Indexed as:

Baumann v. Turner (B.C.C.A.)

Between
Frank Baumann, Plaintiff, (Appellant), and
Phil Turner and District of Squamish, Defendants,
(Respondents)

[1993] B.C.J. No. 1649

105 D.L.R. (4th) 37

[1993] 8 W.W.R. 319

32 B.C.A.C. 9

82 B.C.L.R. (2d) 362

16 M.P.L.R. (2d) 114

41 A.C.W.S. (3d) 1223

Vancouver Registry: CA014800

British Columbia Court of Appeal
Vancouver, British Columbia

Toy, Southin and Legg JJ.A.

Heard: June 1 and 2, 1993.
Judgment: filed July 22, 1993.

(40 pp.)

Defamation -- Appeals -- Libel -- Malice -- Qualified privilege.

Appeal from judgment dismissing libel claim. At issue was the defence of qualified privilege. The publication of the report complained of originated in a municipal or city council meeting.

HELD: Appeal dismissed. The statements were protected by qualified privilege. Further, the case had been ill-pleaded. The appellant had not delivered a reply to the defence of qualified privilege, believing a plea of false and malicious publication to suffice as the well-known judgment of Brett, L.J. in Clark v. Molyneux (1877), 3 Q.B.D. 237 at 246-247, showed. The statement of defence was also badly drafted. The trial judge would have been justified in refusing to hear the case at all. In addition, the court stated the legislature should adopt the provisions of sections 4 and 5 of the Public Bodies (Admission to Meetings) Act 1960.

STATUTES, REGULATIONS AND RULES CITED:

Municipal Act, R.S.B.C. 1979, c. 290, ss. 239, 632, 635.
Public Bodies (Admission to Meetings) Act, 1960 (U.K.), 8 & 9 Eliz. II, c. 67, ss. 4, 4(b), 5.
Water Act, R.S.B.C. 1979, c. 429.

Counsel for the Appellant: Joel S. Mackoff.
Counsel for the Respondents: B.G. Baynham.

Reasons for judgment delivered by Southin J.A., allowing the appeal in part. Separate reasons delivered by Legg J.A., dissenting in part and Toy concurring.

1 **SOUTHIN J.A.**:-- This is an appeal from the judgment of the Honourable Mr. Justice Tyrwhitt-Drake sitting without a jury dismissing an action for libel.

2 Not the least of the problems in this appeal is that the pleadings are incomplete, the appellant not having delivered a reply, although he relies on express malice to defeat a defence of publication upon occasions of privilege.

3 From this omission, I infer that the draftsman of the statement of claim understood a plea of "falsely and maliciously publishing" to be a plea of that express malice which will defeat a plea of qualified privilege. It is not. See the judgment of Brett L.J., in Clark v. Molyneux (1877), 3 Q.B.D. 237 at 246-47.

4 Lest I be thought unduly harsh to the appellant, I say that the statement of defence also leaves a good deal to be desired.

5 The learned trial judge could not have been faulted had he refused to hear a case of libel so ill pleaded.

6 As Russell L.J., as he then was, remarked in Broadway Approvals Ltd. and another v. Odhams

Press Ltd. and another, [1965] 2 All E.R. 523 at 540, the law of libel has characteristics of complexity and subtlety. These characteristics, when analyzed, are not only logical but also assist in maintaining the balance between, on the one hand, the private right to a reputation unsullied by calumny and, on the other hand, the public right of free and vigorous discussion which underlies the complex defence of fair comment.

7 This case is about the also complex defence of qualified privilege which is founded on private and public duty and interest.

8 The matter arises this way. The Mayor and Council of the District of Squamish were of the opinion that Squamish was in need of an additional water supply. Among the sources under consideration was Mashiter Creek. The appellant, a resident of the area, by training a geological engineer and a member of the Association of Professional Engineers of British Columbia, the self-governing body of the engineering profession in this province, but at the time a teacher, was much opposed to Mashiter Creek. He believed that to choose that source was an act of egregious folly. Thus, he came into collision with the respondent Turner, then the Mayor, who believed with equal passion that to choose the Mashiter as that source was an act of municipal statesmanship.

9 The battle raged.

10 In April, 1990, the Mayor was minded to complain of the appellant to the Association and, on 17th April, went to an in camera Council meeting with a draft of a letter to the Association containing these words:

> I sincerely believe that Mr. Baumann has misused his Professional Engineer's certification in a political manner which is eroding my, and the community's, confidence in the competency and credibility of the Professional Engineer's Association of B.C.

11 The draft was seen by the members of Council and at least one municipal official. The Mayor was persuaded not to send it.

12 On the 18th April, the Mayor received a copy of a letter dated 10th April, 1990, from the Minister of the Environment for British Columbia to the appellant:

> Thank you for your letter expressing your concerns regarding the District of Squamish's plans to use Mashiter Creek as a domestic water supply.
>
> The Ministry of Environment shares your concerns and has notified Squamish that optimal fish flows must be maintained. Since records show that mean summer flows are not adequate to meet fisheries and domestic requirement, the District has been advised to pursue other opportunities.

I appreciate you writing and sharing your concern for our environment.

13 In fact, the District had not been advised to pursue other opportunities.

14 The letter to which the Minister was replying was a letter dated the 29th January, 1990, from Mr. Baumann to the Minister. The Mayor had not received a copy of that letter at the time he wrote the Minister.

