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Councillor and Administration Conduct: What You Need to Know

Sean Ward
Kelsey Becker Brookes



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Introduction

- Bad behaviour on Council (or by staff) is nothing new, but a few things have changed:
- Social Media gives a much more instant and public forum for that behaviour, and for attacks of and by elected officials or administration

2

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Introduction

- Bad behaviour on Council (or by staff) is nothing new, but a few things have changed:
- Law of defamation continues to evolve to address online and social media issues, and the rights or duties of public bodies in dealing with those issues

3

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Introduction

- Bad behaviour on Council (or by staff) is nothing new, but a few things have changed:
- Codes of Conduct bylaws are now mandatory for all municipalities, and provide an avenue for addressing complaints, but also as a tool to be used against councilors by ratepayers or other members of Council

4

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Introduction

- We will start by reviewing the law of defamation:
- How to deal with defamatory remarks levelled against municipal officials or employees
- How to protect yourself from defamation claims in dealing with difficult members of the public

5

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Introduction

- Review specific issues arising from defamation or online harassment on social media:
- Difficulties in enforcing defamation laws
- Risks of sharing or hosting content
- Duty to protect employees from harassment
- Evidence of Disqualifying Bias of Elected Officials

6

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Introduction

- Consider issues related to Code of Conduct Bylaws and their application:
 - Review statutory requirements and limitations
 - Selection of Investigator
 - Conflict of Interest Concerns
 - Abuse of Code of Conduct Process

7

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Defamation

- Council conduct issues often involve (or devolve into) threats of defamation
 - In some cases because defamatory comments by an elected official are the problem
 - In other cases because an aggrieved Councillor subject to code of conduct complaints or sanctions threatens to sue for defamation

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Defamation

- Also an increasingly common concern arises from how to respond to defamatory remarks by members of the public
 - Attacking elected officials, but also staff members
 - Discuss how municipality can (and can't) help in those situations

9

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Defamation Law

- Law develops slowly, and not well-understood
- New media outpaces legislative and common law changes
- Law operates by applying existing rules to new situations, and modify as necessary.

10

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Defamation Law

- Sources of Law
 - *Constitution Act 1982, Part 1 (Charter, s. 2(b))*
 - *Defamation Act*
 - Slander and Libel- both referred to as "defamation"
 - Common Law
 - (*Criminal Code, ss. 300 and 301*)

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Defamation Law

- Law of torts - a civil wrong
- "Strict liability"
 - Intention is irrelevant
 - Doesn't matter what you meant

12



Defamation Law

- Statement which tends to lower a person in the eyes of others
 - Diminish respect and confidence in the victim
- Three elements
 1. Statement was defamatory
 2. Statement was about the victim
 3. Words were published (i.e. communicated)

13



Was Statement Defamatory?

- Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?
- “Defamation” vs. “Insult”
- Defamatory meaning is determined by a judge or jury- may be different than what you thought you were writing!

14



Defamatory Meaning

- Natural and ordinary meaning; or
- Innuendo
 - An ordinary reader would “read between the lines”.
 - Story about a fire, noting recent insurance coverage.

15



Identified the Victim?

- Was what was said about an identifiable individual?
 - Doesn't have to name the person
 - If a reasonable reader would understand it refers to the person, by innuendo, by photograph, or through references made in the article, this element is satisfied
 - Intention is irrelevant

16



Identified the Victim?

- Group Defamation
 - Size of the group, nature of the group, target of the defamation, seriousness of the allegations, tendency to be accepted.
 - Example- Do allegations about "Council" identify and apply to each or any individual Councillor?

17



Publication Requirement

- Communicating the statement to someone other than the Plaintiff
 - Oral or written communication
 - Repetition is Publication
 - Publisher of other party's statements

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Publication Requirement

- Modern meaning of “published”
 - Includes emails, tweets, blogs and websites
 - Makes a website host potentially liable for any content, even when posted by others (just as a newspaper could be liable for stories or even letters to the editor it chooses to publish)

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Defamation Law

- Presumptions
 - Damages
 - Falsity

20

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Defamation Law

- Defences (defendant)
 - Justification (Truth)
 - Consent
 - Absolute or Qualified privilege
 - Fair Comment
 - Responsible Communication/Neutral Reportage

21



Justification (Truth)

- Remember that Truth is a defence, with the onus on the Defendant to prove truth
- Defamatory statements are presumed to be false

22



Justification (Truth)

- Can be very hard to prove
 - Must be actual evidence, not just hearsay or innuendo
 - (“everyone knows” won’t help)

23



Justification (Truth)

