Lenczner Slaght

130 Adelaide St W
Suite 2600
Toronto, ON
Canada M5H 3P5

T 416-865-9500
F 416-865-9010
www.litigate.com

November 29, 2012

Hon. Ian Binnie, C.C., Q.C.
Direct line: 416-865-3737
Direct fax: 416-865-9010
Email: ibinnie@litigate.com

William C. McDowell
Direct line: 416-865-2949
Direct fax: 416-865-2850
Email: wmcdowell@litigate.com

David Livingston
Principal Secretary
Office of the Premier
Legislative Building
Queen's Park
Toronto ON M7A 1A1

RE: Allegations Against Premier McGuinty and the Liberal Government arising out of the Relocation of Mississauga and Oakville Gas Plants

Dear Mr. Livingston:

You have asked us to prepare for the Premier's consideration a formal written opinion that addresses defamation issues, including whether there is a basis for an action and, if so, what are his options (including a recommended course of action).

In this respect you have provided us with a summary of the various allegations made in October 2012 against the Premier and Minister Chris Bentley. For ease of reference we have attached a list of those allegations as Schedule A to this letter.

You have also asked us to consider the question of Parliamentary Privilege, and in particular any potential remedies available to elected officials for disregard by MLAs of *Charter*-mandated rights and freedoms. Finally, we are also to consider the possibility of having an independent review of the privilege issue by the Court of Appeal or obtaining a non-judicial opinion from a credible and independent expert(s). The context is the pending gas plant investigation/contempt proceedings in the House.

For the reasons that follow we believe that neither defamation proceedings nor an inquiry into Parliamentary Privilege would produce a positive outcome in *legal* terms. We

Bromm, William (CAB)

From: Phillips, David (GHLO)
Sent: December 4, 2012 8:58 AM
To: Bromm, William (CAB)
Subject: Justice Binnie's Legal Opinion re Defamation and Parliamentary Privilege
Attachments: Ltr Livingston and Phillips_2603611.PDF.PDF

William:

I have attached a copy of the opinion prepared by Lenczners (Justice Binnie and Will McDowell) in relation to both the defamation and parliamentary privilege matters.

Would you mind forwarding this to Patrick M. and Malliha W.?

I'll stop by today to discuss, but don't anticipate any next steps in the immediate future.

Dave

David Phillips
Director of Legislative Affairs, Office of the Premier
Chief of Staff, Government House Leader
Office: (416) 325-3412
Cell: (416) 420-9523
E-Mail: david.phillips@ontario.ca

appreciate, of course, that many other considerations will inform the course of action ultimately decided upon.

If defamation proceedings are to be taken against newspapers or other media notice must be given within six weeks of the date of publication, and formal proceedings instituted within three months.

A. THE DEFAMATION ISSUES

Many of the allegations in Schedule A are in our view clearly defamatory.

Equally, however, the allegations are made on political matters of high public interest and importance.

Political speech, or more broadly, discourse on matters of public interest, is given extensive immunity from liability under the law of defamation. The defences of fair comment and qualified privilege have been expanded by a series of recent decisions in the Supreme Court of Canada. In addition, we expect that the prospective defendants would assert the defence of "justification", which would result, in effect, in a judicial inquiry into the "truth" of the Opposition's allegations, and consequent publicity.

We would be concerned that the Opposition might welcome a defamation lawsuit as a vehicle to keep these issues before the public eye. In this endeavour they would be assisted by the coercive documentary production power of a court and media grandstanding.

The Test for Defamation

As to whether the words in Schedule A are defamatory, the law provides a low threshold. It is protective of reputations. Elected officials, as plaintiffs, would almost certainly succeed at this first stage. In *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the Supreme Court of Canada affirmed the longstanding test to determine if published material is defamatory:

> It is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule is defamatory and will attract liability.