15 On the 19th April, the Mayor wrote to the Minister this letter:

> Dear Mr. Minister:
>
> It was surprising to read a copy of a letter from your office dated April 10, 1990 to Mr. Frank Baumann, a local resident, with regard to the District's plans to utilize the Mashiter Creek as a domestic water supply. I do not recall receiving any direction from the Ministry of Environment advising the District of Squamish to pursue other opportunities with regard to domestic water supply.
>
> Your Ministry issued a Water Licence dated July 15, 1988 under the signature of J.W. McCracken, Regional Water Manager and have supported the District in acquiring this secondary water intake. I recently spoke with Mr. McCracken and Mr. Earl Warnock, Acting Regional Director from your Ministry on March 27, when they were in our community discussing flood plain management concerns, and they both indicated that they feel our application for a domestic water supply from the Mashiter is reasonable and that Federal Fisheries may be slightly unreasonable at this time.
>
> On April 3, 1990 we hosted a meeting with representatives of Federal Fisheries. Mr. Ken Lambertson of your department attended and he spoke in support of our reasonable request to access the Mashiter Creek as we are negotiating for a reasonable amount of water for domestic use and, at the same time, assuring that the fish habitat can be maintained and possibly be enhanced.
>
> The District of Squamish was forced by Federal Fisheries to undertake a biophysical fisheries study at a cost of some $15,000. The resulting report by Triton Environmental Consultants stated that the minimum amount of water required to maintain the fish habitat was .58 cubic metres per second. The

District was prepared to accept this level as a requirement as the water licence is only for 0.18 cubic metres per second (3.5 million gallons per day). The average water flow on the Creek is approximately 2.6 cubic metres per second. Federal Fisheries picked a figure of 1 cubic metre per second (out of the air, I believe) as their requirement with an indication that this may be excessive provided our consultants provide further data, which has been done. I am attaching a copy of the letter from Federal Fisheries and copies of two letters sent to the Honourable Mary Collins, M.P. for Capilano-Howe Sound, who has provided the District of Squamish valuable assistance.

I am also attaching a brief submitted to Federal Fisheries from our Consulting Engineers, Webb Engineering, and copies of letters of support from the Squamish Chamber of Commerce, Howe Sound School District #48 Board of Trustees, and Chief Les Harry from the Squamish Indian Band.

I am expecting a letter from Federal Fisheries any day now which will refine the Fisheries requirement to, hopefully, approximately .5 cubic metres per second without compensation. The Canada Water Survey hydrological records on the Mashiter were only undertaken over a 10 year period and 3 years of records in the 10 year period were missed. At the meeting on April 3, 1990 a local resident gave evidence that the Mashiter Creek changed course in 1973 (the lowest recorded water flow levels) due to a flood and the Canada Water Survey measuring device sat high and dry for an extensive period of time until the resident used his earth moving equipment to divert the creek flow off of his property and back into the old channel.

Mr. Lambertson stated that even if the Canada Water Survey statistics are accurate, a 10 year record is too short a period and thus inconclusive to be used with any accuracy.

As you can tell by the tone of this letter, the District of Squamish has been very patient and has attempted to work with the Federal and Provincial Government to assure that mutually beneficial results can be achieved. I want to assure you that the District has been honourable in our approach with applicable agencies and conscientious of environmental, fishery and people concerns.

I have considered sending a letter of complaint to the B.C. Professional

> Engineer's Association regarding Mr. Baumann as I believe he has misused his Professional Engineer's certification in a political manner which is eroding my, and the community's, confidence in the competency and credibility of the Professional Engineer's Association of B.C. I took a draft of my letter of complaint to Council and they, although supportive of my concerns, felt that the consequences to Mr. Baumann may be too severe in that he could lose his job and ability to provide for his young family. I would appreciate receiving a copy of the letter Mr. Baumann sent to you and which your letter of response referred to.
>
> In closing, if you require any further information to clarify the District of Squamish's position, this office would be happy to respond. We feel we have addressed all relevant concerns and have strongly defended our case in favour of our plans to use the Mashiter Creek as a domestic water supply. We look forward to your support.
>
> Yours sincerely,
> (signed)
> Phil Turner
> Mayor (Emphasis mine)

16 On the 25th April, the Mayor received a reply from the Minister:

> Thank you for your faxed letter of April 19th, with regards to the District's plans to utilize the Mashiter Creek as a domestic water supply.
>
> I have asked my ministry to look into your request. Once I receive their reply I will get back to you as quickly as I possibly can.

17 The next Council meeting was scheduled for Tuesday, the 1st May.

18 It was the practice of the District of Squamish that, on the Thursday or Friday before a scheduled Council meeting, the Mayor caused to be distributed, no doubt with the assistance of the staff of the District, to each member of the Council and to certain members of the staff, a package consisting of the agenda, together with documents relating to items on the agenda. The local media, that is The Squamish Times Newspaper and Mountain FM Radio, had available to them an identical package. The package for the 1st May meeting included the letter, unedited.

19 The Squamish Times obtained a copy of the letter not, at least in the first instance, from the package but in this way: On either the 26th or 27th April, the editor of The Squamish Times spoke

to the Mayor. Because the Mayor inferred that she had received a copy of the letter from the Minister of the 10th April, he sent to her copies of the letters of the 19th and 25th April.

20 This conclusion is substantiated by a memorandum from the Mayor to Council of the 27th April:

> Subject: Mashiter Water Intake - Federal Fisheries
>
> Mr. Payne has received a letter from Mr. Kevin Conlin re: the Mashiter Water Intake which revises the Federal Fisheries requirements from 1.0 cubic metres per second to 0.5 cubic metres per second with various other conditions that can be fairly easily facilitated. Mr. Payne is reviewing the letter (just received) and will be sharing it with Mr. Doug Webber and I have asked him to request Mr. Webber attend, along with Mr. Payne, Council at 7:00 p.m. Tuesday, May 1, 1990 to explain the letter and also to allow members of the public the opportunity to provide input as per the suggestion of the Squamish Times for a public meeting. Knowing that you would all concur with providing members of the public the opportunity to provide input, I have scheduled this meeting and have notified the Squamish Times and Mountain FM Radio that this will be taking place. Council should treat this as just a continuation of our Council meeting. Copies of the letter from Federal Fisheries will be made available either the first part of next week or at the meeting.
>
> I have been informed that the Squamish Times were provided with a copy of the letter of the Honourable John Reynolds, addressed to Mr. Frank Baumann. I have also provided the Squamish Times with a copy of my letter dated April 19, 1990 to the Honourable John Reynolds and his response of April 25, 1990.

21 I digress here to note that counsel for the appellant at the trial objected to the Mayor giving evidence of that conversation with the editor on the ground that what the editor said was hearsay. The objection was not well taken insofar as the conversation showed the reason for the publication of the letter.

22 As I understand the evidence, the radio station obtained its copy from the agenda package shortly after the Council meeting.

