Say anything: The absolute protection given by absolute privilege

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The scene has been played out over the years in parliaments around the world. Someone stands up – perhaps a government minister under fire, perhaps someone defending a constituent – and says: "I invite the Honourable Member to repeat those allegations outside of this House, so that I [or fill in blank] can deal with them in a proper court of law."

The invitation is a challenge to the invitee to put the truth of his allegations to the test by exposing himself or herself to a possible libel suit. It is an invitation to step out from under the protection of a privilege that protects statements made by parliamentarians when they speak in the House, and does so absolutely. Which is why it is known as absolute privilege.

In recent columns, we have discussed the defence of qualified privilege. To illuminate what makes absolute privilege absolute, it may be useful to contrast absolute privilege with that related defence.

Qualified privilege applies to occasions where the defendant's communication is protected such that the defendant cannot be held liable for false and defamatory statements unless the plaintiff proves that he made those statements with actual malice, or that the statement went beyond the circumstances that gave rise to the privilege. The defence is said to be "qualified" because it has the potential to be defeated in this manner. That is not true of absolute privilege. Qualified privilege is a broader defence, in the sense that it would be found to apply in a wider range of circumstances. But qualified privilege can be lost; absolute privilege cannot.

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Absolute privilege

Absolute privilege is a defence that applies to shield speech from claims in defamation where they are spoken on a recognized occasion of such a privilege. The privilege attaches to the occasion, not the content, of the speech. The privilege is "absolute" because it cannot be defeated even if the plaintiff proves that the defendant spoke the words with actual malice and knowing them to be false. The statements will not be actionable regardless of their impact on others, making it one of the most powerful defences in the law of defamation.

The occasions where this privilege applies can all be characterized as circumstances where the public interest in promoting full and frank communications between individuals takes precedence over the protection of an individual's reputation. Those occasions include communications made by executive officers of state, or parliamentary and legislative officials, and persons involved in the processing and furtherance of judicial or quasi-judicial proceedings. In a judicial proceeding, for example, judges, counsel and witnesses are protected by absolute privilege from defamation claims.

In each of those circumstances, the law strikes the balance between freedom of speech and the protection of reputation differently than it would in other social contexts. The policy rationale behind the rule is that participants would be unable to perform their functions fully and properly if they were chilled, even in the slightest, by the fear of being sued for what they said. Providing that immunity in absolute terms is justified as a necessity for the proper and effective administration of those offices, roles and bodies. The immunity is also a reflection of the special importance of the roles being performed by executive officers of state, parliamentarians, and those involved in the administration of justice.

The lawsuit filed by former Minister of State for the Status of Women, Helena Guergis, against Prime Minister Stephen Harper and others provides a recent and high-profile example of the defence of absolute privilege being applied in one of its well-recognized categories.

In that case, Ms. Guergis alleged that, following a conversation with the Prime Minister, she was pressured to

resign from Cabinet and did so under duress. On the same day, the Prime Minister issued a public statement, and members of his staff wrote letters to the RCMP and the Conflict of Interest and Ethics Commissioner concerning allegations that Ms. Guergis had been seen consuming cocaine. She later sued for, among other things, defamation. The Ontario Superior Court of Justice struck her claim of defamation against the Prime Minister's staff, finding that their statements fell "squarely within absolute privilege accorded to officers of state and their senior advisors when communicating on matters within their official duties".[1] The court's decision regarding the application of absolute privilege was affirmed on appeal.[2]

The categories of absolute privilege we have discussed above are well established. Outside of these traditional categories, however, questions regarding absolute privilege can arise in three circumstances that are of particular interest to municipal and corporate counsel: (1) communication in anticipation of or incidental to litigation, (2) complaints or correspondence with regulatory bodies, and (3) proceedings before municipal councils.

Communications incidental to judicial proceedings

The absolute privilege that attaches to communications in judicial proceedings is well established as it applies to statements such as the pleadings filed by a party, the submissions made by counsel, the evidence of witnesses, and the findings and decisions of judges. But how far can the defence be extended to cover statements made by lawyers, including corporate counsel, that are preparatory or "incidental" to judicial proceedings? A recent case from B.C. shows the potential reach of the defence beyond the four corners of the courtroom.

