



Safe to Slander City Hall? Ontario Court Bars Defamation Suits by Government Bodies

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Safe to Slander City Hall? Ontario Court Bars Defamation Suits by Government Bodies

Do municipal governments, and also perhaps corporations connected with government, have reputations that are capable of being protected in the courts by an action in defamation? It was clear until recently that, under Canadian law, the answer to this question was “yes”. A 1979 British Columbia Court of Appeal decision found that a municipal corporation had the same powers as any other corporate body, including the right to protect its reputation by suing in defamation in its own right. However, two recent Ontario decisions have broken with that precedent, relying on the *Charter of Rights and Freedoms* and a 1992 decision of the House of Lords in finding that allowing governments to sue their critics would be inconsistent with freedom of speech and other democratic values. These two decisions have left in doubt whether municipal governments (outside Ontario) can sue for defamation and whether other corporations connected in some way with governments might also be barred from suing for defamation.

Both Ontario cases involve accusations of corruptions or incompetence levelled against municipal governments. In *Halton Hills (Town) v. Kerouac*,¹ the local newspaper published a story that accused the town’s director of parks and recreation of corruption. While the story did not make similar accusations against the town itself, both the director and the town sued in defamation. In *Montague (Township) v. Page*,² the defendant wrote a series of letters and made statements at a public council meeting regarding the competence of the township’s fire service, which he had witnessed in operation at a fatal fire and which he described in one letter as a “rogue Fire department.” The Township sued in its own right.

In each case, the defendant brought a motion to strike the claim of the municipality. The defendants argued that, while it is undisputed that an elected official or a public servant may maintain a claim in libel, the same cannot be said for the municipality itself. To allow a government to turn to the courts to protect its reputation would be inconsistent with the freedom of expression guaranteed by section 2(b) of the *Charter* and would have a chilling effect on legitimate criticism of a government by its citizens.

In opposing the motion, the plaintiffs relied, in part, on *Prince George (City) v. British Columbia Television System Ltd.*³ In that 1979 decision, the British Columbia Court of Appeal found that it was “beyond question” that a municipal corporation could have a reputation and that, like any corporation, it could use the law of defamation to protect it. Bull J.A. noted that the province’s *Municipal Act* and

¹ (2006), 80 O.R. (3d) 577

² (2006), 79 O.R. (3d) 515

³ (1979), 95 D.L.R. (3d) 577. The plaintiffs also relied on *Windsor Roman Catholic Separate School Board v. Southam Inc.* (1984) 46 O.R. (2d) 231 (H.C.J.), and *Kenora Police Services Board v. Savino* (1996), 36 C.P.C. (3d) 46 (Ont. Gen. Div.).

Interpretation Act gave municipal corporations the same rights and liabilities of any other corporation. He concluded:

I can see no basis in principle for holding that a municipal corporation, empowered by statute to sue in its corporate name, cannot maintain an action for libel. To hold otherwise would leave municipalities the helpless victims of all those who choose to publish untrue imputations which injure their reputations.

In *Halton Hills*, Corbett J. found this reasoning unpersuasive. Governments, he observed, are far from helpless:

Governments have numerous responses to criticism. For while a government has a reputation, sometimes called a “governing reputation”, it exists wholly in the public sphere. A government has no reputation apart from this public “governing reputation”. And the courts are not a fit institution to sit in judgment on the fairness, or otherwise, of critical comments made about government. The options available to government are all public in nature, even when they involve the judiciary by means of a public inquiry or Royal Commission. For in that context, the jurist is responsible to and reports to the legislature that laid down the task for the inquiry. That legislature, in turn, is responsible to the public. Ultimate judgment will be made by the public in periodic elections.

Accordingly, Corbett J. found that criticism of government bodies was protected by an absolute privilege. In *Montague*, Pedlar J. reached the same conclusion, stating as follows:

It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities.

In emphasizing the role of the electorate in passing judgment on governmental bodies, the courts in *Halton Hills* and *Montague* followed the reasoning of the House of Lords in *Derbyshire County Council v. Times Newspapers Ltd.*,⁴ which distinguished municipal corporations from other corporations on the

⁴ [1992] UKHL 6

basis that they were governmental and elected by the public. The reasons of Lord Keith considered decisions from the United States and South Africa as well as provisions from the *European Convention on Human Rights*, which provide similar protections to those provided by section 2(b) of the *Charter*. His Lordship concluded that allowing local authorities to sue in defamation would be contrary to the public interest.

It is, of course, difficult to predict how two trial court decisions from Ontario will be received in other provinces, especially in light of the contrary appellate authority of *Prince George*. Both decisions place considerable emphasis on the *Charter* and on the Supreme Court of Canada's direction in *Hill v. Church of Scientology* that the development of the common law of defamation must be consistent with section 2(b) of the *Charter*. However, the court in *Prince George* was also alive to the importance of freedom of speech, but found that the defence of fair comment adequately protected that value.

There are several reasons to believe that courts may prefer the reasoning of *Halton Hills* and *Montague* to that of *Prince George*. First, one of the key English authorities relied on by the court in *Prince George* was expressly overruled by the House of Lords in *Derbyshire*.⁵ Secondly, as the court noted in *Montague*, the mere availability of a defence may be an insufficient answer to the concern that the threat of litigation by government will stifle political speech.⁶ Finally, the concern that good people may be driven from public service if they cannot protect their reputation is arguably answered by the fact that, while government may not be able to maintain an action in defamation, the people who serve in government clearly can.

It is also difficult to predict how far any bar on defamation actions by governments would extend. Since the Ontario decisions rely in part on the *Charter*, will courts employ the expanded definition of "government" that has emerged under the *Charter* so as to bar actions by bodies such as community colleges? Or will the bar only preclude defamation actions by elected bodies, such as city and town councils, school boards and parks boards? The latter position seems more likely, as both the Ontario decisions and the foreign cases they cite place considerable emphasis on the argument that, as Corbett J. stated in *Halton Hills*, "[g]overnments are accountable to the people through the ballot box, and not to judges or juries in courts of law."

These two recent Ontario decisions have left several important issues to be decided in future cases, including the following:

- Will the courts of other provinces follow these Ontario decisions or will they prefer the analysis of the British Columbia Court of Appeal in *Prince George*?
- Would any bar against defamation actions by governments be confined to elected government bodies or would it be expanded to include corporations and other entities that are connected in some way with government?

⁵ See the comment of Lord Keith regarding *Bognor Regis Urban District Council v. Champion*, [1972] 2 Q.B. 169.

⁶ *Montague* at paras. 31-32

- If the courts were to adopt a more expansive definition of government for this purpose, would that definition be based on the jurisprudence that has grown out of section 32 of the *Charter* or would it be narrower in scope? The answer to this question would be potentially significant for entities such as community colleges, government insurance companies, and other corporations associated in some way with government.

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