23 Neither the newspaper nor the radio station republished the offending paragraph.

24 Having been given a copy of the letter by another opponent of the Mashiter Creek Project,

although the evidence does not establish how the latter obtained it, the appellant went to the Council meeting to seek a retraction. He described what happened thus:

Q. ... And so when you attended at the meeting and you read that passage from your --
A. From my submission.
Q. -- from your submission, what was the reaction?
A. Well, there seemed to be a certain amount of discomfort on the part of the Council people there and there also seemed to be some questioning of what I was actually referring to, what letter.
Q. Yes?
A. And so at that point I said words to the effect, well, you know, the specific part that I am so concerned about is Mayor Turner's letter of April 19th, and then I turned to that letter.
Q. And what did you --
A. Of which I had a copy.
Q. Did you comment on the contents of that?
A. I did. Now, I can't remember precisely what I read out but I read out part of that April 19th letter --
Q. Do you have some --
A. -- to the members of Council.
Q. Do you have some beliefs as to which portion you read?
A. I believe the part I read out was the last page, was page 3.
Q. Which portion or --
A. The portion that talked about the -- that I could lose my job and ability to provide for my young family. That was the part I remember and that was the real focus of what I was trying to do, was to read this out in such a way that the Council people would realize how absurd and how unfair that passage was.
Q. Did you --
A. I may also have read out the preceding part, but I can remember wanting to read that last part out, to just bring home this point of how unfair this was.
Q. Is there any knowledge you had about the relationship between Mayor Turner and Council that led you to believe that they might honour your desire at that time?
A. Well, I knew that Mayor Turner had previously been censured by his Council for writing inappropriate letters. I didn't know the exact details, so forth, but I knew that there had been -- that a motion had been passed that limited what he could write in his capacity as Mayor of Squamish in representing the District of Squamish, and I felt that, since Council has passed that motion, I was sure that when this - - you know, when I brought this matter up, I was sure that they would immediately just, you know, say, Mr. Turner, this is -- you know, this is -- this is unfair, we will move right away to retract that, we want that stricken from the

record, or words to that effect or something, and that was the whole intent. I realized at the time that I was not worried about the press or the gallery, the gallery were in support of me. The press had already indicated they weren't going to publish that. What I was -- what I was concerned about was the fact that this letter had gone to the Minister of the Environment, that was the big concern.

Q. When you say the press had indicated, was there a particular element of the press you had the belief they would not publish it?

A. Sherry Bishop told me personally --

Q. I don't want you to tell me what Miss Bishop said, I am asking, as a result of the conversation with particular portions of the press, did you have a belief that certain of them wouldn't publish it?

A. Yes.

Q. Did you know how far this had been published to the press, other press?

A. No, I certainly didn't.

Q. What was the reaction of the Council when you made this plea?

A. Silence. That -- and that was the other thing I so vividly remember was, I stood there just kind of disbelieving that they would not, you know, undo this very obvious wrong that had been done. I sat there and I expected, you know, I expected the matter to be resolved right there, and nothing happened. Nobody proposed a motion, nobody apologized, nobody said anything. And so I could do nothing but just sit down again. And that also hurt. That really hurt that Council would not -- it seems so malicious that they would not work immediately to undo this wrong.

25 The words I have quoted from the draft and the words emphasized in the letter to the Minister are asserted to be and conceded to be defamatory in their natural and ordinary meaning. While the pleader refers to the "material and ordinary meaning of the words" I take "material" to be a misprint.

26 The pleader gives a number of meanings to the complained of words, none of which is a true innuendo. For the difference between a true and a false innuendo and the importance of that difference, especially in an action tried by a jury, see Lewis v. Daily Telegraph, [1963] 2 All E.R. 151 (H.L.).

27 The respondent Turner pleads, concerning the draft letter, in part this:

5. ...The Defendant Phil Turner wrote the letter in his capacity of Mayor of the District of Squamish and distributed copies of the draft letter to members of the Squamish Municipal Council because he wished to know whether they shared the views expressed by him in the letter and whether they endorsed the sending of the letter to the Professional Engineers Association. The Defendant Phil Turner therefore says that the letter was distributed on an occasion of qualified privilege.

6. In further answer to the allegations of fact set out in Paragraph 9 of the Statement

of Claim, the Defendant Phil Turner denies that there is anything false or malicious in the draft letter.

7. While members of the Municipal Council were generally supportive of the concerns expressed in the draft letter, they felt that the consequences to the Plaintiff may be too severe. The Defendant Phil Turner therefore decided not to send the letter.

Paragraph 7 is a plea without point.

28 As to the letter sent to the Minister and published to others, the respondent Turner pleaded in part:

9. On April 17, 1990 the Defendant, Phil Turner, received a copy of a letter dated April 10, 1990 from the Honourable John Reynolds, to the Plaintiff. The letter read:

"Dear Mr. Baumann:

"Thank you for your letter expressing your concerns regarding the District of Squamish's plans to use Mashiter Creek as a domestic water supply.

"The Ministry of Environment shares your concerns and has notified Squamish that optimal fish flows must be maintained. Since records show that mean summer flows are not adequate to meet fisheries and domestic requirement, the District has been advised to pursue other opportunities.

"I appreciate your writing and sharing your concern for our environment.

Sincerely,

John Reynolds Minister"

10. The Defendant Phil Turner admits that he sent the letter referred to in Paragraph 11 of the Statement of Claim. The letter read:

* * *

> The Defendant Phil Turner sent this letter in answer to the allegations that were being made by the Plaintiff with respect to the Mashiter Creek proposal and in answer to the facts set out by The Honourable John Reynolds in his letter dated April 10, 1990. As such, the letter is protected by the doctrine of qualified privilege.

11. The Defendant Phil Turner denies the allegations of fact set out in Paragraph 12 of the Statement of Claim. The words referred to in Paragraph 11 of the Statement of Claim purport to express nothing more than the honestly held opinion of the Defendant Phil Turner, and, as such, amount to fair comment on a matter of public interest.

* * *

13. The Defendant Phil Turner admits that copies of his letter dated April 19, 1990 to The Honourable John Reynolds were made available to members of council and members of the local media. It is customary to distribute materials that will be discussed at the next council meeting, and distribution of the letter is therefore protected by the doctrine of qualified privilege. Furthermore, the Plaintiff's concerns regarding Mashiter Creek had been given broad media coverage and, as Mayor of the District of Squamish, the Defendant Phil Turner had an obligation to respond publicly to those concerns. His distribution of the letter dated April 19, 1990 to the media is therefore protected by the doctrine of qualified privilege.