A defamatory meaning may be distilled from the ordinary meaning of the published words themselves or the surrounding circumstances (e.g. the information the public already has about the gas plant decisions) even if the allegations are couched as opinion. In *Prud'homme v Prud'homme*, [2002] 4 S.C.R. 663 the Supreme Court stated:

> Words may be defamatory because of the idea they expressly convey, or by the insinuations that may be inferred from them . . . 'The form in which the libel is expressed is of little import; it is the result achieved in the mind of the reader that creates the delict.' The defamatory allegation or imputation may be direct, or it may be indirect 'by simple allusion, insinuation or irony, or may be made conditionally, as an expression of doubt, or hypothetically.' Often, the allegation or imputation is conveyed to the reader by way of simple insinuation, an interrogative sentence, a reference to a rumour, mention of information that has infiltrated the public awareness, juxtaposition of unrelated fact that, together, take on the appearance of being related. (para. 34)

In The Law of Defamation in Canada (2nd ed., looseleaf) R.E. Brown states:

> The fact that words are expressed as mere opinions, suspicions or belief does not make them any less actionable if they are defamatory. Words which raise a strong suspicion of the plaintiff's guilt in the minds of listeners or readers may be a sufficient basis upon which to bring an action for libel or slander. (para. 5-215)

Accordingly, as an example, MLA Todd Smith's statement on October 15, 2012 is defamatory:

> The House can simply no longer believe Minister Bentley, Minister Milloy or the Premier are telling the truth.

Further, Mr. Hudak's statement is also defamatory:

> Not only did Dalton McGuinty misuse a billion dollars of taxpayers' money, he tried to paper it over, cover it up (and) keep the details from the public.

Indeed most of what is said in the entries in Schedule A exceeds the threshold of defamation.

Defences

Given the relative ease of proving that words are *prima facie* defamatory, the Court's focus in libel actions tends to be on the defences available to the defamers, namely fair comment, qualified privilege and justification (i.e. that their allegations were true in substance and in fact).

The Defence of Fair Comment

The present law is generous to defamers who speak out on issues of public importance.

The requirements for the fair comment defence can be summarized as follows:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment must be cognizable as opinion rather than a simple allegation of fact;

(d) the test is whether *any* person (i.e. not necessarily the defendant), viewed objectively, could honestly express that opinion on the proved facts?

(e) even though the other elements of "fair comment" are established, the defence will be defeated if the plaintiff proves that the defendant was actuated by express malice (at pp. 1099-1100), including an improper purpose.

The Supreme Court of Canada in *Simpson v Mair,* [2008] S.C.C. 40 [2008] 2 SCR 420 held that with respect to (d), the comment does not have to be one which only a "fair minded" person might honestly express. It was observed that:

> Political partisans are constantly astonished at the sheer "unfairness" of criticisms made by their opponents [but] Trenchant criticism which otherwise meets the "honest belief" criterion ought not to be actionable because, in the opinion of the court, it crosses some ill-defined line of "fair mindedness". The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts. (at para. 28)

Earlier, in *Cherneskey v Armadale Publishing Ltd.* [1979] 1 SCR 1067 at 1079, Dickson J. (later Chief Justice) observed that:

> The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury.

There are several subsidiary points which should be clarified:

(i) The comment must be based on fact and related to a matter of public interest

In the present case, the offensive statements have obviously been made in relation to matters of public interest, namely the circumstances surrounding the government's decision to change its plans in relation to the Mississauga and Oakville gas plants, and the consequent financial consequences.

(ii) Existence of a factual foundation

The facts upon which the opinion is based must either be stated, at least in general terms, or must be known to the audience. In *Simpson,* the Supreme Court said the facts must be "properly disclosed or sufficiently indicated" unless the facts "were so notorious as to be already understood by the audience" (at para. 34). While the whole set of factual circumstances behind the government's decisions in relation to the gas plants are undoubtedly quite nuanced, there can be little doubt that the public was at all relevant times aware that (a) the government had decided not to proceed with either project at a time proximate to an election, (b) that these decisions have significant financial consequences, and (c) major controversies have subsequently arisen in relation to MLAs demands for the production of government and Crown corporation documentation in relation to these decisions.

