



CLEAR SAILING: REPUTATION MANAGEMENT IN MUNICIPAL POLITICS

By: Robert H. Brent

*For a politician to complain about the press
is 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.

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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 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.

¹ Please consult a lawyer with respect to potential claims that arose prior to January 1, 2004.

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.

² Raymond E. Brown, *Defamation Law: A Primer* (Toronto: Thomson Carswell, 2003) at 141-142

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

*Where it concerns himself,
Who’s angry at a slander makes it true.*

Ben Jonson

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.

REPUTATION MANAGEMENT

Always Be Proactive

The media are more likely to view you favourably (or at least give you the benefit of the doubt) if you are a known commodity. This means there is value in developing ongoing relationships with the reporters and editors with whom you are likely to deal with on an ongoing basis.

Some simple tips on building and maintaining media relationships:

- be open, honest and available;
- be nice, even if the reporter isn’t;
- return calls promptly;
- be mindful of the reporter’s deadline needs;
- strive to come across as humble and forthright;
- maintain regular contact;
- don’t waste their time: don’t call a press conference unless you have something important to say; and
- protect yourself by keeping good notes or by recording your words.

³ *Westbank Indian Band v. Tomat* (1992), 63 B.C.L.R. (2d) 273 (C.A.) at 289 per Wood J.A.

Dealing with the Media/Avoiding Exposure to Defamation Claims

Recognize that the media have their own goals, rules and ethics in how they approach and use your words. Understand where the reporter, etc. is coming from: do they have a relationship with you worth maintaining (from their perspective) or is this a one-off story for them? Also, know the agenda of the media outlet they represent.

Understand the rules of engagement: Simply saying that something is “off the record” is not enough, both sides must clearly agree on what that means. Are you being quoted? Will the quotes be attributed to you? If they are not being attributed to you but to a “source”, how is the source being described? Will the information you convey be published at all, or is it strictly “on background” i.e. it is to help the reporter understand the story. Make sure that these rules of engagement have been agreed to by the reporter, at the outset of the conversation. Don’t assume that, just because the last conversation you had with a reporter was off the record, then next one will be, too.

Know your message: identify key points and then work those points into each media contact. Prepare and review what it is that you are going to say or write. If possible, write it down in advance and make sure no important point has been left out. If you don’t say it, they can’t quote it. This also will help you to consider whether there is anything in your words that potentially is defamatory. If so, err on the side of caution (and/or consult a lawyer).

Know the medium: each form of media has its own special requirements and emphasizes different aspects of your message. For example:

Radio:

- importance of sound bites: words and tone are everything
- lack of visuals means that message must be clear and simple
- reporters’ commentary is more important, therefore invest time in providing information on background

Television:

- people are more likely to remember the visual message, with a picture being worth a thousand words: what image do you want to convey? i.e. City Hall steps
- can this backfire? (think Stockwell Day on a jet-ski)
- again, importance of sound bites: words and tone are everything
- control the editor: message has to be boiled down to one run-on sentence

Print:

- this largely is a one-dimensional medium: the challenge is to make it visual
- reporters’ words are everything: you are in their hands, so try to make sure the reporter understands (i.e. background)

Generally speaking, take time to be reflective in all of your communications, in any form, by:

- choosing your words carefully;
- considering to whom you send/copy correspondence; and
- removing emotion from the equation.

Crisis Management

At times, an exercise in reputation management can escalate to where it also becomes a question of crisis management. In the words of one professional media advisor, a problem becomes a crisis when the media starts paying attention to it, amplifies it, and matters rapidly escalate out of your immediate control. Once a crisis erupts, the problem may become a matter of perception rather than reality. The goal then is to correct that perception.

Tips for managing a media crisis:

- Don't panic: Stay calm, think clearly and act fast. Look at issues from an outsider's perspective.
- Rely on Others: Don't be afraid to rely on advice of others: form a small "crisis team" of trusted advisors who bring different skills or perspectives to the table.
- Analyze the Situation: Conduct a quick and objective "SWOT" analysis (assessing your strengths and weaknesses, and the opportunities and threats posed by the situation). Be brutally honest with yourself: avoid assigning blame and try to understand what has happened. Is this a short-term or long-term situation? Try to avoid viewing the media as the problem.
- Respond Decisively: Indecision, slow or late responses to the media, or an apparent lack of concern, will make people nervous and suggest there is something to hide. This can make you a bigger target.
- Formulate Your Key Messages and Stick to Them: Make your case clearly and simply, ensuring that it is understood. Make sure the message, both from you and your supporters, is consistent. Look to identify positive messages as well as responses to the negative.
- Tell the Truth: Any outright lies, as well as lies of omission, will only add fuel to the fire (think Bill Clinton and Monica Lewinsky) and can become a story in themselves.
- Co-Ordinate the Flow of Information: You or another point person should manage the situation, provide leadership and ensure the information flows efficiently and consistently, both within your team and to the outside world. Use every media outlet available to you (see below) to provide a counter argument or question the credibility of the original negative publicity.
- Handle the Media Professionally: Keep in mind that the media want a good story with new and different angles that will interest, inform and entertain their audiences. They will be looking to identify heroes and villains. Avoid a communications vacuum: if you don't communicate with the media, someone else will, and your story will not be told.
- Listen to the public: Don't be afraid to find out what the public thinks. Then, hone your message and approach, to get through to those people.
- Use Direct Communications Wherever Possible: The media has the widest impact but cannot be controlled. Take advantage of any opportunities (i.e. direct mailings to your constituents, web-sites, e-mail) to get your message out to key audiences.