29 The plea of fair comment was not pursued before us.

30 The respondents did not plead that the sentence "I took a draft... young family" was true. There was some evidence that members of the Council at the meeting at which the draft was considered did not agree with the concerns of the respondent Turner and no evidence that they then persuaded him not to send the draft out of tender concern for the appellant.

31 The appellant delivered what he called "particulars of malice" which are essentially the same for both documents. The one relating to the letter of 19th April was this:

> The Defendant, Phil Turner did not honestly believe the statement particularized in Paragraph 11. [The emphasized passage.] Further, his purpose in writing the April 19 Letter arose in the following circumstances:

1. Mr. Turner was a strong proponent of using Mashiter Creek as a second water

source for the District of Squamish.

2. The Plaintiff, Mr. Baumann, was against the use of the Mashiter Creek as a second water source for the District of Squamish without an independent assessment being done.
3. Mr. Turner believed that Mr. Baumann had such engineering expertise and peculiar knowledge about Mashiter Creek that Mr. Baumann might be able to affect the views held by Department of Fisheries officials concerning the use of Mashiter Creek.
4. On about February 21, 1990 Mr. Turner became concerned that the Department of Fisheries was going requiring a minimum maintenance flow of one cubic meter per second for fish habitat and that only water flow in excess of this rate could be used for the District of Squamish's purposes.
5. Prior to this time the Water Survey of Canada had documented the flows of the Mashiter.
6. These prior flows of the Mashiter documented by the Water Survey of Canada could be used by an engineer, such as Mr. Baumann, to demonstrate to the Department of Fisheries that if Mashiter Creek was actually constructed and used as a second water supply a necessary minimum maintenance flow of 1m3/s could not reasonably be met by the District of Squamish.
7. By March 1990 Triton Environmental Consultants Ltd. had been engaged by the District of Squamish and were preparing a basis for the District of Squamish to negotiate with the Department of Fisheries a reduction in the minimum maintenance flow of one cubic meter per second for fish habitat.
8. Mr. Turner's purpose in preparing the April 19 Letter was part of an attempt to dissuade Mr. Baumann from communicating with the Department of Fisheries about the Mashiter and to create a basis for impugning the competency and credibility of anything Mr. Baumann might say or write about, including the prior flows documented by Web Engineering Ltd.
9. Mr. Turner's purpose in preparing the April 19 Letter was part of an attempt to persuade the Minister of the Environment that Mr. Baumann's views were unprofessional and were contrary to those of informed members of the community when Mr. Turner did not believe that this was the case.

32 The learned judge below found the occasions of publication to be privileged and found no express malice, saying:

> What evidence is there of malice, of some improper motive on the part of the defendant when he wrote and published the words in question? It was argued that the defendant sought to belittle the plaintiff in the eyes of the Council and the authorities who were in a position to stop the Mashiter project -- notably, the Minister of the Environment. That may well have been the case: indeed, the defendant, in order to defend the project, was obliged to attempt to discredit the

expertise of the plaintiff as an opponent thereof. That was a legitimate motive for his utterances and does not necessarily indicate personal spleen or vengeful anger or anything else which was improper.

To expand somewhat on the concept of defence: in regard to the letter to the Minister of 19 April, I am satisfied that the defendant, as Mayor of Squamish, was under an obligation to respond to the letter the plaintiff wrote to the Minister, which letter elicited the reply which caused the Mayor and Council to believe the Mashiter project was in jeopardy. In his letter to the Minister, the defendant repeated what he had published to the Council and added some further material which, even if it is correct, is quite irrelevant. This response and republication, in my view, go no further than to constitute a fair defence to the plaintiff's attack on the Mashiter project: see Mallett v. Clarke (1968), 70 D.L.R. (2d) 67 (B.C.) and Turner v. MGM Pictures Ltd., [1950] 1 All E.R. 449 therein cited.

A great deal more than this would be required to establish malice and rebut the presumption of the defendant's good faith. The only possibility of showing malice to have been present would be proof of personal spite on the part of the defendant, or that he was seeking "to obtain some private advantage unconnected with the duty or interest which constitutes the reason for the privilege" as Lord Diplock put it in Horrocks v. Lowe, op. cit., p. 150. The evidence falls far short of doing that. The defendant, I find, sincerely believed that it was wrong for an engineer to hold himself out as such when engaged in a public controversy with the Municipality. That stated opinion is the basis of the innuendo: it may well have been erroneous; but it was sincere, and that is enough to negative any suggestion of malice.

33 The first question is whether the publications were made on occasions of qualified privilege.

34 What is an occasion of qualified privilege?

35 In De Buse v. McCarthy, [1942] 1 K.B. 156 at 164, Lord Greene M.R. put it thus:

The requirements for such a plea can be taken from many passages in judgments, but they are very conveniently stated in the speech of Lord Atkinson in Adam v. Ward (I), to which du Parcq L.J. referred in the course of the argument. Lord Atkinson said: "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This

reciprocity is essential." I prefer that language referring to an interest or duty to make the communication to language, sometimes found, which refers to an interest in the subject-matter of the communication. The latter phrase appears to me to be vague and to leave uncertain what degree of relevance to a particular subject-matter the communication has to bear.

36 In Halsbury, 4th ed., v. 28, para. 111, we find:

> III. Correspondence of duty or interest. An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The privilege extends only to a communication upon the subject with respect to which privilege exists, and does not extend to anything that is not relevant and pertinent to the discharge of the duty, or the exercise of the right, or the safeguarding of the interest, which creates the privilege.
>
> Examples of privileged statements are statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them, statements made for the protection or furtherance of an interest to a person who has a common or corresponding interest to receive them, statements made in protection of a common interest, and statements made in answer to inquiries; alternatively there must be an appropriate status and subject matter to confer the privilege, such as exists in the case of fair and accurate reports of judicial or parliamentary proceedings.
>
> There may be occasions when a communication to the public at large is protected by qualified privilege, provided the public at large has a legitimate interest in the subject matter of the communication.