(iii) The comment must be recognizable as a comment

Most of the statements set out in Schedule A concerning the Premier would qualify as comment within the broad definition of the law. For example,

- The House can simply no longer believe Minister Bentley, Minister Milloy, or the Premier are telling the truth when they speak in the Legislature (Todd Smith, October 15th);

- I don't believe [Minister Bentley] and more importantly I don't believe Premier McGuinty. When he says he has brought forward all the documents. I mean, what's the old expression? Once bitten, twice shy. We've had now several occasions where they have actually lied to MLAs... Not only did Dalton McGuinty misuse a billion dollars of taxpayers' money, he tried to paper it over, cover it up (and) keep the details from the public (Tim Hudak, October 15th).

These admittedly strong statements concerning the Premier's actions all amount to comment, however unfair, about Mr. McGuinty's conduct on matters of high public importance.

(iv) Could any person honestly express the opinion on the proved facts?

It must be repeated that the defendants need not meet a "reasonable person" standard. As the Court held in *Simpson, supra*, at para. 62, the question is whether the matter complained of "is an opinion that could honestly have been expressed in the proved facts by a person prejudiced, exaggerated or obstinate [in] his views". That is all the law requires.

We are of the view that the comments set out in Schedule A, would likely be covered by the fair comment defence.

The Alternative Defence of Qualified Privilege

Statements in the Legislature cannot, of course, provide the foundation for a defamation action. However even comments outside the Legislature by MLAs may be protected by the defence of qualified privilege. The defamatory material must be published pursuant to some moral, legal or social duty, e.g. the duty of Opposition MLAs to hold the government accountable for its actions. The privilege is "qualified" in that it can be defeated upon proof of malice (e.g. improper purpose), or proof that the defendant knew that the statement was false or was reckless as to its falsity: *Hill v Scientology*, [1995] 2 S.C.R. 1130.

The recipient of the material (i.e. the public) must have some corresponding interest in receiving the communication.

Where a Federal Minister accused a senior public servant of gross incompetence in the course of a media scrum in the Commons lobby, the Minister was held to be entitled to the protection of qualified privilege given the corresponding duty and interest on matters of public importance: *Stopforth v Goyer* (1979), 97 D.L.R. (3d) 369.

In 1986, the British Columbia Court of Appeal held that a politician's "duty to ventilate" matters of concern to the public could give rise to qualified privilege: *Parlett v Robinson* (1986), 5 B.C.L.R. (2d) 26 (BCCA) at p. 39. In that case, Svend Robinson MP was held to be protected by qualified privilege even though he had made his statements "to the world". The Court observed:

> 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 program which were reported in the newspapers and through the media cannot be said to be 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. [emphasis added]

Finally, it may be recalled that in *Clement v McGuinty*, 2001 CanLII 7949 (ON CA), the Court of Appeal suggested that the protection of qualified privilege was likely available to the Leader of the Opposition who had made remarks impugning the motives and actions of a Minister of the Crown.

In our opinion the defendants would likely be able to claim successfully the defence of qualified privilege as well as fair comment on matters of public importance.

The Defence of Justification

Defamatory words are presumed to be false. Truth furnishes a defence. The onus is on the defendant to displace the presumption of falsity by establishing the truth of the defamatory words as a matter of fact: *Downard on Libel* (2nd ed.) at 85. Ordinarily, the defendant pleads that the words were true "in substance and in fact".

Pursuant to the *Libel and Slander Act*, R.S.O. 1990, c.L.12, s. 22:

> In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

In essence, the section provides that if the defendant can prove the substantial truth of the libel, he may escape liability altogether.

We expect that the defendants here would plead justification and that the resulting litigation would quickly become a media circus. It would set in motion a very intrusive discovery process backed up by the Court's power of contempt. There are already some 50,000 documents in the public domain (at e.g. *tomadamsenergy.com*). Given the extent of this material there would undoubtedly be very extensive litigation over production of further documents. For example, it is said that solicitor and client privilege has been waived in material that has been produced to the Committee. On a motion for production of third party records (e.g. those belonging to the Ministry of Energy, or to the Premier's office or others), attempts would be made to access a great many more ostensibly confidential or privileged materials.

