not be viewed technically or narrowly".

[71] The motion judge erred by failing to define the scope of the occasion, or to the extent he considered it, he took a narrow technical approach rather than focusing on the social utility of protecting the communication from civil liability in the context of the municipal planning process and the public's role in that process.

[72] It therefore falls to this court to define the occasion to which the qualified privilege attaches in the circumstances of this case. I conclude that qualified privilege attaches not only to council meetings but to the entire public planning process including the material received in response to the respondents' application and posted on the Township's publicly available website.

Was the privilege exceeded by posting the impugned comments from members of the public?

(a) Were the impugned letters posted on the Township website after the site plan process was complete and therefore outside the privileged occasion?

[73] The respondents submit that because the comments were not solicited by the Township but were sent in by members of the public in response to the newspaper article reporting on council's rejection of the site plan application process, they were posted outside the time of the site plan process and therefore cannot be protected by qualified privilege.

[74] I would not give effect to that submission. When considering the defence of qualified privilege, this court has previously cautioned against attaching too much weight to the matter of timing without regard to the circumstances and nature of

the issue under consideration: *Clement v. McGuinty* (2001), 143 O.A.C. 328, 18 C.P.C. (5th) 267, at para. 28. Here, arguably the site plan process remained ongoing while council's failure to address the application was on appeal to the LPAT. Council made a preliminary procedural decision, but had not addressed the merits of the site plan application. The concerns of the residents over the proposed micro-brewery had not been addressed because the procedural issue had yet to be resolved by the LPAT or the Superior Court of Justice.

(b) Did some or all of the posted comments exceed the limits of the reciprocal duty or interest of the Township and the residents to conduct a transparent and collaborative site plan process?

[75] In *Bent v. Platnick*, the Supreme Court of Canada explains, at para. 128:

> Qualified privilege may be defeated when the limits of the duty or interest have been exceeded. This is the case when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion.[2] [Citations omitted.]

[76] The motion judge appeared to base his conclusion that if there was a privilege it was exceeded, on his description of the following three factors:

> The content posted online by the Township, was in large measure irrelevant to the issue to be determined by the Township. Much of the public comments simply paint that

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[2] In *Bent v. Platnick,* the court goes on to discuss a further criterion of necessity in the context of that case where a particular person was named in the published information and the issue was whether it was necessary to name the person when publishing the information. I believe that the "necessity" criterion is limited to that context and does not arise in this case where the names of the people and their proposed project are the subject of the site plan application upon which the comments were made.

> plaintiffs as bullies, cruel towards animals, destructive towards the environment, deceitful and fraudulent, of poor business acumen and unethical farmers. None of these comments are relevant to the proposed use of the farm land for a micro-brewery.
>
> The content was posted on a publicly accessible website, captured by Google search algorithms and accessible to a much broader audience than the residents of the Township.
>
> The Township published the information online in the absence of any policy, guideline or procedure that might serve to attenuate the potential risk of harm by ensuring that the information was appropriate.

[77] These three factors speak to the motion judge's concern about the relevance of the comments, that the recipients were not limited to those with reciprocal interest, and that there was no policy or guideline for the comments, respectively. I will address each in turn.

(i) Relevance

[78] The first factor is a conclusion by the motion judge that negative comments about the way the respondents have operated their existing hops operation contained in the letters from their neighbours are irrelevant to the proposal to use the farmland to operate a micro-brewery.

[79] This constitutes a misapprehension of the comment letters, which, when read in their entirety, appear to be intended to provide the Township with insight into problems with the current operation that affect the neighbours and the farming character of the community. They are intended to alert the Township to the

potential for further problems if the respondents were to be permitted to add an additional non-farming operation. They are clearly relevant to the site plan process. The motion judge focuses only on certain negative words used to describe the respondents, taken out of context of the entire letters. However, if for example, a landowner had built a trench that could trap animals in an inappropriate manner, that practice may be relevant to Township authorities before granting further rights to abrogate farmland where animals might otherwise live.