37 In considering the issues arising from the two defamatory documents and their publication, one must bear in mind the duty of the Mayor of a municipality. He has, in addition to the rights and duties of every member of Council, certain special obligations imposed upon him by the Municipal Act, R.S.B.C. 1979, c.290:

> 239. The mayor is the head and chief executive officer of the municipality. In addition to his powers and duties as a member of council, he shall
> (a) see that the law for the improvement and good government of the municipality is carried out;
> (b) communicate to the council information and recommend bylaws, resolutions and measures which, in his opinion, may assist the peace, order and good government

of the municipality in relation to the powers conferred on the council by any Act;

(c) establish standing committees for matters he considers would be better regulated and managed by means of committee, and appoint members of council to the committees; but the proceedings of a committee are subject to the approval of council, except executive or administrative proceedings delegated under section 242;

(d) inspect and direct the conduct of municipal officers and employees, and direct the management of municipal business and affairs, and suspend, if deemed necessary, a municipal officer or employee;

(e) * * *

38 As section 632 of that Act sets out, the Council may by bylaw provide for the establishment and use, within or without the municipality, of a water distribution system and, by section 635, operate, maintain, repair, and so forth, the works or services within the municipality, and may apply for and obtain any licence, right or privilege under the Water Act or any other Act.

39 Thus, it was part of the proper duty of the Mayor to see to the provision of water for the District, a duty which in the modern world can require for its carrying out the assent of other branches of government, both federal and provincial.

40 Apart from his duty as Mayor, the respondent Turner, in common with every other citizen, has a proper duty or interest in the maintenance of the standards of every selfgoverning profession and may make complaints concerning the conduct of a member of such a body to his professional governing body. To make such a complaint is to publish upon an occasion of qualified privilege.

41 When, therefore, the Mayor was minded to complain to the Association, his putting the draft before Council was carrying out his duty as Chief Executive of the District to the members of Council who had a corresponding duty to know what the Mayor was proposing to do. Had he sent the draft, he would have been making a statement in pursuance of a duty, both private and public, to the Association which had a corresponding statutory duty to receive it.

42 When he wrote to the Minister the letter of 19th April, in response to the Minister's letter of 10th April, he was carrying out his duty to ensure a water supply to the District of Squamish.

43 The question is the relevance of the offending passage to that subject matter.

44 Mr. Baumann had been a persistent critic of the proposal. His communication to the Minister led to the Minister's reply of 10th April which itself led to the letter of 19th April.

45 In my opinion, the Mayor was arguing that the Minister should not give credence to the appellant's views because the appellant was asserting, in his fight against the Mashiter, a professional expertise he did not have and, by so asserting, was contravening the standards promulgated by the Association.

46 The question of how far the defence of qualified privilege goes to protect someone who defames an opponent in order to prevent that opponent's arguments being accepted by those in authority does not lend itself to an easy answer. It might well not protect someone in the Mayor's position who falsely published of an opponent such as Mr. Baumann concerning an issue such as Mashiter Creek that he had been convicted of theft or sexual assault because such an assertion is not germane to the occasion of privilege.

47 But if someone asserts that, because of his professional standing, his argument rather than that of his opponent should be accepted and the subject matter of the debate gives rise to an occasion of privilege, an attack on that standing is germane to the occasion.

48 In fact, the appellant in his letter of the 29th January, had done so by signing it "Frank W. Baumann, P.Eng., Geological Engineer" and enclosing in it a copy of a letter to the Minister of Fisheries and Oceans which began "As a professional engineer...".

49 The Mayor had not seen the letter of the 29th January and its enclosure when he wrote the letter of the 19th April, but he was making the reasonable and, indeed, true assumption from prior events that Mr. Baumann was putting his professional expertise in the scales. He had done so in a letter of 22nd December, 1987, to the Inspector of Municipalities, a copy of which was received by Squamish on the 25th January, 1988. He had been referred to in an article in The Squamish Times of March, 1988, as a professional geological engineer, which indeed he was. He had written to an official of Squamish on 10th May, 1988, using his professional designation, and staff of the District's firm of consulting engineers had attended in 1989 a meeting with officials of the Ministry of Fisheries and Oceans, some of whom apparently were of the view that Mr. Baumann's qualifications as a geological engineer made him an expert in hydrology. Whether he is or is not such an expert is, in these proceedings, irrelevant.

50 In the circumstances, the Mayor cannot be faulted for assuming that the appellant had succeeded, by invoking his professional qualifications, in persuading the Minister to interfere and, thus, the Mayor's response, although intemperate, did not go outside the occasion of privilege. His publication to the members of Council and the senior officials was also upon an occasion of privilege because of his duty and their duty.

51 But what of the publication to the editor of The Squamish Times?

52 In approaching this issue, some propositions should be borne in mind:

1. 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.
2. At common law, no qualified privilege attaches to the publication to the world of defamatory documents which are to be the subject of discussion at a meeting of a municipal body such as this Council. See De Buse v. McCarthy, supra.

53 In 1960, the Parliament at Westminster passed the Public Bodies (Admission to Meetings) Act 1960, (U.K.), 8 & 9 Eliz. 2, c. 67, which in part was this:

> (4) Where a meeting of a body is required by this Act to be open to the public during the proceedings, or any part of them, the following provisions shall apply, that is to say
>
> > (b) there shall, on request and on payment of any other necessary charge for transmission, be supplied for the benefit of any newspaper a copy of the agenda for the meeting as supplied to the members of the body (but excluding, if thought fit, any item during which the meeting is not likely to be open to the public), together with such further statements or particulars, if any, as are necessary to indicate the nature of the items included or, if thought fit in the case of any item, with copies of any reports or other documents supplied to members of the body in connection with the item;...
>
> (5) Where a meeting of a body is required by this Act to be open to the public during the proceedings or any part of them, and there is supplied to a member of the public attending the meeting, or in pursuance of paragraph (b) of subsection (4) above there is supplied for the benefit of a newspaper any such copy of the agenda as is mentioned in that paragraph, with or without further statements or particulars for the purpose of indicating the nature of any item included in the agenda, the publication thereby of any defamatory matter contained in the agenda or in the further statements or particulars shall be privileged, unless the publication is proved to be made with malice.

54 I note, purely as a matter of legal history, that this was a private member's bill introduced by Mrs. Margaret Thatcher, then simply the member for Finchley. (See a note concerning this statute at (1962), 25 Mod.L.R. 204).