In *Monument Mining Ltd.v. Balendran Chong & Bodi*,[3] the two personal defendants and their Malaysian law firm were sued over letters that the law firm sent to recipients in B.C. concerning a dispute over ownership of a mine located in Malaysia, which had been underway in the Malaysian courts for years. While that litigation was still ongoing, the mine was sold to Monument Mining Limited, a Vancouver-based mining company. The defendants' Malaysian law firm wrote letters to Monument's external counsel, its head office, its European agent, and its investment bankers, advising the recipients of their client's claim and putting them on notice that those claims had not yet been resolved. Monument alleged that these letters were defamatory and had interfered with an imminent financing. Monument sued for defamation, claiming over $50 million in damages.

The court dismissed the claim, finding, among other things, that the letters were sent on an occasion of absolute privilege. The court held that the Malaysian lawyer sent the letters after learning that Monument had purportedly purchased the mine. The letters were written to those involved with Monument's acquisition of the mine to give notice that his client was in fact the owner of the mine. The court found that the letters were "reasonably related" to the claims in the Malaysian proceeding, and that the lawyer sent them "on behalf of his clients to protect their rights in the [litigation] and based on his professional judgment that it was appropriate and necessary to do so". Accordingly, the letters were sent on an occasion of absolute privilege, which extended to the lawyer and his clients.

Complaints and communications with administrative tribunals

Over the years, the defence of absolute privilege that applied to proceedings in the courts has been extended to communications made during or incidental to quasi-judicial proceedings. A review of cases from the last three years shows several in which the defence of absolute privilege was applied to shield communications made to a regulatory body from a claim in defamation. For the privilege to apply, the tribunal must exercise functions equivalent to those of a court of justice. These include the ability to adjudicate upon and determine rights between competing litigants, to require attendance at a public hearing at which witnesses testify under oath, to administer fines, impose punishment, render decisions, and enforce orders, all governed by principles of fairness and justice with a fixed procedure comparable to that of a judicial body.

In *Salewski v. Symons*,[4] the plaintiffs sued over a letter of complaint that the defendant sent to the Office of the Superintendent of Bankruptcy ("OSB") regarding the plaintiffs' conduct. One of the plaintiffs was a licensed trustee in bankruptcy; the other was an associate who had worked with the licensed trustee. The court held that the statements made to the OSB were protected by absolute privilege and on that basis struck out the claim. The court held that the privilege extended to the statements made regarding the second plaintiff even though he was not licensed with the OSB because there was a sufficient nexus between these statements and the conduct of the licensed trustee.

In *Hedary Hamilton PC v. Muhammad*,[5] the plaintiff law firm sued the defendants alleging various economic torts, including a claim for defamation arising from a complaint made to the Law Society of Upper Canada concerning the plaintiff. The court made quick work of this claim, dismissing it on a motion to strike as disclosing no cause of action. The court held that the letter of complaint, which instigated a Law Society investigation, was privileged and could not ground a defamation claim.

Similar claims for defamation have been struck in recent years where they have arisen in the context of communications made during the course of a Canadian Human Rights Tribunal proceeding (*Spidel v. The Queen*[6]), a letter of complaint to the Institute of Chartered Accountants of Alberta (*Hay v. Platinum Equities Inc.*[7]), statements made by a witness during the course of a New Brunswick Dental Society complaint (*Desjardins-King v. Castonguay*[8]), and communications made in the context of an *Employment Standards Act* investigation and adjudication (*Satkunan v. Gnanatheepam*[9]).

In contrast, in *Wilson v. Williams*,[10] the court held that absolute privilege did not apply to statements made in letters submitted by persons who had registered as interveners in a review conducted by the British Columbia Utilities Commission (the "BCUC") under s. 71 of its enabling statute. The BCUC conducted a review of an energy supply contract. The trial had held that the BCUC's review was an occasion of absolute privilege but held that the letters fell outside the scope of that privilege. The Court of Appeal dismissed the appeal, finding that a s. 71 review was not an occasion of absolute privilege (though the court noted that it should not be taken as deciding whether absolute privilege might apply to other proceedings before the BCUC). The court considered in detail the framework to be applied in determining whether the proceedings of an administrative tribunal will be an occasion of absolute privilege. In the end, the court held that, while a s. 71 review has some characteristics similar to that of a court, its process lies closer to the administrative end of the spectrum because, in such a review, the BCUC weighs public interest considerations and does not determine legal rights or impose sanctions.