[80] As the motion judge observed earlier in his reasons:

> The letters, viewed as a whole, consist of public comments on proposed and current land uses by the plaintiffs. They are from Township residents who are clearly concerned with, *inter alia*, the reported plans to build a micro-brewery on the farm property.
>
> …
>
> Viewed in this context, I am satisfied that the posting of the letters on the website is an expression relating to a matter of public interest.

[81] This conclusion dovetails with the analysis that the entire site plan process including the website constitutes an occasion of qualified privilege and that the letters from the public are relevant to that process and are therefore protected by the privilege.

[82] The fact that the letters contain negative comments about the respondents and their operation does not make them irrelevant and does not result in the loss

of the protection. As noted by the Supreme Court in *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 30:

> The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends. [Citations omitted.]

[83] In that regard, the evidence of Ms. Burton, the Director of Community Services in the Township's Planning and Development Department, was that while it was not the role of the Township to edit the submissions of residents, that was always subject to comments that are contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19. Any letters containing such comments would be referred to legal counsel. I would anticipate that such a letter would be wholly rejected for any inclusion in the process.

(ii) The potential audience for the postings went beyond residents of the Township

[84] The motion judge has identified an issue that is currently endemic to the internet – posting on a publicly available website makes content searchable and accessible worldwide. As technology is constantly evolving, improvements will certainly be made to continue to address privacy and control issues. For now, the motion judge's concern is that the audience for the information posted on the website is not limited to the residents of the Township who are the constituency

who have the reciprocal interest in receiving the posted information about local land use planning matters.

[85] In my view, to address this issue for the purposes of the qualified privilege analysis, one should look at the purpose of the Township website and who are the people most affected by it. The purpose is to keep the residents of the Township informed of and to give them the opportunity to be involved in all matters that may affect their rights, obligations, and daily life as residents. It is therefore the residents who are the target of the website and, are the people most likely to access it.

[86] The material is posted in a database designed to assist the Township's planning process and keep the public engaged. The database is made known to applicants, including the respondents who acknowledged receipt, through their planner, of the Township's Guideline, which specifically notes: "At any time, a member of the public, an agency, or Township staff member can go to the database to get all the information they need on a given application."

[87] Accordingly, while its contents are accessible to others, that does not undermine the reciprocal duty and interest between the Township and its residents and the fact that today a website is the most efficient, accessible and cost-effective method of allowing the public access to government information.

(iii) The Township did not give instructions to the public about appropriate content for public comments

[88] Although there is a *Charter* right to freedom of expression, there is no *Charter* right to have one's comments published by the Township. It is done as a matter of policy for transparency, full disclosure and participation. As a course of prudence, a Township may wish to give guidance to those who want to comment on planning issues, to best ensure that comments are relevant and do not exceed the scope of the qualified privilege. However, the failure to do that does not change the analysis for deciding whether any of the content of the posted letters exceeds the privilege.

[89] While there is no suggestion of malice on the part of the Township, in another case, if, for example, the content of the public comments clearly amounted to a vitriolic attack on an applicant resident, the Township could risk a claim of malice if it chose to post such an attack on its website.

[90] The Township is required to exercise some prudence in the operation of its website, the need for which is amplified when it is posting comments from the public not written or edited by the Township. But the scope of the privilege is broad. It fosters the goals of transparency, public participation in Township matters and the exercise of democracy. The intent of the privilege is 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.

(c) Conclusion on the defence of qualified privilege

[91] The motion judge erred in law by failing to define the occasion of qualified privilege, as required by the Supreme Court of Canada jurisprudence in *Bent v. Platnick*, or by defining it in a narrow and technical fashion. He further erred by finding that if qualified privilege applied, the posted comments exceeded the privilege.

