

**MANAGING RISKS RELATED TO
ONLINE ACTIVITY IN
MUNICIPAL ELECTIONS**

PART II

**A PRIMER ON DEFAMATION AND USE
OF SOCIAL MEDIA BY
MUNICIPALITIES**

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Consider the following scenarios:

- A municipal employee broadcasts a link to ilovecannabis.com using her workplace computer and her employee Twitter account instead of her personal Twitter account.
- A municipal human resources manager is conducting a background check on a potential employee to whom an offer has been made. She comes across that person's Facebook profile. It contains information about how much the potential employee hates his past employer. The employment offer is reneged, but not until after the new hire finds out the reason why.
- A mayor connects with an acquaintance from his past business on LinkedIn. That connection is charged with major fraud and money laundering soon afterwards. The mayor has forgotten about the connection until a reporter digs up the information and publicizes it in an article linking the mayor and the accused.

Municipalities will increasingly use social media to engage the electorate, as will candidates running for office. Municipalities should be aware of the risks involved and how responsible use of social media can be an advantage.

Municipal elections will be held throughout British Columbia in November 2011. The election process will likely involve contentious issues, position statements and public debate. Some public consultation will be managed through social media platforms. Before municipalities post anything about these issues, they should know how a social media policy can protect them as an employer, as a government institution and how it can help manage the relationship between the organization and the elected officials who govern it.

Defamation Primer

A reputation can be destroyed in the click of a mouse, a post to a website or an ill-timed Tweet. The rapid expansion of the internet coupled with the surging popularity of social networking services such as Facebook and Twitter has created a medium for virtually limitless international defamation. It was not that long ago that a municipal media release or a notice to taxpayers would reach a local audience in the municipality, a brief story in the local newspaper or, at most, heated discussion at the local coffee shop. Those days are long gone. The same notice posted on Facebook could result in it going "viral" to a Facebook audience of active users that now numbers in excess of 500 million worldwide.

As a general rule, the larger the potential audience the greater the damages that will be awarded to the defamed. The internet is a game changer for the torts of defamation and breach of privacy.

The Protection of Reputation Versus Restriction of Freedom of Speech

The law of libel is fundamentally concerned with the protection of reputation. The purpose is to provide individuals with a remedy for the sting that a defendant's false statement has caused to the plaintiff's reputation in his or her particular community, and to the plaintiff's feelings.

The protection of reputation may restrict freedom of speech.

The tension between these competing interests is particularly evident in the political sphere. Many of the guiding principles of defamation law originate at the intersection of local government and the public interest.

Municipalities would be wise to consider this if they create social media profiles that allow public comment on election candidates or their positions on contentious issues.

What renders a statement defamatory?

A defamatory statement is an untrue publication which tends to injure the reputation in the popular sense, to diminish the esteem, goodwill or confidence in which the plaintiff was held, or to excite adverse, derogatory feelings or opinions against the plaintiff.

It does not matter whether the statement is made in a newspaper, on television, or via a social media site. This is because the law of defamation is based on a form of no-fault liability. The plaintiff need establish only three things to make out a prima facie cause of action, namely, that the words complained of:

1. are reasonably capable of a defamatory meaning;
2. refer to the plaintiff; and
3. have been published.

The classic definition of what is defamatory was stated by Lord Aitken almost 75 years ago, as follows:

“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”

Reference to the Plaintiff

The plaintiff must prove that the defamatory words refer to him or her. The individual need not be named. A picture or video clip showing the individual with a defamatory caption included with the picture is more than adequate. As with the defamatory meaning of words, the test relies on the understanding of the hypothetical “ordinary person”.

If an employee were to defame a colleague or elected official on a social media site, the municipality may have to address this issue. The defamation could be made using the municipal site, his or her personal profile, or other means.

What Constitutes Publication?

The question the courts ask is who is the publisher? The actual author or speaker of words is obvious, but what about a person who reviews and approves a draft, or a person who transmits the article to others? Fifteen years ago, in the case of *Hill v Scientology*, 2 SCR 1130 (1995), the Supreme Court of Canada made it clear that:

“If one person writes a libel, another repeats it, and the third approves of what is written, they all have made the defamatory libel.”

What this means in the internet context is in the process of being sorted out by our courts. It was recently decided in England that some knowledge of the defamatory statement is fundamental to being a publisher. This generally means that the internet service provider (ISP) will not be held liable for publishing the defamatory statement even though the ISP was the vital link between the individual who typed the defamatory statement and the people who received the internet message.