- Doesn’t mean the truth of a quote or source
 - Have to prove the underlying information is truthful
 - Be careful about assumptions
 - So even if you accurately quote a source, or reproduce information from a book or article, you have to prove that the statement itself is true
- (Although could be protected by Neutral Reportage as we’ll see later)

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Justification (Truth)

- Being partly true is not helpful
 - Even if it is a small portion or minor details that are incorrect

For example:

- Story talks about affairs with 10 women...actually only 8...seems like mostly proved, but not enough
- And even if he had 10 affairs, but you only had evidence to prove 8...hotel receipts, pictures, etc...still can't establish truth

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Justification (Truth)

- Have to prove that statement is true in substance and fact
 - So you also have to prove the truth of innuendo found to arise from the story

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Consent

- Very rarely would ever apply, but possible for a person to consent to being defamed even where information is untrue
- However, consent must be **full and informed**, and must be consent to the specific statements being made
- Don't assume someone is okay with comments you will make

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Fair Comment

- This protects the right to opinions and interpretations
- Intended to allow people to express their own views on matters of public interest; even if the statement is otherwise defamatory
- But there are several requirements to rely on this defence...

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Fair Comment

- 1) The information must be clearly recognizable as comment
 - It can include inferences of fact
 - But a reasonable reader must conclude that it is an expression of opinion

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Fair Comment

- 2) The comment must be based on provable facts
 - Have to be able to prove facts- not enough that it is reasonable to conclude they are true, or that "everyone knows"
 - Must be facts set out in the story or generally known.

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Fair Comment

3) Comment must be on a matter of public interest

- This has not been a very high standard, but a reasonable person (as opposed to the author) must consider the issue to be of public interest

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Fair Comment

4) Comment must satisfy this test:
 Could any person honestly express that opinion on the proved facts?

- Again, there is a very low threshold, and doesn't require the author to actually hold that opinion (specifically set out in the Alberta *Defamation Act*)

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Fair Comment

Malice

- Finally, even if you meet all four requirements, the defence of fair comment will not apply if the author acted with malice
- Means that the author intentionally set out to harm the target of the comment because of some improper motive

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Fair Comment- takeaways

- Although not required, it is easier to establish this defence for articles published in forums clearly conveying opinions (letters to the editor, portions of newsletters or other communications labeled as opinion)
 - But remember “in my opinion” is not determinative

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Fair Comment- takeaways

- When expressing opinions that are potentially defamatory, limit the statements of fact associated with that opinion
 - The more facts that are set out in a letter, email or other publication mixed in with statements of opinion, the greater the risk that one of those facts cannot be proven as true (thereby losing the defence of fair comment for the defamatory opinions)

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Absolute Privilege

- Defence protects statements made in certain forums:
 - Parliament
 - Legislature
- Applies regardless of malice or other issues
- Note this does not include municipal council meetings

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Absolute Privilege

- Recent decision seeking to dismiss a defamation claim against Councillor for statements made in Council chambers
- Court declined to extend absolute privilege protection, confirmed it was a qualified privilege defence that would apply
 - Central difference is that it is subject to malice

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Qualified Privilege

- Limited defence available to persons who make statements as part of their professional or social duty
- Even if statement is not true (or cannot be proven as true), if made in good faith as part of that professional duty, to persons with an interest in receiving that statement, may be protected by qualified privilege

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Qualified Privilege

- Statements made in Council Meeting or Committee Meeting generally subject to this defence
- Careful not to “exceed the privilege” in terms of audience for statement
- Always subject to an argument made with malice

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Qualified Privilege

- Same statement may be protected in Council Chambers, but not once circulated on social media- the context is important
- Consider directing people to attend Council meeting or public hearing; better protection for statements made in that forum

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Responsible Communication

- Defence is generally more applicable to journalists, but available to any member of the public
- Where publication on a matter of public interest can be proven to be true, defendant may be able to show they took sufficient responsible steps to justify the publication

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Responsible Communication Factors

- Seriousness of the allegation
- Nature of the information (extent of public concern)
- Source (direct knowledge/bias)
- Steps taken to verify the information
- Whether the issue was already subject to investigation

42



Responsible Communication Factors

- Urgency in publishing (without gathering further information or checking other sources that might have helped avoid any false and defamatory statement)
- Whether comment sought from the “target” of the story; and whether the article contained his side of the story
- Circumstances of publication (ie-timing)

43



Responsible Communication Factors

- Neutral Reportage
 - Exception to the traditional “repetition rule”
 - In cases of public controversy where allegations and counter-allegations are being made- can report on the allegations, even if they are potentially defamatory

44



Responsible Communication Factors

- Neutral Reportage
 - Point of the publication is not to simply repeat the allegations (which would be defamatory), but to publish the existence of the controversy.
 - Lesser duty to verify statements; because it's the *fact* of the allegation rather than the *truth* of that allegation which is the matter of public interest.