Municipal proceedings: Could absolute privilege be on the horizon?

It is clear that absolute privilege applies to statements made in Parliament or in provincial legislative assemblies. In Canada, it appears that only a qualified privilege applies to the proceedings of local governments. In *Prud'homme v. Prud'homme*,[11] the court observed (albeit in *obiter*) that, "[e]lected municipal officials do not enjoy the parliamentary privilege enjoyed by members of the National Assembly of Quebec or of the federal Parliament".

Similar *obiter* comments can be found in the dissenting judgment of Madam Justice Southin in *Baumann v. Turner*:[12]

> The proceedings of meetings of municipal councils are not, unlike proceedings in Parliament or the Legislature, absolutely privileged. The occasion is one of qualified privilege only.

More recently, in *Wells v. Sears*,[13] the court held:

> In the result, while municipal councils do not enjoy the absolute privilege that applies to debates in Parliament and the legislatures, the courts have held that words spoken at a municipal council meeting may be protected by qualified privilege.

But again, these comments were made in *obiter* because the defendant had only argued qualified privilege and had not defended the claim based on absolute privilege.

American state courts are divided on the question of whether municipal proceedings are an occasion of absolute privilege. Several state courts have held that statements made at municipal council meetings should be protected by absolute privilege to the same extent as other legislative bodies. These states include Alabama, Arizona, Florida, Illinois, Michigan, New Jersey, Ohio, and Oregon.[14]

Other state courts have denied the protection of absolute privilege to municipal proceedings, holding that the defence of qualified privilege provides adequate protection. These states include Delaware, Iowa, Minnesota, and Maine.[15]

However, the tide of judicial opinion in the U.S. may be moving towards a greater willingness to recognize an absolute privilege defence for municipal proceedings. The *Restatement on the Law of Torts* is an authoritative publication in the U.S. that summarizes American tort law. The Restatements are often cited favourably by Canadian courts when the court wishes to understand and follow American law on a point. In its most recent revision, the *Restatement on the Law of Torts* changed its position and recognized a defence of absolute privilege for municipal proceedings where it had not done so before (see Section 590, comment c).

Comments can also be found in the Canadian authorities to support such an extension of the privilege one day as a policy matter. As far back as 1911, commenting on qualified privilege, the Ontario Court of Appeal noted that, "[a]ldermen are legislators in as true and in many instances as important a sense as members of Parliament or of the Legislature – it is their right and their duty to speak their mind fully and clearly without evasion or equivocation."[16]

Conclusion

The defence of absolute privilege is a powerful one, and it should not be neglected by counsel as if it were something relevant only to those who are involved in parliamentary affairs or matters of high state. As shown by the recent cases discussed above, the defence can arise in a variety of circumstances where counsel, including corporate

counsel, are involved in matters incidental or related to judicial or quasi-judicial proceedings.

[1] *Guergis v. Novak*, 2012 ONSC 4579, 353 D.L.R. (4th) 552, 94 C.C.L.T. (3d) 328 (Ont. S.C.J.), reversed in part 2013 ONCA 449, 364 D.L.R. (4th) 70, 116 O.R. (3d) 280 (Ont. C.A.), at para. 32 (Ont. S.C.J.). Other claims, including those against the Prime Minister, were dismissed on the basis that the words were not capable of bearing a defamatory meaning.

[2] *Supra.*

[3] *Monument Mining Ltd. v. Balendran Chong & Bodi*, 2012 BCSC 1769, 99 C.C.L.T. (3d) 300, 2012 CarswellBC 3731 (B.C. S.C.). Marko Vesely, one of the co-authors, was counsel for the defendants in this case.

[4] *Salewski v. Symons*, 2012 ONSC 236, 86 C.B.R. (5th) 229, 2012 CarswellOnt 784 (Ont. S.C.J.).

