I. http://www.thomsonrogers.com/sites/default/files/docs/library/Reputation_Management.pdf

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CLEAR SAILING: REPUTATION MANAGEMENT IN MUNICIPAL POLITICS

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For a politician to complain about the pressis like a ship's captain complaining about the sea. Enoch Powell

In politics, like many things, you are only as good as your reputation. But a reputation that was built over the course of years can be sunk in a matter of days or weeks. For that reason, the ability to navigate the shifting tides of public life, and the media, represents a vital skill for every politician.

This is especially true for municipal politicians, who live in the community and bear responsibility for issues – whether garbage, parks or planning – that hit close to home. The debate over those issues can rise to a fever pitch, fanned by the media. Just consider a recent and very public clash at Toronto City Council: what began as a debate over potholes erupted with two councillors accused of trading personal insults on the Council floor and one allegedly calling the other a "waste of skin".

This paper will explore issues surrounding defamation and reputation management, with a special emphasis on the political arena at the municipal level. We hope to provide the reader with a short introduction to the often complicated area of defamation law – both from the perspective of the claimant and the defendant – as well as tips on dealing with the media and managing threats to your reputation.

DEFAMATION LAW FOR MUNICIPAL POLITICIANS

What is Defamation?

The law of defamation, at its heart, concerns damage to a person's reputation. The highest courts of England and Canada have recognized the value, in a democratic society, of protecting reputation "as an integral and important part of the dignity of the individual." Legally defined, reputation is the estimation in which a person stands in the opinion of others.

Defamation, meanwhile, has been defined by one leading author as the communication of words to others that have the "tendency to do harm, injure, disparage or adversely affect the reputation" of an individual, or to diminish the opinion of that person that is held by others. The test is an objective one, assessed through the eyes of a reasonable person.

Defamation includes two sub-sets: libel and slander. Libel refers to written words that are defamatory, while slander refers to spoken words. In Ontario, the *Libel and Slander Act* is provincial legislation that governs legal actions based on words that are published in a newspaper or on a television or radio broadcast.
In order to recover in an action for defamation, a plaintiff must establish that:
(a) the words about which the plaintiff complains were defamatory;
(b) the words referred to the plaintiff; and
(c) the words were published or spoken to a third person.

Available Defences

Even where a plaintiff establishes that defamatory words that referred to the plaintiff were published to a third person, a defendant still can successfully defend the plaintiff's claims by proving that:
(a) the words were true (this is called the defence of justification);
(b) the defendant had the plaintiff's consent;
(c) the words were communicated on an occasion of:

i. absolute privilege; or
ii. qualified privilege and the plaintiff is unable to prove that the defendant was acting with malice;

(d) the words were contained in a document that was privileged, i.e. a report of judicial or legislative proceedings; and
(e) the words are fair comment made honestly and in good faith on a matter of public interest.
Whether an absolute or qualified privilege might apply depends on the occasion upon which the words were communicated. As its name suggests, absolute privilege offers complete immunity from an action for

defamation. Communications in the following instances have been held to be shielded by such absolute immunity:
• by public officials holding high or executive office (relating to matters to state);
• during parliamentary or legislative proceedings (or proceedings of their subcommittees); or
• in judicial or quasi-judicial proceedings (whether by judges, counsel, parties or witnesses with respect to anything said or done during the course of proceedings, or in supporting documents).
Qualified privilege, as the name suggests, is not absolute. On occasions governed by qualified privilege, a defendant cannot be held liable for a defamatory communication unless the plaintiff establishes that that the statements were motivated by malice. Malice may be express or implied.

It will be established where the defendant acted for an improper or indirect motive such as personal spite or ill will, or where a defendant knew that the words were false or recklessly disregarded whether they were true.

There is no hard and fast rule for determining the occasions to which qualified privilege will attach. A Court will focus on the purpose of the communication and whether it was intended to further the legitimate interests of the defendant (i.e. responding to a personal attack) or another person (i.e. responding to a request by another employer for a reference), or a shared interest (i.e. communications between company personnel) or public interest (i.e. between government officials during the course of their duties).

As a general rule, the qualified privilege will not apply to statements made by a public official to the world at large. Because the existence of a qualified privilege is so dependent on the particular facts of a given situation, we recommend that you consult a lawyer before making any communication that you believe could be defamatory.

