Type of Decision									
Meeting Date	Friday, Dec. 16, 2011				Report Date	Tuesday, December 13, 2011			
Decision Required	X	Yes		No	Priority	x	High		Low
Direction	x	Information Only			Type of Meeting	X	Open		Closed
REPORT TITLE									
Harassment and Code of Conduct Options Report 16/12/11/1205									

Subject: Possible actions of Council concerning Harassment and Code of Conduct Complaints received in the municipal office.

RECOMMENDATION: Council currently has a Policy on Harassment and Workplace Violence as well as a Municipal Code of Conduct which Council as an employer is bound to comply with. This report is in response to complaints received from a member of the community filed against Melinda Reith, Clerk; Councillor Dave Foote; Councillor Jim Gibson and the Council of the United Townships of Head, Clara & Maria.

WHEREAS a ratepayer has filed a Harassment Complaint according to the Municipal Policy on Harassment and Workplace Violence and the Municipal Code of Conduct against Council in general, against Councillors Dave Foote and Jim Gibson in particular and against the Municipal Clerk Melinda Reith;

AND WHEREAS in order to resolve these long standing issues Council must take some definitive action;

THEREFORE BE IT RESOLVED THAT the Council of the United Townships of Head, Clara & Maria does hereby resolve to take these matters seriously and does agree to bring these complaints to Mr. Ray Bonenberg of the Delfi Group for consideration and final resolution as they relate to the same events listed in the complaints Mr. Bonenberg is currently investigating;

(Other)

_____
_____
_____
_____
_____
_____
_____;

BACKGROUND/EXECUTIVE SUMMARY:

In the past, this Council has not been able and/or willing to come to a timely agreement on the validity of complaints submitted for consideration as they relate to harassment, employees, members of the public and Council itself.

As a result, it is staff recommendation that the current complaints be formally and immediately submitted to a professional on workplace culture, harassment, discrimination and successful resolution.

As Council did just hire the Delfi Group, and Mr. Bonenberg specifically, as an appropriate individual qualified to investigate and resolve the complaints filed by the Clerk; and as a great number of the allegations in the attached complaint forms are based on the exact same events; perhaps Mr. Bonenberg should be asked to provide comments on these additional claims as well.

Mr. Bonenberg has been consulted and as these claims overlap a number of the current issues, he is willing to encompass them in his current investigation.

A summary review of the allegations and responses has been created by the Clerk. From a first review, it appears that a large number of the allegations listed are: lacking in specific detail or substantiation; are simply opinion and interpretation of events; or are outright false. Most of these allegations do not lead to any type of action or resolution as per the Municipal Code of Conduct policy.

The following information relates to the freedom of speech, the private reputations of public servants and Council as an entity. It has been presented to Council previously on another matter.

From Case Law

E. Halton Hills (Town) v. Kerouac, 2006 CanLII 12970 (ON SC)

[32] In a democracy, it is essential that the government be in the public domain, and be available for criticism of all kinds. Individual members of government, whether elected representatives or public servants, do not, by virtue of their offices, have all of their private interests subordinated to their public service. They maintain private reputations, which may be damaged, and which may be vindicated in defamation proceedings. Here the legal terrain may be murky. American jurisprudence favours a large and robust territory for criticism of public officials.[16] To date, Canadian courts have not accorded as much deference to freedom of speech at the expense of the private reputations of public servants.[17]

[33] Unlike public officials, governments have no private interests, no private reputations. They exist wholly in the public domain, and it is in this arena that their reputations may be attacked and defended. There may be some circumstances where a statement made about a public body irreducibly tarnishes the reputation of specific individuals. Such was the case in *Kenora Police Services Board v. Savino*. In that case, a First Nations person died in a altercation with police. In the aftermath, a solicitor for the deceased's family blamed police and called them racist. In a small community of 10,000 persons, in connection with a well-publicized incident, the general statement about the police could be understood to refer to specific police officers.

[34] The *Kenora* decision was also a motion for summary judgment. The analysis described above leads to the following statement of principle: where a defamatory statement made about a public body is properly understood to refer to a specific individual, that individual may have a right of action in defamation. I agree with this statement of principle. That does not mean that the converse principle is sound. It may well be that a defamatory statement made about an individual public servant reflects badly on the public authority itself, but that does not make the statement "about" the public authority.

[56] **"Taxpayers" Are Not Privileged Speakers**: Taxpayers" do not have a superior right to criticize government. Some courts have focused on the rights of "taxpayers" or"citizens" or "residents" or other "members" of a polity to criticize their government. With respect, it is not the identity of the speaker that precludes a defamation action. This can be seen from two perspectives:

(1) If some privilege arises because of the relationship between the speaker and the governmental authority, it is difficult to see why this privilege would not exist in respect to statements made about public officials. The relationship would be analogous.