55 Even if British Columbia enacted a statute containing the same words as sections 4 and 5 (and, if I may so, it should), the publication of the offending passage to the editor of The Squamish Times, which was not publication as part of the agenda, would not be within the protection.

56 Mashiter Creek or no Mashiter Creek was a public issue but whether the appellant was abusing the standards of his profession was not.

57 The case, therefore, on the issue of qualified privilege bears no resemblance to Parlett v. Robinson (1986), 5 B.C.L.R. (2d) 26, where the issue was the competence and integrity of the Correctional Service and, more particularly, that of the plaintiff in his capacity as a member of that service.

58 Many issues in the public life of this province are now fought over by those who assert themselves to be experts.

59 If A, not a holder of elective office, said about the appellant what the Mayor said about him to others with an interest in the Mashiter Creek question, could he rely on a defence of qualified privilege? I can find no authority saying that someone not holding elective office could do so.

60 Did the Mayor, because of his office, have an interest or a duty to make this communication to the editor when he did and did the editor have a duty or an interest in receiving it? By "this communication" I refer, of course, to the defamatory paragraph.

61 In my opinion, the answer to both parts of the inquiry is "no". Only on the footing that the Mayor had a duty to communicate to others outside Council all his official correspondence and all his constituents had an interest in receiving copies could such a privilege attach. If such a privilege attaches in this situation, then, if the Mayor wrote a letter to the Royal Canadian Mounted Police saying he believed a member of the staff of the District was stealing from the District and asking for an investigation, he could publish his letter to any one of his constituents. No authority goes so far.

62 I am not prepared to extend to the publication here in question the protection of the doctrine of qualified privilege, partly because by more temperate language the Mayor could have made his point which simply was that being a geological engineer did not necessarily make the appellant an authority on water supply, secondly, because if the Mayor had made enquiries of the Association before writing the letter, he would have found out exactly what standards, if any, of the Association bear on his complaint and, thirdly, had he put his point differently, he could have invoked the defence of fair comment.

63 The defence of fair comment provides wide scope for knock down, no holds barred, public debate. It does require, however, that he who relies upon it get his facts straight and state his facts to his readers or listeners. Having done so, he can heap invective, assuming he has some command of the language, upon his opponent.

64 The next question is whether the publication to the radio station is, in the circumstances, actionable. By the time the radio station obtained its copy of the letter, the appellant had himself gone to the Council meeting which was held in public and repeated the offending words. In such a case, the plaintiff has, I think, assented to or acquiesced in publication to the local media and no action will lie. See Gatley, 7th ed., para. 248.

65 The final question is whether the publications on privileged occasions are actionable because the respondent Turner was actuated by express malice.

66 That can only be so if one concludes as a matter of fact that he published the defamatory words not for the reasons which justify the privilege, but for some indirect or wrong motive (see Clark v. Molyneux, supra, at page 247).

67 What then does the appellant point to as disclosing such indirect and wrong motive? He says at the outset of his particulars of malice

> The Defendant, Phil Turner did not honestly believe the statement particularized in Paragraph 11.

and at the end

> 9. Mr. Turner's purpose in preparing the April 19 Letter was part of an attempt to persuade the Minister of Environment that Mr. Baumann's views were unprofessional and were contrary to those of informed members of the community when Mr. Turner did not believe that this was the case.

68 I take paragraph 9 of the particulars to be an expansion of the opening words of the particulars. Thus, as pleaded, the issue for the learned judge below was whether:

> 1. The respondent Turner did or did not believe:
>
> (a) that the appellant's views were unprofessional;
> (b) that the appellant's views were contrary to those of informed members of the public.
>
> 2. If the respondent Turner did not believe either or both, whether the lack of belief constitutes express malice. Lack of belief can be evidence of express malice but not always. Whether it is depends on the nature of the duty or interest giving rise to the occasion of privilege.

69 The learned judge found as a fact that the respondent Turner did believe the appellant's conduct was unprofessional. I am not persuaded that he erred in doing so.

70 As to whether the respondent Turner did or did not believe that the appellant's views were contrary to those of informed members of the public, seems to me to be of no significance. It must be a rare issue in Canadian political life today in which one cannot find informed members of the public and, indeed, experts, real or soi-disant, ranged on each side. If this had been a trial by jury, it would not, in my opinion, have been proper for the learned trial judge to let that allegation go to the jury as evidence of express malice. See on the question of what may be put to a jury as sustaining a plea of express malice, Turner v. M.G.M. Pictures Ltd., [1950] 1 All E.R. 449 (H.L.).

71 To sum up, therefore, I sustain the pleas of paragraphs 5 and 10 of the statement of defence but reject the plea of paragraph 13 insofar as it refers to the publication on 26th or 27th April to the editor of The Squamish Times.

72 To what damages then is the appellant entitled?

73 For every actionable libel, a plaintiff is entitled to damages. In considering the amount, the court must take into account how widely the libel was disseminated. In this case, no evidence was drawn to our attention from which we could infer that this libel was disseminated by the editor of The Squamish Times to anyone. If real harm was done to the appellant, it was done by the publication to the Minister which is not actionable. I would award damages for the publication to the editor of The Squamish Times of $500.00.

SOUTHIN J.A.

74 LEGG J.A.:-- I have had the privilege of reading in draft form the reasons for judgment of Madam Justice Southin. I agree with her that the publication by the respondent, Turner, of the defamatory words in the letter dated April 19th, 1990 to the Minister of the Environment and to the members of Council and to senior officials of the District of Squamish, was upon an occasion of qualified privilege. I also agree with her that Turner's statement in the letter that he believed that the appellant had misused his Professional Engineer's Certification in a political manner did not go outside the occasion of privilege. I further agree with her that Turner was not activated by express malice. However, unlike Madam Justice Southin, I have concluded that the publication by Turner of a copy of that letter to the editor of the Squamish Times was also on an occasion of qualified privilege. I am therefore unable to agree with her proposed disposition of the appeal.

75 Madam Justice Southin has set out the circumstances under which the letter of April 19th was written. It is therefore unnecessary for me to refer to those circumstances in any detail. I confine myself to a brief recapitulation in order to explain my reasons.