Turning to the defence of fair comment, the law recognizes that open and public discussion and comment on public issues is the very foundation of a free and responsible government. This is the source of the defence of fair comment. What is protected under this defence is commentary on matters of public concern. "Comment", for the purposes of the defence, is an expression of opinion about underlying facts (as opposed to a statement of the facts themselves). To successfully establish this defence, a defendant must prove that the words were:

i) comment;
ii) based upon facts that are true;
iii) made honestly and fairly;
iv) without malice (see the description of malice above); and
v) on a matter of public interest.

Time Limits
As noted above, Ontario's *Libel and Slander Act* governs legal actions based on words that are published in a newspaper or on a television or radio broadcast. The Act establishes strict deadlines both for providing a potential defendant with notice of an alleged libel, and for commencing a legal action:

• Notice: No action can be brought for a libel in a newspaper or broadcast unless the plaintiff has provided the defendant with notice in writing, specifying the matter complained of, with six weeks after the alleged libel has come to the plaintiff's knowledge; and
• Action: An action for libel in a newspaper or broadcast, meanwhile, must be commenced within three months after the alleged libel has come to the plaintiff's knowledge.

For defamation that does not fall within the scope of the *Libel and Slander Act* (and which occurred or was discovered on or after January 1, 20041), there are no formal notice requirements but a proceeding must be commenced within two years of the day on which the claim was discovered.

Defamation in the Political Arena
The United States Supreme Court has applied their constitutional free speech rights (under the First Amendment) to establish a higher threshold that public figures, including public officials, must meet to successfully sue for defamation. Canadian law makes no such distinction concerning public figures. This cuts both ways for public figures: it is easier to sue here for defamation, and also easier to be sued by other

public figures. Two particular areas in the political arena merit attention when considering potential defamation: council meetings and elections.

a) Council and Committee Meetings

The absolute privilege that protects speech in Parliament or Queen's Park does not apply to proceedings of a municipal council. However, as noted above, communications that further the public interest will be subject to qualified privilege. On this basis, the proceedings of municipal councils and their committees are protected by qualified privilege. Again, this means that the author cannot be held liable for statements – even defamatory ones – unless it can be shown that he or she was motivated by malice. The law on this point has been summarized as follows:2

Communications by, to or between public officials involving matters of public interest are protected by qualified privilege.

This includes communications made during the course of the proceedings of a public body such as a municipal and town council, conversations between public officials during the course of the performance of official duties, and communications by public officials to members of the public on matters having to do with the business and affairs of government. While ordinarily the qualified immunity does not extend to communications made to the public generally, a privilege will be recognized where the communication is necessary in the public interest, health or safety.

Particular care must be exercised, however, if comments that normally would attract the protection of a qualified privilege (i.e. at a council meeting) are made in the presence of the media. While there is conflicting case law on this point, some judges have concluded that the protection of the privilege will be lost where a defendant was aware both that the media was present and that whatever was said on the occasion would be reported to the general public.

b) Elections

As noted above, the defence of qualified privilege generally will not apply to statements made by a public official to the world at large. This means that comments made in the course of an election, i.e. to voters at large, will not attract a defence of qualified privilege. A political candidate still would be entitled to rely, however, on the defences of justification and fair comment.
The corollary is that qualified privilege *will* shield communications by private citizens during a political election concerning the character and qualifications of a candidate.

Canadian courts have rejected legal actions brought by failed candidates who argued that an election was lost because of a defamatory statement. Such claims, the courts have held, are too speculative to succeed. In the words of one British Columbia judge: "the outcome of a democratically held election would in most cases necessarily be a matter of conjecture, and beyond ascertainment on a balance of probabilities."3

To Sue, or Not to Sue?: Some Practical Considerations

The decision whether to commence a legal action always involves a form of cost-benefit analysis. The chances of success in court and the likely damages that might be awarded must be weighed against the time and cost (both financial and psychological) of battling in the courts. Litigation, without question, is both extremely expensive and time consuming.

Defamation actions, meanwhile, add another factor to this mix: pursuing a law suit may actually increase public awareness of – and risk lending credence to – the defamatory words (as the above quote suggests). Plus, a lawsuit may keep an issue, which the public otherwise might have forgotten, in the public spotlight much longer (and lawsuits can drag on for *years*). This will be especially true where the lawsuit, such as one arising out of the political arena, is likely to receive media attention. One also needs to consider the optics of being seen to use the courts (and lawyers) to attack a political opponent or the media.

This is not to say that a legal action should be avoided in all circumstances. But it should be approached deliberately.