

The attached research memorandum on the issue of funding the commencement of litigation on behalf of members of Council, local boards, committees, employees or former employees, concludes that, though the enactment of a by-law to provide funding for members of council, local boards and/or members of staff to pursue litigation against third parties is not prohibited at law, it is not a practice that has been used by municipalities in Ontario. And in some specific instances where certain types of such indemnification were considered, there has been a fairly vocal public outcry.

D. The Blue Mountains' Strategic Plan

Goal # 4: Promote a Culture of Organizational and Operational Excellence

E. Environmental Impacts

N/A

F. Financial Impact

N/A

G. In Consultation With

N/A

H. Attached

Appendix "A" Aird & Berlis Research Memorandum dated June 23, 2016

Respectfully submitted,

Troy Speck
Chief Administrative Officer

RESEARCH MEMORANDUM

TO: Troy Speck

FROM: Jody E. Johnson

DATE: June 23, 2016

RE: Whether Municipal Indemnification By-laws in Ontario Permit Funding for Members of Council, Members of Local Boards and/or Members of Municipal Staff to Pursue Litigation Against Third Parties.

Client Name: Blue Mountains, Town of **Matter Name:** Finance Department Agreements

Client #: 27055 **Matter #:** 126566

A. Assignment

You asked me to research whether any municipalities in Ontario have indemnification by-laws that permit the municipality to provide funding for members of municipal council, members of local boards and/or members of municipal staff to pursue litigation against a third party.

You also asked me to find cases and situations related to this issue, and to review and provide relevant information and commentary on the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23.

B. Conclusion(s) / Brief Answer(s)

Despite a canvas of numerous municipalities, I did not find any municipalities with indemnification by-laws that provide for the indemnification of members of municipal council, members of local boards and/or municipal staff who pursue litigation against a third party.

The case law demonstrates that, in circumstances where a member of municipal council has pursued litigation against a third party, the cause of action has been defamation. I did not find any cases where, in such circumstances, the cause of action was anything other than defamation. Further, I only found cases where such an action was brought by a member of council, and none where such an action was brought by a member of a local board and/or a member of municipal staff.

There are at least two cases in Ontario where a municipality attempted to indemnify a member of council for pursuing an action in defamation; however, only one of these cases was successful (see section "D").

I found two instances where a municipality in Ontario proposed an amendment to their indemnification by-law to allow for a member of council to pursue an action in defamation; however, in both instances, the amendment was not passed and the public's reaction was hostile (see section "E").

The Ontario Legislature enacted the *Protection of Public Participation Act, 2015*¹ in October of 2015. The Ministry of the Attorney General stated that the legislation is intended to "allow the public to participate more freely in public discussions without fear of retribution by giving them a better way to

¹ S.O. 2015, c. 23 ["PPPA"].

defend themselves against strategic lawsuits, commonly known as Strategic Litigation Against Public Participation (SLAPP)² (see section “F”).

Despite this intention, the *PPPA* has been criticised as being vague and most likely ineffectual in clarifying the area of defamation law in Ontario (see section “G”).

C. Legislation

Can a municipality pay the legal costs for a municipal councillor, a member of a local board and/or a member of municipal staff to bring a civil action against a third party? Technically, subsection 283(2) of the *Municipal Act, 2001* allows for this. However, practically speaking, as the case law and analogous situations included below demonstrate, an action of this nature is: a) unlikely to be successful, and; b) likely to elicit a hostile reaction from the public.

The payment of expenses to members of a municipal council, members of local boards and/or members of municipal staff are dealt with in subsection 283(2) of the *Municipal Act, 2001*, which provides as follows:

283. (2) Despite any Act, a municipality may only pay the expenses of the members of its council or of a local board of the municipality and of the officers and employees of the municipality or local board if the expenses are of those persons in their capacity as members, officers or employees and if,

(a) the expenses are actually incurred; or

(b) the expenses are, in lieu of the expenses actually incurred, a reasonable estimate, in the opinion of the council or local board, of any actual expenses that would be incurred.³⁷

Subsection 283(2) imposes two express limitations on the payment of expenses to a member of council (or a local board member). The limitation applies “despite any Act” and provides that the expenses must be:

(i) incurred by the council members in their capacity as members of council; and

(ii) incurred or be a reasonable estimate of expenses that will be incurred.