We recognize the harshness of the attacks by Opposition MLAs against the Premier and Ministers in recent months. The unfairness of some of the comments cannot be easy to withstand. However, given the public importance of the subject matter, we think a defamation action would simply prolong the media controversy and, in the end, do the plaintiffs' more harm than good. Accordingly, prudence in our view dictates taking no action for defamation be commenced.

B. PARLIAMENTARY PRIVILEGE ISSUES

Parliamentary Privilege is simply a term used to describe the degree of autonomy considered necessary to enable the legislators to get their job done free from the interference from outsiders. The courts do not interfere with the workings of the House. Obviously if MLAs could run off to the courts with complaints about how the Speaker is exercising his power, or how a legislative committee is composed, and if the courts could issue interim relief against further proceedings in the House until the validity of the objection was determined, the business of the House would grind to a halt.

The classic description of privilege is found in the British "bible" of Parliamentary procedure, *Erskine May*, 23rd edition at page 102:

> . . . underlying the Bill of Rights [1689] is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle – or depart from – their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or whether (like a bill) it is the joint concern of both Houses. (Emphasis added)

In *New Brunswick Broadcasting v Nova Scotia (Speaker of the House Assembly)* [1993] 1 SCR 319, the Supreme Court of Canada emphatically affirmed the principle of non-interference. In that case the CBC claimed that its *Charter* right to gather news in the public interest was violated by the Speaker's decision to exclude television cameras from the Nova Scotia House of Assembly. In its decision, and more recently in *Canada (House of Commons) v Vaid* 2005 SCC 30 [2005] 1 SCR 667, the Supreme Court insisted that Legislative privilege is as much part of our constitution as the *Charter*. Neither trumps the other. Instead, as pointed out by McLachlin J. (now Chief Justice) in *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876,

> The proper approach is not to resolve [any] conflict by subordinating one principle to the other [i.e. *Charter* guarantees to Legislative privilege or vice versa] but rather to attempt to reconcile them (para. 69)

A Court will insist on its right to determine whether a particular category of privilege exists (e.g. to exclude a "stranger" from the legislature), but once it is decided that such a category exists, it will be for the members of the House, not the courts, to determine whether the privilege has been appropriately exercised.

There is no doubt the Opposition members are exercising, however offensively and intemperately, a recognized "category" of privilege. As Speaker Peter Milliken stated in his April 27, 2010 ruling in the House of Commons with respect to the protection of documents relating to Afghan detainees:

> Before us are issues that question the very foundations upon which our parliamentary system is built. In a system of responsible government, the fundamental right of the House of Commons to hold the government to account for its actions in an indisputable privilege and in fact an obligation.
>
> (*http://openparliament.ca/debates/2010/4/27/the-speaker-9/*)

Speaker Milliken's ruling is an important and recent precedent as it involves a minority government, production of government (and its agents') documents, and proceedings for contempt of Parliament, all of which find a parallel in the present controversies at Queen's Park.

Speaker Milliken went on to say, with respect to the particular issue of the House's right to call for the production of government documents (which included those of the Armed Forces deemed to be under the *control* of the government):

> As has been noted earlier, procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security.
>
> Therefore, the Chair must conclude that it is perfectly within the existing privileges of the House to order production of the documents in question. Bearing in mind that the fundamental role of Parliament is to hold the government to account as the servant of the House and the protector of its privileges, I cannot agree with the government's interpretation that ordering these documents transgresses the separation of powers and interferes with the spheres of activity of the executive branch. (emphasis added).

The judicial policy of "hands-off" the legislature has limited exceptions:

(i) The legislature cannot assert a "category" of privilege unknown to the law e.g. the members might resolve to exempt themselves from the payment of income tax. Such a step would have nothing to do with the efficient conduct of the business or duties of the House and the courts would simply declare such an initiative to be void and of no effect. In the present case however the "category" consists of procedures adopted by the House majority to hold the government to account in matters of public interest and expenditure. This is in the undoubted exercise of legislative privilege.