Application of the test under s. 137.1 of the *CJA* to the potential defence of qualified privilege

[92] Based on this analysis and conclusion regarding the potential defence of qualified privilege, in my view, the potential for that defence to be successful weighs more in the Township's favour and has a real prospect of success. With that finding, the conditions for not dismissing under s.137.1(4)(ii) are not satisfied. Therefore, as the conditions for dismissing under s. 137.1(3) were satisfied, the proceeding in defamation must be dismissed.

The Indemnification Defence

[93] The site plan application contained a release and indemnification clause regarding "any responsibility or consequences rising from publishing or releasing the application and supporting or associated information." The motion judge found that the language in the site plan application regarding what information would be published does not refer to comments from the public. The Township's position is that the motion judge erred in his interpretation of the indemnification.

[94] The following is the contractual language considered by the motion judge:

> … the information on this application and any and all supporting documentation provided by myself, the applicant, agents, consultants and solicitors, as well as commenting letters or reports issued by the municipality and other review agencies will be part of the public record, may be published and distributed by the municipality in any form, and will also be fully available to the general public.

[95] The motion judge found that "commenting letters or reports issued by the municipality and other review agencies" is not to be read disjunctively, and means commenting letters from the municipality. Typically, the interpretation of "or" is disjunctive while "and" is conjunctive unless it should be read vice versa to avoid absurdity: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022), at para. 4.05. The motion judge's unusual interpretation of the word "or" as not disjunctive is unsupported. In addition, there

is no evidence that the municipality or other review agencies send commenting letters. However, there is evidence that their comments are made in reports. There is also evidence that the practice of the Township is to make all commenting letters from the public available to the public along with all the other documentation relating to the application. It would be anomalous for the Township to seek an indemnity that does not include all of the information that it makes available to the public.

[96] Moreover, the full paragraph of the indemnification makes plain the purpose of the indemnification is to engage the public:

> In accordance with the provisions of the Planning Act, it is the policy of the Planning and Development Department to **provide public access** to all development applications and supporting documentation. In making or authorizing submission of this development application and supporting documentation, I/we, the owner hereby acknowledge the above-noted and provide my full consent …that the information on this application the information on this application and any and all supporting documentation provided by myself, the applicant, agents, consultants and solicitors, as well as commenting letters or reports issued by the municipality and other review agencies will be part of the public record, may be published and distributed by the municipality in any form, and will also be fully available to the general public. [Emphasis in original.]

[97] The emphasis and encouragement of public participation in planning matters is not merely to give notice, but to engage the public. The result of reading the

indemnity in a manner that ignores the plain and ordinary meaning of “or” is that public comments are excluded from the indemnification, an unlikely outcome given the intent of ensuring this engagement occurs.

[98] In my view, the motion judge erred in his interpretation of the indemnity clause. As a result, that defence as well would have a good prospect of success.

The Claim for Breach of Fiduciary Duty

[99] The motion judge declined to dismiss this claim under s. 137.1 of the *CJA*, but indicated that it would be open to the appellant Township to bring a further motion under r. 21 of the *Rules of Civil Procedure*.

[100] As the Township did not bring this issue forward other than under s. 137.1, there is no basis to interfere with the disposition made by the motion judge.

Conclusion

[101] There is no need to address the other issues raised by the appellant. I would allow the appeal on the defamation claim, and dismiss that claim under s. 137.1 of the *CJA*. I would dismiss the appeal on the breach of fiduciary duty claim.

[102] The parties have agreed to costs of this appeal in the amount of $16, 026.85, inclusive of disbursements and HST. The parties did not make submissions on the impact of a successful appeal on the costs awarded by the motion judge. If the

parties are unable to reach an agreement regarding the costs below, the Township may file written submissions limited to a maximum of three pages on the costs of the motion below no later than February 28, 2023, and the respondents may file written costs submissions limited to a maximum of three pages no later than March 14, 2023.

Released: February 10, 2023 “K.F.”

“K. Feldman J.A.”
“I agree. J. George J.A.”
“I agree. J. Copeland J.A.”