D. Case Law

The case law demonstrates that, in circumstances where a member of municipal council has pursued litigation against a third party, the cause of action has been defamation.

Individuals and corporations can sue for defamation, but the law is clear that a municipality itself cannot. The Ontario Superior Court of Justice in *Montague (Township) v. Page*³ wrote that allowing a municipality to protect its reputation would be antithetical to the notion of freedom of speech and would be inconsistent with the guarantee to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. A few months later, the same court issued its judgment in *Halton Hills (Town) v. Kerouac*.⁴ In this case, the municipality and its director of parks commenced a defamation action

² Ministry of the Attorney General, “Ontario Passes Law to Protect Freedom of Expression” (28 October 2015), online: <https://news.ontario.ca/mag/en/2015/10/ontario-passes-law-to-protect-freedom-of-expression.html>.

³ *Montague (Township) v. Page* (2006), 24 M.P.L.R. (4th) 81, 79 O.R. (3d) 515 (Ont. S.C.J.) at para 29.

⁴ *Halton Hills (Town) v. Kerouac* (2006), 80 O.R. (3d) 577, 39 C.C.L.T. (3d) 117, 142 C.R.R. (2d) 285, 270 D.L.R. (4th) 479 at para. 32 (Ont. S.C.J.).

against a local Internet-based news provider. Again, the court held that a municipality could not bring an action in defamation.

With respect to municipalities indemnifying individual members of Council for pursuing defamation actions, the City of Toronto considered the issue of paying for a councillor's defamation suit in a report in 2009, but noted that "the tort of defamation, by its nature, is directed toward protecting the private interest."⁵

In the spring and summer of 2009, Toronto Council considered amendments to its "Indemnification Policy for Members of Council and Defamation" which would provide for the funding of defamation actions initiated by members of Council. At its meeting held August 5 and 6, 2009, Council declined to amend the policy to include such provisions and instead simply received a staff report, which contained the recommendations of the City of Toronto's executive committee to amend the policy.

Notwithstanding the decision to refrain from amending the policy, Council passed a by-law to indemnify former Councillor Sandra Bussin's legal expenses with regard to a defamation action she was then considering launching.

The background facts are well summarized in *Holyday v. Toronto (City)*:⁶

Ms. Bussin, while serving as a member of Council, brought an action for defamation against a publication known as the *Ward 32 News* and named individuals because of an article accusing her of having received improper campaign donations in 2006 from a property developer and members of his family. The donations were said to be in return for arranging a decision in the developer's favour from the Ontario Municipal Board in relation to a particular development. In fact, Ms. Bussin had been actively engaged in opposing the development.

On August 6, 2009, City Council approved a resolution that she be reimbursed for legal expenses incurred in relation to the defamation proceeding. This was confirmed in By-Law No. 749-2009. Before adopting this resolution, the City obtained a legal opinion from outside counsel...that commented on the merits of the action, as well as issues relating to the public interest.

A Statement of Claim was issued on August 27, 2009. The action is being defended, and it is currently in the court system. In total, the City has reimbursed Ms. Bussin \$7,700.96 for legal expenses to date.

The Ontario Divisional Court upheld the City of Toronto's by-law authorizing payment to former Councillor Bussin on the basis that it was an expense incurred in her capacity as a councillor.⁷ Although this action succeeded, the facts of this particular case are unusual and relate specifically to municipal election issues. As such, this case should not be looked to as a general example of the outcome in cases where members of council sue members of the public for defamation.

More recently, the Town of Aurora had passed a by-law to pay the legal expenses of a defamation suit commenced by its then Mayor, Phyllis Morris. Ms. Morris sued third parties in respect of a series of blog posts on the "Aurora Citizen" website published during the last election that attacked not only her, but

⁵ City of Toronto Staff Report, "Indemnification Policy for Members of Council and Defamation" (11 May 2009) at 2.