In the context of a municipality, the fact that a defamatory statement is posted on a municipality’s website would almost invariably constitute publication by the municipality with the result that the municipality would be liable for all damages suffered.

What is not yet clear is whether someone posting a comment to a municipal website, or whether a hyperlink from a municipality’s website to another website that contained defamatory statements constitutes publication.

If the owner of a website receives notice of a request to take down a defamatory statement and fails to do so the owner of the website will, almost certainly, be found to have published the defamatory statement from that point forward although, to date, there is no Canadian case on this point.

Publication, by definition, requires that the defamatory statement be seen or read by others. The onus is on the plaintiff to prove that the defamatory statement was actually seen or read. While this may be a defence for some obscure website, it is not a defence that will be open to municipal websites or Facebook pages.

Another interesting dilemma is the potential for a claim where the statement is not defamatory at the time it was originally posted but becomes defamatory because of subsequent events. For example, if a municipal website were to list individuals or companies who were in breach of some municipal bylaw, only to have the bylaw later set aside by court order, the municipality could be held liable if the web page is not updated to correct the erroneous information previously posted.

Defences to Defamation

TRUTH

Justification or truth is an absolute defence to a defamation action. That said, it is important to note that the burden of proving the “truth” of a defamatory statement falls upon the defendant, who must establish the truth of the defamatory words as a matter of fact.

The defence rests upon the presumption that defamatory words are false - if they can be proven to be substantially true, then the plaintiff cannot have been defamed.

FAIR COMMENT

The defence of fair comment in a libel action is often invoked by media defendants in defamation actions, although it is available equally to all defendants.

The test for fair comment is as follows:

- (a) the comment must be made in a matter of public interest;
- (b) the comment must be based on fact;
- (c) the comment, although it can include inferences of fact, must be recognizable as comment;
- (d) the comment must satisfy the following objective test:
 - (i) could any person honestly express that opinion on the proven facts; and
- (e) even though the comment satisfies the objective test, the defence can be defeated if the person proves that the defendant was subjectively acting by express malice or, to put it in colloquial terms, was out “to get” the plaintiff.

The onus of proving malice rests on the plaintiff.

From time to time the defence of fair comment may be available to municipal politicians who are expressing their views or the views generally of the municipality.

ABSOLUTE PRIVILEGE

Absolute privilege arises in a very limited set of circumstances where it is recognized that the strong public interest in hearing the potential defamatory words is significant enough to outweigh any damage to reputation. This defence attaches to words spoken in parliament, the courts, and to some but not all regulatory bodies.

Absolute privilege does not extend to local government officials or meetings.

QUALIFIED PRIVILEGE

This is the defence that most often applies to municipal politicians, employees, meetings, and publications.

Qualified privilege arises upon special circumstances where the defendant has a legitimate interest in communicating the statement and the recipient has a legitimate interest or duty to receive it. Reciprocity is essential.

There are numerous cases in British Columbia and throughout Canada where the courts have recognized that municipal politicians have a duty to communicate with the taxpayers of a municipality and the taxpayers have a corresponding duty to receive the information. So long as the statements made relate to a matter that arises within a municipal jurisdiction, and so long as there is an honest belief in the truth of what is contained in the alleged defamatory statement, the defence of qualified privilege will prevail, unless the plaintiff is able to prove that the

statement was made with express malice or that the statement extended to matters beyond the interests of the municipality as a corporate entity.

The courts recognize that municipalities have a positive obligation to inform and engage the public and to seek feedback from the public. This often involves vigorous debate and emotional responses from competing interest groups. Open communication is to be encouraged, as is transparency.

These general principles apply to the new and the more versatile means of communicating on blogs and Facebook pages that encourage direct interaction with and between taxpayers.

A word of caution is required with respect to allowing people to post comments to a municipal website or Facebook page. Over the last year or so there has been a general move away from allowing anonymous posts. A growing number of media outlets now require that individuals identify themselves by name and contact information before allowing them to post to a website. This goes a long way to eliminate anonymous cyber libel. It is advisable that all municipalities be able to identify individuals that post to their social media sites.

