# Controlling (Mis)Conduct at Council Meeting

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**AMCTO Zone 5 Spring Meeting 2024** 

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AIRD BERLIS

#### Disclaimer

These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.

This presentation may contain general comments on legal issues of concern to organizations and individuals.



# **Overview**

- Primer on Freedom of Expression
- Case Law
  - Bracken v. Fort Erie (Town)
  - Gammie v. South Bruce Peninsula (Town)
  - Mann v. Saugeen Shores (Town)
- Strategies for Controlling Civility at Meetings



### **Primer on Freedom of Expression**

# Charter right to Freedom of Expression

#### Section 2

Everyone has the following fundamental freedoms:

. . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communications.



# **Primer on Freedom of Expression**

- "Expression" is any conduct or activity that seeks to express meaning
- Purpose: promote search for and attainment of truth, democratic discourse, individual self-fulfilment
- However, some expressive activity not protected"
  - Violence or threats of violence
  - Expression not protected in certain location or forums:
    - Private property
    - Some types of government/public property (e.g., private offices)
- Freedom of expression can be violated by purpose of a law, or effect of the law



# **Primer on Freedom of Expression**

#### "Reasonable Limits" Clause

- Section 1 of the Charter provides that rights may be subject to "reasonable limits"
- Four step test:
  - Pressing and substantial objective
  - Rational connection
  - Minimal impairment
  - Balancing of deleterious and salutary effects

Bracken v. Fort Erie (Town) 2017 ONCA 1025 (Ont. C.A.) Feldman, Lauwers, Miller, JJ. A.

#### **Background**

- Fred Bracken outspoken Niagara resident, "citizen journalist," vocally opposed to local government actions
  - "He is a large man and some people find him intimidating." (para. 1)
- Town proposed to approve a medical marijuana facility across the street from Bracken's home
  - Bracken previously video recorded meetings
  - Before meeting, attended Town Hall and pounded fist on customer service desk, demanded to meet with CAO
  - Bracken protested decision outside Town Hall



#### **Background**

- Before meeting, left a note on council members' desks
- Left council chamber, set up protest outside Town Hall
  - Used sirens, megaphone; audible from council chambers
  - Chants, accused Town staff of lying
- Town staff member expressed fear for safety, that "erratic behaviour" would intimidate attendees at council meeting
- Closed meeting of council interrupted so that CAO could deal with issue
- Town hall placed under "lockdown"



#### **Enforcement Actions**

- Town prepared a Trespass Notice, to be provided to Bracken by CAO; police also called
  - CAO watched through window; never confronted Bracken
- Police arrived; advised Bracken Trespass Notice was issued
  - Bracken refused police request to leave
  - Bracken was arrested, placed in cruiser; issued tickets
- Town issued written Trespass Notice and Cover Letter
  - Prohibited entry to Town properties for 1 year; properties where Town staff works
  - Exceptions for appointments with CAO, paying taxes



#### **Constitutional Challenge**

- Bracken launched legal proceeding to challenge the constitutionality of the Town's actions
  - Alleged Trespass Notice violated his right to freedom of speech under s. 2(b) of the Charter
  - Applications judge dismissed proceeding: "crossed the line of peaceful assembly and protest," and engaged in acts of violence not protected by the *Charter*
- Bracken appealed



- Bracken's protest did come within protection of s. 2(b)
  - Application judge wrongly relied on evidence Town staff felt threatened; no act of violence committed
  - Only one employee had any interaction, and after Bracken was arrested
  - "Violence is not the mere absence of civility." (para. 49)
  - Town Hall was a location where freedom of expression would apply
  - "The literal town square is paradigmatically the place for expression of public dissent." (para. 54)

- Town's Trespass Notice violated Bracken's rights under s. 2(b) of the Charter
  - Purpose of trespass notice was not to prevent Bracken from conveying his message
  - However, it had the effect of preventing him from conveying his opinion on the proposed by-law

- Could not be justified under s. 1 "reasonable limits" clause
  - Town failed to establish it was acting for a sufficiently important purpose in expelling Bracken
  - Town's actions were not "minimally impairing"; other escalation options could have been taken
    - Trespass notice issued in a hurried manner
    - Prohibitions were overbroad

#### Ruling

- Could not be justified under s. 1 "reasonable limits" clause
  - Effects on Bracken's free expression disproportionate to any benefit gained by the Town

"In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes." (para. 82)

 Appeal allowed, trespass notice quashed, declaration issued that Bracken's rights were violated

