From Case Law

A. MacRae v. Santa, 2006 CanLII 32920 (ON SC)

Even though case law is not particularly helpful in assessing damages in libel and slander actions due to their subjective nature, I have considered the following cases in which unelected public officials were defamed:

1. In *Hill v. Church of Scientology of Toronto* **[5]**, a Crown Attorney was defamed by parties on the other side of a criminal case which he was prosecuting, and a damage award of $1.6 million for general, aggravated and punitive damages was given by a jury and upheld by the courts.

2. In *Peckham v. Mount Pearl (City)* **[6]**, the Defendant, a city councillor, stated at a public meeting that a senior civil servant had deliberately lied to a government minister and to the provincial premiere. Compensatory damages were awarded in the amount of $25,000.00.

3. In *Newson v. Kexco Publishing Co.* **[7]**, a citizen published an ad referring to a senior municipal servant as a "fascist swine" where the issue of a business licence had arisen. A compensatory damages award was granted in the amount of $15,000.00.

4. In *Olson v. Runsimen* **[8]**, the Defendant wrote to the Director of Transport Canada indicating that the Plaintiff, a Transport Canada Inspector, had improperly favoured arrival airline in carrying out his duties. In that case $25,000.00 in compensatory damages and $25,000.00 in aggravated damages were awarded.

B. From http://thomsonrogers.com/sites/default/files/docs/library/Reputation_Management.pdf

"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."

C. Court File CV -10-00412021-0000 – Morris Factum - http://auroracitizen.files.wordpress.com/2011/01/factum-ab.pdf - provides reference to other defamation of public figure cases specifically

Struckwhick v. Lee [2006] S.J. No. 564 (Q.B.) at paras. 28, 30 – allegations that a public civil servant was a liar and was corrupt;

D. Morris v. Johnson, 2011 ONSC 3996 (CanLII)

[15] Canadian law recognizes that the right to free expression does not confer a licence to ruin reputations, both with respect to private citizens and people in public office. Those who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. Nor does participation in public life amount to open season on reputation.

[16] The Courts have recognized the relationship between the protection of reputation and the concern for personal privacy.

E. Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 SCR 640

Per **McLachlin** C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ

"… The law of defamation should therefore be modified to recognize a defence of responsible communication on matters of public interest."

The proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact. To be protected by the defence of responsible communication, first, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances. [95] [98-99]

In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public, or a segment of the public, has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached. Public interest is not confined to publications on government and political matters, nor is it necessary that the plaintiff be a "public figure". [101] [105-106]

The judge determines whether the impugned statement relates to a matter of public interest. If public interest is shown, the jury decides whether on the evidence the defence of responsible communication is established. The following factors may aid in determining whether a defamatory communication on a matter of public interest was responsibly made: (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and (h) any other relevant circumstances. [110] [126] [128]

[28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

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.]

H. http://www.libelandprivacy.com/cyberlibel_home.html#d

2011 May 16 - Sarachman v Whitehead**, 2011 ONSC 2946**

The Ontario Superior Court of Justice awarded the plaintiff, a professional engineer and businessman, general damages of $15,000 against the defendant alderman over an email message copied to the mayor and all other municipal councillors. The email described the plaintiff as a "destructive mean spirited irrational liar that does not deserve the time of day." The plaintiff acknowledged at trial the email did not appear to have affected his reputation. The defendant apologized for his statement in an email to the mayor and council. The Court held that the damages would have been considerably higher but for the apology.

2009 October 16 - Mudford v Smith**, [2009] O.J. No. 4317**

The Ontario Superior Court of Justice awarded the plaintiff interior designer $30,000 general damages and $5,000 aggravated damages over false allegations posted on the Internet impugning the plaintiff's integrity and falsely alleging she had refused to pay two judgments against her.

2009 May 25 - Alleslev-Krofchak v Valcom Ltd.**, [2009] O.J. No. 2469.**

The Ontario Superior Court of Justice awarded the plaintiff, a senior project manager, $100,000 general damages for defamation over libels contained in emails which falsely reflected on her reputation for honesty, integrity and trustworthiness. Although the defamatory emails had a limited initial circulation, the court noted they were seen by a wider audience and the plaintiff worked in a "small, closely-knit network where news travels fast and reaches most individuals." The plaintiff was also awarded $100,000 damages at large in relation to a claim for intentional interference with economic relations plus further damages to be calculated for economic loss.