⁶ *Holyday v. Toronto (City)* (2009), 74 M.P.L.R. (4th) 194 (Ont. Div. Ct.), at paras. 13-15 ["*Holyday*"].

⁷ John Mascarin, "Defamation in the Municipal Context" *The Six-Minute Municipal Lawyer 2011*, The Law Society of Upper Canada, (18 May 2011) at 10.

also the Town Solicitor and the Integrity Commissioner. When Ms. Morris was not re-elected, one of the first orders of business of the new council was to discontinue funding the litigation. Interestingly, the Town council also sought to resile from its previous commitment and its executed legal retainer to pay the costs already incurred in the defamation action. The Town's legal counsel provided an opinion that the legal accounts should be paid.⁸ This opinion is in keeping with the reasoning and conclusion of the Ontario Divisional Court in *Holyday v. Toronto (City)*.⁹

E. Analogous Situations: The City of Toronto Staff Report and the Town of Georgina

The City of Toronto staff report, noted above, contains a canvas conducted by city staff of sixty-eight other Canadian municipalities in respect of their indemnification policies. The result was that none of the canvassed municipalities had a by-law that indemnified members of council for the costs of bringing an action in defamation:

“D. Indemnification for Defamation Actions in Other Municipalities

Staff made inquiries with sixty-eight municipalities across Canada in respect of their indemnification policies. Of the fifty-six municipalities who responded (or for whom information was available on-line) none reported that they indemnify members of Council for legal costs incurred in bringing a defamation action. The indemnification bylaws in the cities of Kenora, Ontario and Coquitlam, British Columbia specifically provide that the municipality will not indemnify a member of council defending a defamation action. Kenora and Coquitlam are the only responding municipalities that have by-laws specifically touching on defamation.”¹⁰

In July of 2015, the Town of Georgina's council members proposed an indemnification by-law to indemnify members of council for the costs of bringing a defamation suit. The proposed by-law was passionately opposed by the public, gained negative attention in local media outlets and ultimately failed to be passed.

As an example, in an article titled: “Proposed Georgina bylaw called: ‘spear into heart of democracy’ sent back to staff for review” published in the *Georgina Advocate*, there is a line that reads: “Describing far-reaching impacts of a bylaw that would ‘morph into nothing more than strategic lawsuits against public participation (SLAPP)’, Wolfe (a resident of the municipality) and solicitor Mark Donald said the bylaw would chill public participation and use taxpayer money to do it.”¹¹

F. The *Protection of Public Participation Act, 2015, S.O. 2015, c. 23 – Bill 52*

The *PPPA* amended three pieces of legislation: the *Courts of Justice Act*, R.S.O. 1990 c. C.43, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, and the *Libel and Slander Act*, R.S.O. 1990, c. L.12.

The intended purpose of the *PPPA* is to allow the public to participate more freely in public discussions without fear of retribution by giving them a better way to defend themselves against strategic lawsuits,

⁸ *Ibid* citing: The Town of Aurora retained George Rust-D'Eye of WeirFoulds LLP and an executive summary of his opinion is posted online: www.town.aurora.on.ca/app/wa/mediaEntry?mediaEntryId=58454.

⁹ *Ibid*.

¹⁰ *Supra* note 5 at 4.

¹¹ Heidi Riedner, “Proposed Georgina bylaw called: ‘spear into heart of democracy’ sent back to staff for review” (16 July 2015), online: <http://www.yorkregion.com/news-story/5737854-proposed-georgina-bylaw-called-spear-into-heart-of-democracy-sent-back-to-staff-for-review/>.

commonly known as SLAPPs (Strategic Litigation Against Public Participation).¹² This legislation is intended to prevent SLAPPs of all kinds, including, but not limited to, defamation suits.