# Gammie v. South Bruce Peninsula (Town) 2014 ONSC 6290 (Ont. S.C.J.) Price J.



#### **Background**

- Craig Gammie, former candidate for Councillor (eventually elected), engaged in periodic litigation with Town, history of animosity
- Left a recording device in Council Chambers to record closed session discussion, had altercations with elected officials and staff, brought signs to meetings
  - Council passed resolution banning Gammie from entering Town property ("2012 Resolution"); challenged in court, but proceeding resolved
- Gammie continued to engage in "disruptive activities"
  - Council passed another resolution banning Gammie ("2013 Resolution"), requiring communication through CAO



#### **Background**

 Council later revoked, replaced 2012 and 2013 resolutions with new resolution ("2014 Resolution"):

**THAT** Town staff shall not be required to communicate or otherwise interact with Craig Gammie, except for the Town's Administrator;

AND FURTHER THAT notwithstanding the foregoing, should Craig Gammie submit nomination papers for the 2014 municipal election for the Town, the Town Clerk is hereby permitted to contact Mr. Gammie via mail or e-mail, as required, and only in relation to municipal election matters; and, if permitted by the Town Clerk, Mr. Gammie could attend at the Clerk's office, provided that the Administrator or another staff person is also in attendance.



#### **Legal Challenge**

- Gammie challenged the 2012 and 2013 Resolutions on the basis that, inter alia, they were unconstitutional:
  - 2013 Resolution prohibited attendance at all municipal properties
  - This included Council Chambers, and therefore, all future meetings of Council
  - This restricted Gammie's freedom to attend and participate in public meetings

- Gammie's freedom of expression was infringed:
  - "Expression" is anything that seeks to convey meaning; entering Council Chambers constituted a protected form of "expression"
  - Gammie's protests related to public issues and were protected
    - Expression did not take a violent form
    - Expression was not inconsistent with rights of others at, purpose of, Council meetings

- Gammie's freedom of expression was infringed:
  - Purpose of 2013 Resolution was not to restrict freedom of expression, but rather, to prevent disruptive conduct
  - However, effect of Resolution was to limit expressive conduct of entering Council chambers

#### **Ruling – Reasonable Limits**

- The infringed was not justified under the "reasonable limits" clause:
  - Resolution had a "pressing and substantial objective" of preserving order at meetings, restricting access to property for valid purposes
  - The Resolution was "rationally connected" to this objective, but was not "minimally impairing"

#### **Ruling – Reasonable Limits**

"The Town Council could, and should, have passed a resolution that restricted Mr. Gammie's right to enter the Council Chambers in a more limited manner. For example, a resolution could have prohibited only his attendance at Council meetings with recording devices, or with signs mounted on hard backings, or restricted his communication with members of Council to the confines of Council Chambers, and in accordance with the rulings of the Chair of such Meetings, or restricted his communication with Town staff to business hours and at Town Offices or Council Chambers or, as in the third Resolution, with designated staff..."



# Brisson v. Hill 2008 CarswellOnt 615 (Ont. Div. Ct.) Heeney, Molloy, Strong JJ.

#### Brisson v. Hill

"No person has an absolute right to appear before a municipal council meeting merely by making a demand to be heard. The mayor and council have the right to control their own process provided they do not do so arbitarily [sic] or in bad faith. There is nothing improper in requiring a delegation to identify in writing in advance the issue that the delegation proposes to address in order to determine whether it is relevant to the business of council or appropriate to be addressed in an open forum. In this case, the mayor did no more than that. There is no basis for concluding that in doing so he was acting improperly, arbitrarily, or in bad faith..."



# Mann v. Saugeen Shores (Town) 2023 ONSC 1025 (Ont. S.C.J.) Bielby J.

#### Background - the Procedure By-law

- Municipal Act, 2001, s. 238 requires every municipality in Ontario to pass a procedure by-law to governing the proceedings of a council meeting
- Many procedure by-laws contain provisions dealing with public participation at meetings
  - absent statutory requirements (e.g., the *Planning* Act), the degree of participation varies
- Town's Procedure By-law, Section 3.10, provided for an "open forum" portion of meetings
  - "open forum" limited to 15 minutes total, maximum of 3 minutes per delegation
  - only at meetings of the Committee of the Whole



#### **Background – the Procedure By-law**

- Town's Procedure By-law set out several restrictions on delegations during "open forum":
  - delegates were required to register with the Clerk in accordance with the established procedure
  - delegations could only be made on items on the meeting agenda
  - if delegates were "re-delegating" on same topic within six months, delegations could only be on "new information"
  - requirements for decorum, courtesy, and refraining from insulting language
  - no election campaigning
  - restricted subject matters (e.g., procurement, legal issues etc.)