2010 August 24 -Alleslev-Krofchak v. Valcom Ltd., 2010 ONCA 557**, affirming** 2009 CanLII 30446 (ON S.C.)
The Ontario Court of Appeal dismissed an appeal from the May 25, 2009 trial judgment which included an award to the plaintiff of $100,000 for defamatory statements in emails circulated by the defendants which falsely alleged that the plaintiff had lied, lacked integrity, was not trustworthy and was lacking in management skills.

2011 February 25 - Klein v Camara, [2011] O.J. No. 1752, Court File 464/09
The Ontario Small Claims Court awarded the plaintiff $10,000 damages (the maximum in Small Claims) over defamatory accusations about his conduct as coach of a peewee baseball team. The defamatory accusations were contained in an email sent by the defendant parent to other parents and to officials. The email was also posted on the defendant's website. The court held the email was part of a "campaign of character assassination" to have the plaintiff removed as coach. He did in fact resign. The Court said it would have awarded a larger sum, including aggravated damages, if monetary jurisdiction had been higher.

2010 November 19 - Windsor-Essex Catholic District School Board v. Lentini, 2010 ONSC 6364.
The Ontario Superior Court awarded the plaintiff high school teacher $20,000 general damages plus $7,500 aggravated damages over false allegations posted by a parent on a password-protected website.

2010 October 15 - A v B**, 2010 QCCS 5024**
The Quebec Superior Court awarded $9,000 moral damages to the female plaintiff and $3,000 moral damages to the male plaintiff. The Court also awarded $3,000 punitive damages to the female plaintiff and $1,000 punitive damages to the male plaintiff. The defamation arose from harassment by the defendant or his ex-girlfriend by emails, including anonymous emails.

2010 August 20 - Cragg v Stephens**, 2010 BCSC 1177**
The British Columbia Supreme Court awarded each of the three plaintiffs general damages of $25,000 and aggravated damages of $10,000 over false and defamatory statements alleging improper and criminal behaviour which were circulated widely via email to the plaintiffs' work colleagues and supervisors, media outlets, politicians, civil servants, and others. In addition, the defendant posted defamatory statements on a local newspaper website

2010 July 20 - Dawydiuk v Insurance Corporation of British Columbia**, 2010 BCCA 353**
The British Columbia Supreme Court awarded the plaintiff $1,000 nominal damages for defamation over an email sent by her supervisor to an individual who had no reciprocal duty to receive the supervisor's email report.

2010 April 26 - Best v Weatherall**, 2010 BCCA 202, reversing** 2008 BCSC 608 (CanLII)
The British Columbia Court of Appeal awarded the plaintiff, a resident of Salt Spring Island and a member of the Salt Spring Island Tennis Association, the sum of $3000 over disparaging statements contained in an email sent by the defendant to a members of the Salt Spring Island Parks and Recreation Commission, the Capital Regional District and 100 members of the Salt Spring Island Tennis Association. The Court of Appeal stated that a wholly nominal award would not be sufficient and that a "proper damages award" was necessary both to vindicate reputation and as consolation for his hurt feelings.

2009 November 30 - Doré c Lefebvre**, 2009 QCCS 5601**
The Quebec Superior Court awarded moral damages of $12,500 and punitive damages of $5,000 to the plaintiff mayor Dore over false insinuations during the 2006 municipal election that he had a criminal record and over false allegations of fraud and theft made at a municipal council meeting and to the press. The plaintiff councillor Bernard was given the same damage awards over the same allegations plus a false insinuation that he was in a conflict of interest. A local newspaper published the gist of the false allegations in hard copy and on its Internet site.

2007 October 29 - Shell v Cherrier, [2007] O.J. No. 5152
The Ontario Small Claims Court awarded the plaintiff labour lawyer general damages of $7,500 over two defamatory emails sent to prominent members of the union movement and the public.