76 The appellant opposed the plans of Turner and the District of Squamish to utilize the water from Mashiter Creek as a domestic water supply. On April 18th, Turner received a copy of the letter dated April 10th from the Minister of the Environment to the appellant in which the Minister acknowledged receiving a letter from the appellant expressing his concerns regarding the District's plan to use Mashiter Creek water and in which the Minister stated that he shared the appellant's concerns and had advised the District to pursue other opportunities.

77 Sometime before the Council meeting scheduled for May 1st, Turner had caused to be distributed to each member of Council and to certain members of the District staff a package consisting of the agenda together with documents relating to items on the agenda. The local media, that is the Squamish Times newspaper and Mountain FM radio were to have available to them an identical package. That package for the May 1st meeting included the letter of April 19th.

78 The letter was actually released to the editor of the Squamish Times on April 27th prior to the Council meeting. The circumstances of that publication were described by Turner in these passages of his evidence.

Q. Okay. Now, on that date, April 27th, 1990, did you speak to the editor of the Squamish Times, Shari Bishop?
A. On or about that date, yes, I did over the telephone, and --
Q. And did the topic of the Mashiter water intake come up?
A. Yes.
Q. And as a result of what you were told, did you conclude that Miss Bishop had knowledge about recent events concerning the Mashiter?

[Here objections were made by counsel for the plaintiff on the grounds that this evidence was hearsay. This objection was not well taken insofar as the conversation showed the reason for the publication of the letter.]

. . . . .

Q. As a result of speaking to her --
A. Um-hum.
Q. -- what did you do?
A. As a result of speaking to her, I immediately faxed a copy of my letter of April -- the previous letter.
Q. Letter of April 19th to John Reynolds?
A. That's right, to her because I had -- was surprised to hear from her that she did not have a copy of it when it had been appended to --

. . . . .

Q. Buy why did you -- why did you send her the letter of April 19th?
A. Because she had informed me that she had a copy of Mr. Reynolds -- a copy of a letter to Mr. Baumann.
Q. That's the April 10th letter?
A. That's correct.

. . . . .

Q. Now, as a result of that conversation with Miss Bishop, what did you understand she had in her possession?
A. I was -- that she had the letter -- a copy of the letter which was addressed to Frank Baumann from the Honourable John Reynolds and I'm having a little trouble understanding what I can and can't say.

. . . . .

A. I was given -- okay. I was given to understand that it had been faxed to her.

79 The circumstances were also referred to by Turner in a memorandum to Council dated April 27th, 1990 which read as follows:

INTER-OFFICE MEMORANDUM

Memo To: Council Date: 27 April 1990

From: Mayor Phil Turner File No: 13.08.5 1

Subject: Mashiter Water Intake - Federal Fisheries

Mr. Payne has received a letter from Mr. Kevin Conlin re: the Mashiter Water Intake which revises the Federal Fisheries requirements from 1.0 cubic metres per second to 0.5 cubic metres per second with various other conditions that can be fairly easily facilitated. Mr. Payne is reviewing the letter (just received) and will be sharing it with Mr. Doug Webber and I have asked him to request Mr. Webber attend, along with Mr. Payne, Council at 7:00 p.m. Tuesday, May 1, 1990 to explain the letter and also to allow members of the public the opportunity to provide input as per the suggestion of the Squamish Times for a public meeting. Knowing that you would all concur with providing members of the public the opportunity to provide input, I have scheduled this meeting and have notified the Squamish Times and Mountain FM Radio that this will be taking place. Council should treat this as just a continuation of our Council meeting. Copies of the letter from Federal Fisheries will be made available either the first part of next week or at the meeting.

I have been informed that the Squamish Times were provided with a copy of the letter of the Honourable John Reynolds, addressed to Mr. Frank Baumann. I have also provided the Squamish Times with a copy of my letter dated April 19, 1990 to the Honourable John Reynolds and his response of April 25, 1990.

"P. Turner"
Phil Turner,
Mayor.

PT:tc

80 Like Madam Justice Southin, I have concluded that Turner had an interest in communicating with the Minister concerning the Mashiter Creek project and the Minister had an interest in receiving such communication. That qualified privileged occasion included the statement containing the impugned passage in which Turner stated that he believed the appellant had misused his professional engineering certification in a political manner.

81 When Turner became aware on April 27th from his discussions with Shari Bishop, the editor of the Squamish Times that the newspaper had received a copy of the letter from the Minister to the appellant, he had a bona fide interest in ensuring that his response to the Minister's opposition to the Mashiter Creek Project was in the hands of the newspaper so that his disagreement with the Minister and the appellant could be available through the newspaper to his constituents.

82 He was in a position similar to the position of the defendant in Parlett v. Robinson (1986), 5 B.C.L.R. (2d) 26 (B.C.C.A.). In that case, the defendant Robinson was the official spokesperson for his party on the affairs of the Ministry of the Solicitor General. He sought to persuade the Minister to hold a public inquiry into an alleged abuse by an official of the Correctional Service taking advantage of the work of an inmate but failed to persuade the Minister to conduct such an inquiry. He then held a press conference where he expressed concern over the absence of effective controls in the Correctional Service and in the course of that conference, and later on television, spoke words that were defamatory of the plaintiff. This Court held that the publication of the defamatory statements was on an occasion of qualified privilege and allowed an appeal and dismissed the action.

83 In that case, Hinkson J.A. referred to Douglas v. Tucker, [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657 (S.C.C.) and to Jones v. Bennett, [1969] S.C.R. 277, and to a passage in the judgment of Cartwright C.J.C. in Jones v. Bennett (at p. 297) in which the Chief Justice stated:

> In view of the unanimous judgments of the Court in Douglas v. Tucker, [1952] 1 D.L.R. 657, [1952] 1 S.C.R. 275, particularly at pp. 665-7, D.L.R., pp. 287-8 S.C.R., and in Globe & Mail Ltd. v. Boland, 22 D.L.R. (2d) 277, [1960] S.C.R. 203, it must be regarded as settled that a plea of qualified privilege based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, "to the world".

Mr. Justice Hinkson distinguished Jones v. Bennett.