45



Responsible Communication Factors

- Neutral Reportage
 - So if a public dispute between officials which impacts on your community, you may want to refer to what is happening
 - But remember it must be conveyed neutrally, and defence is undermined if you do not provide both sides of the story
 - Expressing an opinion on the controversy undermines any view that you are being "neutral"

46



Apology and Retraction

- Apology and Retraction are not defences, but mitigate any damages that might be owed
- In Alberta, can apologize without it constituting an admission
- But be careful about re-publication

47



Defamation Law

- Damages:
- General
 - Aggravated
 - Punitive
 - Special

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Defamation Law

- Who can be sued?
- Who can sue?

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Defamation Law

- Who can be sued?
 - A municipality
- Who can sue?
 - Not a municipality
- But municipality could consider supporting employee or official in personal action- public funds on basis of being able to attract and retain employees

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Example- Responding to Public Criticism

- Defamation against Mayor and Village by Resident
- Publication was a notice to ratepayers in newspaper with broad circulation, newsletter and website

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Example- Responding to Public Criticism

- Notice was found to be defamatory
- Defences of justification, fair comment and qualified privilege were considered
- No malice found

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Social Media

- Exacerbates traditional problems dealing with unreasonable and abusive members of the public
- Also provides a new forum for grievances by and between elected officials

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Advantages of Social Media

- Instant
 - New news right now
- Widespread
 - Access is not dependent on location
- Allows for community input
 - Reaches individuals who may not otherwise be involved in municipal issues

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Disadvantages of Social Media

- Instant
 - No time for sober second thought; but can create a permanent record
- Widespread
 - Can be accessed by anyone
- Allows for mass input
 - Input may not be from community members and is difficult to control

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Use of Social Media

- Blogs
 - Draft policy, long-form discussions on municipal topics
- Twitter
 - Instant updates on community events, changes in bus schedules and road closures, links to job postings

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Use of Social Media (Con't)

- Facebook
 - Highlight community events
- Multimedia sites:
 - Flickr, Pinterest, Youtube and Podcasts can be useful for tourism, recruiting and community growth

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Legal Issues with Social Media

- Defamation
- Privacy (*FOIP*)
- Copyright
 - Not discussed here, but remember that there is a difference between linking to content (okay) and copying and pasting content on your website, blog or even tweet (which can lead to complaints of unauthorized use of copyrighted material)

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Defamation

- Remember that not only is the author liable for defamation, but any person who publishes or re-publishes the defamatory comment
 - Think before you tweet (or re-tweet)...
 - Is linking publication? (*Crookes v. Newton*)

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Defamation

- Case law has made it clear the host of the website itself may be liable for defamation in comments made by others
 - *Weaver v. Corcoran*: liability likely where complaint is raised and no action taken to remove the material

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Steps You Can Take:

- Take Down Request
 - Rely on Social Media Terms of Use
- Demand Letter(s)
 - Be cautious of fanning the flames
- Court Order to obtain IP address to identify individuals behind comments

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Avoiding Legal Pitfalls

- Development of Policy
- Two branches:
 - Control the message
 - Patrol the message

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Control the Message

- Use and Context
- Municipalities have a multitude of voices
 - Employees
 - Management
 - Front-line
 - Elected officials

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Use by Employees

- Use on behalf of municipality (Official Use)
- Use by municipal employees (Non-Official Use)

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Policy for Official Use

- Limitation of individuals with access
 - Who can post?
 - Policy re: sharing password, changing password systematically
- Scheduling and expectations
 - How often?
- Vetting process
 - What is posted?

65

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Policy for Non-Official Use

- During work hours
 - Restriction through IT firewalls
 - Problem with alternative internet ready devices
 - Policy attuned to minimizing lost time
- Outside of work
 - Policy attuned to minimize public criticism of municipality as employer

66



Policy for Non-Official Use

- Courts have accepted that in some cases, an employee's off-duty conduct may subject them to discipline (including social media use)
 - Particularly where representing themselves as employee of the municipality
- However, need clear policies in place (or part of employee's offer letters or employment agreements)

67



Use by Elected Officials

- Administration has little to no control over Councillor expression
- Can be important tool for political messaging or campaigning
- However, careless use can have a major impact:
 - Re-election
 - *Sitting on local tribunals*

68



Tribunals and Bias

- Councillors often sit on municipal tribunals:
 - During or after political career
 - SDAB, ARB, MGB, etc.
- Every post provides evidence of potential bias
- Interplay between having a strong platform and an open mind