(2) There is no reason, in principle, that persons who are not "citizens" or "taxpayers"or "residents" should not be able to criticize government. Why should non-Canadians have any less freedom to criticize a Canadian government?... Others may also not be "citizens" or "residents" and yet they are surely not constrained thereby from voicing their criticism of government. I conclude that it is not the relationship between the speaker and the government that gives rise to the unavailability of defamation actions. It is in the very nature of a democratic government itself that precludes government from responding to criticism by means of defamation actions.

[57] **Protecting Public Officials:** it has been argued that protecting government from unfair criticism is necessary to attract capable persons to the ranks of public service. This argument is not logical. As in the case before me, the public servant has a right of action for defamatory statements made about him. As in the *Kenora* case, where statements are made about a public authority that are directed at a particular person, that person may have a right of action. That is sufficient protection of the private reputations of public servants.

(61)Statements made about public servants, be they employees of government or elected officials, are not subject to the same absolute privilege because the individuals have private reputations which they are entitled to protect. The underlying principles are the same: no doubt according public servants the right to sue in defamation chills criticism of those public servants. However, it is in the public interest that the state be able to attract and retain competent persons of good repute as public servants. It is not likely to be able to do so if these persons may be subject to false personal attacks without recourse. The same cannot be said of the government itself.

F.The Tort of Misfeasance in Public Office for Municipal Officials by Daniel A. Nelson – protected by copyright – please see complete document at http://www.danielnelson.ca/pdfs/Misfeasance%20in%20Public%20Office%20for%20Municipal%20Officials.pdf

Speaks to deliberate acts with the intention to cause harm, done deliberately and with full knowledge of consequences as well as how municipal politicians and deliberations are not held to the same privilege as those at the provincial and federal level.

G. Metz v. Tremblay-Hall, 2006 CanLII 34443 (ON SC)

[14] In *Lysko v. Braley,*[2006] O.J. No. 1137 (Ont. C.A.), at paras. 102 and 103, the Ontario Court of Appeal approved of the following statement in Raymond E. Brown in *The Law ofDefamation in Canada*, 2nd ed. (looseleaf, updated 1999) (Toronto: Carswell, 1994) at s. 19.3(2)(a)(i):

> The more modern rule is to permit a plaintiff to plead and prove words that are substantially but not precisely the same as those words which were spoken. It is not necessary for the plaintiff to pleador allege verbatim the exact words; it is sufficient if they are set out with reasonable certainty. Not every word must be provided if the variance oromission does not substantially alter the sense of the meaning of the words set out in the pleading. The test is whether the claim is sufficiently clear to enable the defendant to plead it. The words must be pleaded with sufficient particularity to enable the defendant to understand whether the words have the meaning as alleged or some other meaning, and to enter whatever defences are appropriate in light of that meaning. It is impossible to require absolute precision in the pleading of oral communications; it is sufficient if there is certainty as to what was charged. If the words proved are substantially to the same effect as those used in the pleading, the pleading should stand [Footnotes omitted.]

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

Robert H. Brent

CLEAR SAILING: REPUTATION MANAGEMENT IN MUNICIPAL POLITICS

By: Robert H. Brent

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.

Financial Implications/Budget Impact: Investigation will cost another couple of thousand dollars, if Ray Bonenberg and the Delfi Group and interested in investigating those costs may be reduced somewhat.

Policy Impact: Follows policy.

Others Consulted:

Supporting Case Law

- MacRae v. Santa, 2006 CanLII 32920 (ON SC)
- Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 SCR 640
- Morris v. Johnson, 2011 ONSC 3996 (CanLII)
- Hyprescon Inc. v. Ipex Inc., 2007 CanLII 11316 (ON SC)
- Halton Hills (Town) v. Kerouac, 2006 CanLII 12970 (ON SC)
- De Haas v. Mooney, 2003 CanLII 5254 (ON SC)
- Alleslev-Krofchak v. Valcom Limited, 2009 CanLII 30446 (ON SC)
- Hodgson v. Canadian Newspapers Co., 1998 CanLII 14820 (ON SC)
- Sarachman v. Whitehead, 2011 ONSC 2946 (CanLII)
- Watson v. Southam Inc., 2000 CanLII 5758 (ON CA)
- Townhouses of Hogg's Hollow Inc. v. Jenkins, 2007 CanLII 6250
- Metz v. Tremblay-Hall, 2006 CanLII 34443 (ON SC)

Websites researched

- http://auroracitizen.files.wordpress.com/2011/01/factum-ab.pdf
- http://www.thomsonrogers.com/sites/default/files/docs/library/Reputation_Management.pdf
- http://www.loopstranixon.com/articles/when-can-a-councillor-break-the-ninth-commandment/
- http://www.loopstranixon.com/articles/defending-elected-officials-and-municipal-employees/
- http://www.libelandprivacy.com/cyberlibel_home.html

Approved and Recommended by the Clerk
Melinda Reith, Municipal Clerk *Melinda Reith*