(i) Even in the exercise of well understood category of privilege, such as the control by MLAs of their own proceedings, the House is not entitled to go beyond what it "necessary" for its proper functioning. For example, there was some talk in the newspapers of an opposition member seeking to commit the Minister to prison for contempt.[1] We expect a court would say that while great deference must be paid to members of the House as to what is necessary to hold the government to account, any attempt to imprison a Minister for contempt would vastly exceed the limits of "necessity" and would be declared invalid. In that way the legislative privilege and the Minister's *Charter* right to due process would be "reconciled".

In the present circumstances, given the public interest in the subject matter, and despite the shrill tone and abusive language adopted by the Opposition spokespersons, we do not believe there is an arguable case for judicial intervention. The House may step out of bounds in the future, but it has not done so to date. If the House is to be reined in, it must be done by a vote in the House itself.

Reference to the Court of Appeal

It is of course open to the government to "refer" to the Court of Appeal the question whether the House has exceeded its privilege, and infringed a Minister's *Charter* rights. However, given the fast pace of events expected at Queens Park once the House reconvenes, and the generally leisurely pace of court proceedings, the result of a Reference to the Court of Appeal would simply be to have litigation in progress when the House reconvenes. This may have some tactical advantage but in the end, we think, the

---

[1] Historically, it was quite common for Houses of Parliament at Westminster to imprison individuals for perceived "contempt" of Parliament, as described in the leading case of *Stockdale v. Hansard* (1839) 112 ER 1112, but today such a step would almost certainly be regarded as unnecessary and therefore outside the protection of "privilege" and therefore unlawful.

Court would hold that the House is the master of its own procedure and that what has been done to date (as distinguished from statements by Opposition MLAs about what may or may not be done in the future) is covered by a "category" of privilege and that there is no basis for judicial supervision or comment as to the appropriateness of the steps taken by MLAs at this stage.

A panel of experts or a "wise person" opinion letter

An alternative would be to strike a panel (or appoint a "wise person") to consider the propriety of the activities of the opposition through the lens of appropriate Parliamentary practice rather than constitutional law. Such an opinion could be obtained before the House reconvenes. Its weight would depend not only on the persuasive quality of the analysis but on the credibility, perceived independence and public recognition of whoever provides it.

A suitable candidate would be the Honourable Peter Milliken, whose work as Speaker of the House of Commons is of course exceptionally well regarded. His experience, intelligence and independence give him credibility, despite his Liberal connections. However, in light of his ruling in the Afghan detainees case there is little prospect he would conclude in the government's favour.

Another possibility would be the Honourable Roy McMurtry, whose legislative experience is a bit rusty but whose opinion (whatever it may be) would also carry weight.

Professor Peter Hogg has been consulted on similar issues in the past but you indicated that he is likely conflicted out of this mandate.

Former Federal Minister Bill Graham has both the necessary political and legal background, but may be perceived as a Liberal partisan.

Former Supreme Court Justice Frank Iacobucci was called in to help with the Afghan detainees issue in Ottawa, but he has very limited knowledge of (and experience in) Parliamentary procedure.

Former Supreme Court Justice Jack Major (now living in Calgary) has done an inquiry into MLAs entitlement in Alberta, but also lacks any Legislative experience.

In short, it is difficult to identify a "wise person" who has both the legal and Parliamentary experience *and* who would more probably than not side with the government on the issue of privilege.

Accordingly, we would not recommend the "wise person" option either, unless someone could be identified who would be more likely than the people mentioned above to give the government a favourable opinion.

We are of course pleased to hear any questions or concerns, or to meet to discuss the matter further.

Yours Sincerely,

Hon. Ian Binnie, C.C., Q.C.

William C. McDowell

IB/WCM/sa/esc

c.c. David Philips, Office of the Premier