69

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Patrol the Message

- Regular review of known sanctioned accounts
- Regular review of social media accounts for attributed content
- Quick response
 - Deletion
 - Apology or clarification
 - Discipline

70

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Attributed Content

- May become aware of an account that is attributing posts to a municipality without authorization
- Take immediate action
 - Contact the site administrator
 - Determine who is posting
 - Demand immediate cessation of posting
 - Take legal action

71

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Minimize Damage

- Delete
 - If possible
 - Process often slow and convoluted
- Apologize
 - Minimize attribution to municipality
- Discipline
 - Curb offending behaviour through disciplinary action

72

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Safe Workplace and Social Media

- Beyond concerns about the reputation of the municipality, as an employer a municipality's duty to provide its employees with a safe work environment free from harassment and bullying may extend to the online world

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Safe Workplace and Social Media

- Amalgamated Transit Union, Local 113 v. TTC
- Example of successful grievance as a result of public body employer not doing enough to stop abuse of employees on social media

74

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Code of Conduct Bylaws

- Became mandatory through changes to the Municipal Government Act: section 146.1
- *May* establish a code of conduct governing the conduct of members of committees or other bodies established by Council who are *not* Councillors

75



Code of Conduct Bylaws

- Code of Conduct for Elected Officials Regulation sets out requirements:
 - Must address certain topics
 - Must establish complaint system
 - Provides for ability to impose sanctions including the list contained in the Regulation

76



Code of Conduct Bylaws

- Regulation also sets out certain limitations:
 - Any sanctions imposed cannot “prevent a Councillor from fulfilling the legislated duties of a councillor”
 - So cannot require removal of a councillor from any council meeting for bad behaviour or other reasons
 - Cannot exclude Councillor from future in-camera meetings, even where the breach relates to improper disclosure of in-camera or confidential information
 - Consider other duties under section 153 of the MGA

77



Code of Conduct Bylaws

- Regulation also sets out certain limitations:
 - Section 5(i) of the Regulation states that a sanction may include a “reduction or suspension of remuneration as defined in section 275.1 of the Act corresponding to a reduction in duties, excluding allowances for attendance at council meetings”
 - Suggests that completely cutting off remuneration (or reducing it beyond the proportional reduction in duties) would not be permissible and subject to challenge

78



Other Considerations

- Independent of bylaw obligations, owe a duty of procedural fairness to the Councillor against whom sanction is being considered
 - Must notify the Councillor of the accusations being made and give the Councillor the opportunity to respond to those accusations
- Failure to do so, may result in a judicial challenge against the motion



Other Considerations

- Appointment of Investigator:
 - Source of dispute and difficulties for Councils
 - Where it allows Council to appoint an investigator, consider appointing in advance of any dispute
 - Avoids confusion and delay in starting any investigation
 - Avoids the appointment of the investigator becoming part of the dispute between Councillors



Other Considerations

- Appointment of Investigator:
 - Consider whether an outside investigator is necessary in all cases
 - Expensive and time-consuming
 - Some complaints are simple and straightforward for Council to deal with
 - Some bylaws create a Committee of Council as the default investigator



Other Considerations

- Council Committee as Investigator:
 - Can be an effective way of dealing with some complaints more quickly and cost-efficiently
 - However, consider conflict of interest issues (Committee should not be all of Council, but rather all of Council minus the respondent Councillor, and perhaps also minus the complainant Councillor if applicable)

82



Other Considerations

- Raises the Issue of Conflict of Interest when discussing and voting on Code of Conduct Issues
- Remember, MGA only allows for recusal in the case of "pecuniary interest"
 - A councillor does not have a pecuniary interest by reason only of any "allowance, honorarium, remuneration or benefit to which the Councillor may be entitled by being a councillor" (or on other council body)

83



Other Considerations

- MGA also provides that failing to vote on a matter unless excused under the Act (ie- pecuniary interest) is grounds for disqualification?
- So how best to deal with potential conflicts of interest in the context of a Code of Conduct investigation?

84

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Conclusion

- Remember that while Council is usually the decision-maker on Code of Conduct matters, it could end up before the courts on judicial review, and possibility of inquiry by the Minister into the municipality and/or certain Councillor(s) continues under section 572 of the MGA.

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Conclusion

- Whether using social media as a councillor, or are on the receiving end of social media attacks, the impacts cannot be underestimated
- Remember defamation risks (risks that fall outside of the statutory protection for elected officials and employees, and in some cases outside of your insurance policies)

86

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Thank You For Your Attention Questions Are Welcome

Sean Ward
sward@rmrf.com
Kelsey Becker Brookes
kbeckerbrookes@rmrf.com

Toll Free: 1.800.661.7673
www.rmrf.com

87