#### **Background**

- John Mann was a resident (also a lawyer), displeased with Town's procurement decisions of a beachfront development project
- Mann voiced his objections through the "open forum" portion of meetings, based on the Procedure By-law
- On 11 occasions, the Town denied Mann the right to delegate:
  - three times for failing to bring "new information"
  - three times given subject matter was related to litigation
  - five on account of inappropriate or defamatory language
- Mann was however allowed to make nine delegations on the development proposal, and his correspondence placed on the Council agenda four times

#### **Application and Issues**

- Mann brought an Application alleging that the Town violated his Charter right to freedom of expression
  - The Town restricted his right to communicate with elected officials
  - The right to communicated with elected officials includes the right to "meaningful communication," requiring members of Council to respond to inquiries
  - Remedy sought was for Town to commence new process for seeking redevelopment of beachfront

#### Ruling – "Meaningful Communication"

- Sections 2(a), (d), 3, 7, and 15 of the Charter did not protect a right to "meaningful communication"
- Section 2(b), freedom of expression, has not be interpreted to compel government to provide a particular platform to facilitate expression
  - "...the freedom of expression...prohibits gags, but does not compel the distribution of megaphones."
- While section 2(b) protects the right to communicate with elected officials, it does not support a right to "meaningful communications"
- Elected official do not have a Charter-based obligation to respond to such communications

#### Ruling – Freedom of Expression

- The right to communicate with elected officials is central to democracy and protected by section 2(b) of the Charter
- The Procedure By-law, strictly speaking, violated this right as the Town relied upon it to limit Mann's right to communicate with elected officials

#### Ruling – "Reasonable Limits"

- Sections of the Procedure By-law being challenged sought to create efficient procedure for conducting Town business and allow for business to more forward
- Restrictions on "open forum" were rationally connected to the goal of efficient conduct of meetings

#### Ruling – "Reasonable Limits"

- Mann's rights were minimally impaired because the Town did allow him on other occasions to make deputations, and created the "open forum" as a means to allow residents to communicate with Council, which did not limit the other vehicles the public could use to communicate with elected official
- Procedure by-law balanced the needs and rights of residents to communicate with the Town with the efficient conduct of business; if limitations were not in place, a "free for all" would ensue and impair the decision-making process
  - reasonable to prohibit intemperate, insulting language, as the business of the Town should be conducted in a civil manner



# **Summary of Case Law**

- Complete bans on attending meetings of council, municipal facilities,
  may constitute unjustifiable limitations on the freedom of expression
  - See Bracken v. Fort Erie (Town)
- Rights must be impaired as little as possible to promote municipal objectives; Gammie v. South Bruce Peninsula (Town)
- However, some limitations on public participation at meetings can be upheld as reasonable limits on freedom of expression; Mann v. Saugeen Shores:

"The right of freedom of expression, which includes the right to communicate with elected officials, is not an absolute right and can be subject to reasonable limitations. In fact, the need to establish a procedural by-law that contains the sections in issue, can be said to be a "clearest of case" for limitations." (para. 91)



# Strategies for Dealing with Conduct at Meetings

# **Strategies**

- Limitations in procedure by-law for public participation in meetings
- Enforcement of decorum by the Chair
- Adopting a policy dealing with public conduct at municipal facilities
  - reporting and documentation by municipal staff
  - escalating response to incidents
  - Trespass Notice or restrictions on accessing municipal facilities



# **Strategies – Procedure By-law**

- Meetings must be "open to the public," but that does not mean public has an absolute right to participate
- Procedure By-laws often include opportunities for public participation (e.g., Open Forum, Delegations)
- Questions to consider:
  - What topics can the delegate speak on?
  - Is there a screening process for delegation requests?
  - Is there authority to curtail speaking rights?

### **Strategies – Enforcement of Decorum**

Municipal Act, 2001 empowers municipalities to enforce decorum:

#### Power to expel

- **241** (2) The head of council or other presiding officer may expel <u>any</u> <u>person</u> for <u>improper conduct</u> at a meeting.
- Does not however apply to all properties, or future meetings
- Procedure By-laws may also contain restrictions on behaviour, speaking opportunities, curtail speaking rights
- Council may, in limited circumstances, pass a resolution to address misconduct



### **Strategies – Public Conduct Policies**

- Municipalities can establish policies dealing with public conduct at municipal facilities
- Policies help regularize response, give municipalities authority to deal with incidents, and in a consistent manner; prevents post hoc solutions
  - Staff should be properly authorized by Council to deal with issues: Bracken v. Niagara Corp. (Regional Municipality), 2015 ONSC 6934
- Common features:
  - reporting and documentation by municipal staff
  - escalating response to incidents
  - Trespass Notice or restrictions on accessing municipal facilities
  - Internal appeal/review mechanism



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