[5] *Heydary Hamilton PC v. Muhammad*, 2013 ONSC 4938, 116 O.R. (3d) 776, 2013 CarswellOnt 11120 (Ont. S.C.J.).

[6] *R. v. Spidel*, 2011 FC 1525, 2011 CarswellNat 6000, 2011 CarswellNat 5593 (F.C.).

[7] *Hay v. Platinum Equities Inc.*, 2012 ABQB 204, 93 C.C.L.T. (3d) 210, 538 A.R. 68 (Alta. Q.B.).

[8] *Desjardins-King v. Castonguay*, 2013 NBQB 141, 1045 A.P.R. 321, 403 N.B.R. (2d) 321 (N.B. Q.B.).

[9] *Satkunan v. Gnanatheepam*, 2012 ONSC 4654, 219 2012 CarswellOnt 10099, 27 D.E.L.D. 74 (Ont. S.C.J.).

[10] *Wilson v. Williams*, 2013 BCCA 471, 2013 CarswellBC 3243 (B.C. C.A.).

[11] *Prud'homme c. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, 221 D.L.R. (4th) 115 (S.C.C.), at p. 690.

[12] *Baumann v. Turner* (1993), 105 D.L.R. (4th) 37, 16 M.P.L.R. (2d) 114, [1993] 8 W.W.R. 319 (B.C. C.A.).

[13] *Wells v. Sears*, 2007 NLCA 21, 801 A.P.R. 171, 264 Nfld. & P.E.I.R. 171 (N.L. C.A.), leave to appeal refused (2007), 890 A.P.R. 276 (note), 289 Nfld. & P.E.I.R. 276 (note), 2007 CarswellNfld 297 (S.C.C.), at para. 13.

[14] See, respectively, *Butler v. Town of Argo*, 871 So. 2d 1 (Ala. 2003); *Sanchez v. Coxon*, 175 Ariz. 93, 854 P. 2d 126 (1993); *Hanser v. Urchison*, 231 So. 2d 6 (Fla. 1970); *Larson v. Doner*, 32 III. App. 2d 471, 178 N.E. 2d 399 (1961); *Domestic Linen Supply & Laundry Co. v. Stone*, 111 Mich. App. 827, 314 N.W. 2d 773 (1981); *De Santis v. Employees Passaic County Welfare Association*, 237 N.J. Super. 550, 568 A. 2d 565 (1990); *Tanner v. Gault*, 20 Ohio App. 243, 153 N.E. 124 (1925); and *Noble v. Ternyik*, 539 P. 2d 658 (Or. 1975).

[15] See, respectively, *McLenden v. Coverdale*, 202 A. 2d 815 (Del. Super. 1964); *Mills v. Denny*, 245 Iowa 584, 63 N.W. 2d 222, 40 A.L.R. 2d 933 (1954); *Johnson v. Northside Residents Development Council*, 467 N.W. 2d 826 (Minn. App. 1991); and *Cohen v. Boudoin*, 288 A. 2d 106 (Me. 1972).

[16] *Ward v. McBride*, 1911 CarswellOnt 519, 24 O.L.R. 555, 20 O.W.R. 93 (Ont. Div. Ct.), at p. 568.

EMPLOYMENT LAW

Conducting an effective interview: The do's and don'ts of hiring

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Introduction

By the interviewing stage, the employer has already obtained much of the applicant's relevant job-related information from the employment application and the candidate's resume. Most employers, however, want to and are well advised to supplement the application process with at least one interview in order to determine if the applicant has the appropriate qualifications and will be compatible with other employees in the company.[1] Meeting the potential candidate in person provides the employer with the opportunity to assess his or her suitability for the particular position.

While it is important for employers to be able to ask a number of questions during the interviewing stage, employers should be aware of the many issues that could arise and result in violations of their statutory and common law obligations.

This article will focus on some of those important issues relating to: privacy law, the Ontario *Human Rights Code*,[2] negligent misrepresentation, inducement of candidates during the interview process and the *Accessibility for Ontarians with Disabilities Act, 2005*[3] and its Regulations.

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