The legislation: (a) sets out an expedited motion procedure to dismiss a suspected SLAPP (requiring the motion “to be heard” within 60 days after the filing of the dismissal motion and limiting cross-examination to one day for each party, subject to a judge ordering an extension) with an automatic stay of the litigation pending the outcome of the motion and any appeals; (b) gives the judge the authority to order reimbursement of a defendant’s “full indemnity” legal costs of the litigation; (c) permits the judge to award the defendant “such damages as the judge considers appropriate”; and (d) requires appeals from these dismissal motions to be “heard as soon as practicable”.

The *PPPA* expressly provides statutory direction with regard to defamation, in terms of a person seeking to oppose a defendant’s motion to dismiss that person’s defamation proceeding. In particular, the *PPPA* states that a defamation claim shall not be dismissed under the *PPPA* if that person satisfies the judge that: “(a) there are grounds to believe that, (i) the proceeding “has substantial merit”, and (ii) the defendant “has no valid defence”; and (b) the harm likely to be suffered by the plaintiff as a result of the defendant’s expression “is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression”.

G. Commentary on the *PPPA*

The commentary I was able to find on the *PPPA* (from members of the legal community and concerned municipal organizations) ranged in tone from sceptical to vehemently opposed. For example, in an article for the *Law Times*, lawyer Robert Cohen states: “On its face, one would think the *PPPA* would help to promote free speech and eradicate SLAPPs; however, the legal test to succeed on a dismissal motion is so vague that one could hardly take comfort that the legislation will be effective.”¹³

Cohen also implies that the legislation is redundant, stating: “People have always been free to express their opinions in Canada, and to avail themselves of the fair comment defence, as reviewed and modified in 2008 by the Supreme Court of Canada in *WIC Radio v. Simpson*. Further, preliminary motions to strike have often been successfully used to protect defamation litigation in any event, with substantial cost awards in favour of defendants.”¹⁴

He concludes: “Putting aside whether the over-burdened Ontario courts can actually proceed with the hearing of these dismissal motions within 60 days, as required by *PPPA*, and putting aside whether a judge should order additional compensation to a defendant who has received the benefit of a “full indemnity” cost award under the *PPPA*, one is left to wonder whether this vague legislation will achieve its objectives or whether it will simply muddy the already murky waters of defamation law.”¹⁵

The Federation of Northern Ontario Municipalities (“FONOM”) published an article called “Bill 52 Won’t Protect Real Victims of SLAPP Suits in Ontario” on their website before the *PPPA* was enacted. The article criticizes the then proposed Bill 52, stating: “The Ontario Government’s proposed ‘Protection of Public Participation Act’ doesn’t actually protect public participation and in fact simply creates more work for lawyers”¹⁶

The article continues: “MPPs from all parties support legislation that will genuinely protect people from being shut out of public participation out of fear of legal action. What Members said in the legislature and that this bill does not address, is the fact that even being able to threaten someone with a SLAPP

¹² *Supra* note 1.

¹³ Robert Cohen, “Slapping the New Anti-SLAPP Legislation”, *Law Times* (30 May 2016), 7.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Author unknown, “Bill 52 Won’t Protect Real Victims of SLAPP Suits in Ontario” (19 February 2015), online: <http://www.fonom.org/bill-52-won%E2%80%99t-protect-real-victims-slapp-suits-ontario>.

suit (strategic lawsuit against public participation) is enough to shut some people down, because they can't afford a lawyer to defend themselves," said Al Spacek, President of FONOM.

Based on the foregoing, it is possible that defendants named in defamation actions by municipal councillors could argue the actions are SLAPPs and avail themselves of the protections and remedies offered through the *PPPA*. In this sense, the *PPPA* could potentially make pursuing actions of this nature even more difficult, time consuming and expensive for municipalities.

H. Conclusion/Analysis

Generally, the enactment of indemnification bylaws to permit municipalities to provide funding for members of council, members of local boards and/or members of municipal staff to pursue litigation against third parties is not prohibited at law. Nonetheless, it is not a practice that has been used by municipalities in Ontario. Further, in some specific instances where certain types of such indemnification were considered, and/or provided for, the public outcry was loud.