He said:

> It is to be observed that in Jones v. Bennett the defendant was under no duty to communicate the concerns he had about the plaintiff to anyone. Rather, he was taking an opportunity to make a statement which resulted in a defamatory innuendo in respect of the plaintiff. The defendant knew that newspaper reporters were present on that occasion and it was held that in those circumstances publication "to the world" was unjustified.
>
> In an earlier decision in this province, this court had to consider the defence of qualified privilege where a member of the legislature had spoken to two political meetings at which reporters were present. The case was Wade & Wells Co. v. Laing, 19th November 1956 (unreported). The trial judge, Whittaker J., said after reviewing the circumstances in which the alleged defamatory statements were made:
>
> > The defendant was Member for the Vancouver Point Grey constituency. If he honestly held the view that there was waste in the performance of a public undertaking such as the building of a road, and at this state his honesty of purpose is presumed, then it was his public duty to so report to his constituents. It would be a lamentable state of affairs if a Member of Parliament, holding the view that there had been waste or other irregularity in the carrying out of a government contract, were forced to remain tongue-tied lest he be sued by the contractor for libel or slander.
> >
> > The statement made at this meeting was made on a subject matter in which both the defendant and the persons at the meeting had a legitimate common interest. I think it may be assumed that both the defendant and those at the meeting were taxpayers. Every time a citizen makes a retail purchase he pays a tax to the provincial government. All have a legitimate common interest in knowing whether or not their money is being wasted. Further than this, under our system of government there are political parties. The parties in opposition have the privilege, if not the duty, of bringing to the attention of the electors abuses in government and, in order to carry

> out that function, the defendant and his fellow Liberals had a legitimate common interest; the one to impart information, and the other to receive it.

That ruling was appealed to this court.
The decision is reported in (1957), 23 W.W.R. 106
, 11 D.L.R. (2d) 276. Coady
J.A. said at p. 107:

> As to the first ground, it seems to me the learned trial judge was quite correct in the ruling made by him and for the reasons he gave by him when he held that the occasions were privileged. He seems to have considered the matter carefully and his ruling is in keeping with well-established principles. It is unnecessary to review the authorities or enlarge upon this ground of appeal.

Sidney Smith J.A. concurred in that judgment.

In Stopforth v. Goyer (1970), 8 C.C.L.T. 172, 97 D.L.R. (3d) 369, the Ontario Court of Appeal considered the defence of qualified privilege in relation to a statement made by the Minister of Supply and Services of the Government of Canada to the media following on a statement made by the minister on the subject in the House of Commons. In the statement to the media, the minister said:

> I will stand for my officials and I accept responsibility for errors of judgment, mistakes made "in good faith". But I do not believe that ministerial responsibility extends to cases of misinformation or gross negligence. Why should I pay for misinformation?

That statement followed upon a much longer statement in the House of Commons when the minister had announced that the plaintiff, who was a senior civil servant, had been removed from his function as deputy head of the project office. Jessup J.A. referred to the defence of qualified privilege and said at p. 372:

> That defence is succinctly stated in 24 Hals., 3rd ed., pp. 56-7:
>
> "100 . . . . An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.
>
> . . . . .
>
> "101 . . . . A reason for holding any occasion privileged is the common convenience or the welfare of society, and it is not easy to mark off with precision those occasions which are from those which are not privileged or to define what kind of social or moral duty or what measure of interest will make the occasion privileged . . . The trend of the modern decisions is in the direction of a more liberal application or interpretation of the rule."

Jessup J.A. then continued at p. 372:

> In my opinion the electorate, as represented by the media, has a real and bona fide interest in the demotion of a senior civil servant of an alleged dereliction of duty. It would want to know if the reasons given in the House were the real and only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate. Accordingly, there being no suggestion of malice, I would hold that the alleged defamatory statements were uttered on an occasion of qualified privilege.

The learned trial judge quoted the foregoing passage in his reasons for judgment and observed that the Ontario Court of Appeal did not cite any

authority for its statement. Then the learned trial judge continued:

> In my opinion the Stopforth case is concerned with the very special circumstances of a minister repeating the precise statement he had made inside the House of Commons. At p. 179 Jessup J.A. noted that the fact that the respondent was named in the House would create the interest of the electorate and invoke the corresponding interest of the appellant to satisfy that created interest. Those circumstances or similar circumstances do not prevail in the case at bar.

In my respectful opinion, the learned trial judge erred in seeking to distinguish the decision in Stopforth on so narrow a basis. I fail to appreciate why a statement would enjoy qualified privilege when made to the media if first the statement was made in the House of Commons where it would enjoy an absolute privilege. It is not the making of the statement in the House of Commons that creates the interest of the electorate but rather the subject matter of the statement. Thus if the Member of Parliament has a duty to ventilate the subject matter and the electorate has an interest in knowing of the matter, then the only remaining question is whether or not, in the circumstances, the publication "to the world" was too broad.

In my opinion the statements to the media and on the television programme which were reported in newspapers and through the media cannot be said to have been unduly wide. That is because the group that had a bona fide interest in the matter was the electorate in Canada. Hence the privilege was not lost.

84 The decision in Parlett v. Robinson states a qualification to the principle stated in Jones v. Bennett that a qualified privilege cannot be upheld where there is a publication to the public of the

words complained of. In my opinion, the publication by Turner of the April 19th letter to the newspaper editor on April 27th in the particular circumstances of this case falls within the Parlett v. Robinson qualification. I consider myself bound by that decision.

85 The respondent had an interest in ventilating the subject matter of the Mashiter Creek Project and the opposition to that project by the Minister and by the appellant to his constituents, and the constituents had a bona fide interest in knowing of that opposition. When Turner learned that the newspaper had obtained a copy of the Minister's statement of his opposition to the project, and support of the appellant's opposition to that project, his publication to the local newspaper of his answer to that opposition prior to a public meeting called to discuss the matter, cannot be said to have been "to the public generally" or "unduly wide". In my opinion, the privilege was not lost.

86 The question of whether the publication to Mountain FM is actionable stands on a different footing. I agree with Madam Justice Southin's reasons for holding that the publication is not actionable namely that by the time the radio station obtained its copy of the letter the appellant had gone to the Council meeting which was held in public and published the offending words. In such case the appellant had assented to, or acquiesced in, the publication to the local media and no action will lie (see: Gatley, 7th ed., para. 248).

87 For the foregoing reasons I would dismiss the appeal.

LEGG J.A.
TOY J.A.:-- I agree.