Responsible Communication on Matters of Public Interest

In the recent case of *Grant v. Torstar Corp.* the Supreme Court of Canada recognized the new defence of responsible communication on matters of public interest. While the defence normally applies to the public media, the Court noted that there are many new ways of communicating on matters of public interest which do not involve journalists. Many of these communication methods are now online. The Supreme Court of Canada expressly stated that the defence should be available to anyone who publishes material of public interest in any medium.

In deciding whether the defence will succeed, the courts look at various issues, including the seriousness of the allegation, the public importance of the matter, urgency, the reliability of the source, whether the plaintiff's side of the story was accurately portrayed and any other relevant circumstances.

This defence may apply to municipalities if they are reporting on public meetings, rezoning applications and other controversial decisions. Other defences may also apply to these meetings and the reports of those meetings including the defence of qualified privilege as set out earlier.

With regard to responsible communication on matters of public interest, municipalities are advised to create a social media policy to protect themselves.

The process to create a municipal social media policy should:

- Reflect the stated values of your municipality as an employer and a governmental body
- Refer to related policies already in existence. Ideally, a social media policy should shape other rules that are already in place.
- Consider the related laws that may apply to online activity
- Involve people such as communications staff who will actually create and monitor municipal social media pages in the creation of the policy

- Consider the purpose of what social media will generally be used for and what you expect it to do for the organization
- Create a disclaimer and terms of reference that outlines acceptable use (i.e. no slurs, no business activity, no commentary unrelated to the discussion, no anonymous commentary) and will be posted on all municipal social media pages/profiles
- Consider providing a glossary that outlines what is meant by terms such as “comment”, “post”, “identity disclosure”, “accountability”, “defamation”, “moderator”, “offensive”, etc.
- Draw boundaries for when discussions will be taken “offline” - when dialogue crosses the line between meaningful stakeholder discussions and communication with an individual

The municipality as an employer

Employees generally use social media for three purposes: 1) for official agency interests; 2) for professional interests; and/or 3) for personal interests.¹ To protect your municipality from liability and to help employees use social media to their advantage, consider:

- What role employees are expected to play in municipal social media and where the boundaries are between their role as an employee and their role as a citizen of your municipality
- How you will deal with errors in judgment vs. activities that break the law. What will be the consequences of policy violation?
- The relationship between employees and elected officials
- Protocols for creating pages and profiles - who has authority, who speaks for the municipality, who monitors pages and how employees identify themselves on any social networking sites they use in a professional capacity
- Privacy laws - can you force an employee to create a Facebook account?
- The ability to close employee accounts opened in a professional capacity - where are the usernames and passwords stored? This may trigger research into identity verification and authentication rules for government media pages
- Which social media sites are approved for municipal staff to comment on? Consider professional association blogs as well as those accessed by the general public
- Will the rules be different for internal and external communication? For example, are the expected behaviours different for internal blogs than external Facebook pages?
- Other related policies that employees are expected to abide by (whistleblower, confidentiality, IT, who is allowed to access social media from work and how much)

¹ Designing Social Media Policy for Government: Eight Essential Elements, Hirdinova, Helbig & Peters, The Research Foundation of the State University of New York, May 2010. p4.

- The differences between a guideline (how to use a social media to achieve a desired result) and a policy (rules governing behaviour)
- Which department is responsible for monitoring posts and removing them if they are out of keeping with stated values and goals
- How the plan will be rolled out and built upon. Ideally, it should be introduced to employees in the same manner as any other policy.

The municipality as a government institution:

Municipalities will engage the public in various initiatives, seeking feedback and promoting open communication where possible. Most local governments have tried to create more versatile means of engagement in recent years in an effort to increase trust and transparency, and in an effort to reach community members “where they live”.

Governments use social media for a totally different purpose than private business or non-profit organizations. For example, in “Citizens at the Centre: B.C. Government 2.0”, a report published by the Ministry of Citizen’s Services, the defining principle in an overhaul of government communications is stated as being, “We will empower citizens to create value from open government data”. The goal of this initiative is to ease access to information and to share information more openly than before, even if it means abiding by privacy laws that may not have caught up to technology.

Governments planning to use social media might consider:

- What your municipal insurance does and does not cover
- The relationship between elected officials and the organization
- Crisis communications planning and other public awareness issues. Social media is an excellent way to push information out to a lot of people fast, but you need to be prepared to respond. Do not create a social media page and leave it unmonitored.
- How your citizens prefer to be communicated with - stakeholder engagement projects, ongoing initiatives
- Position statements on contentious issues - how will they be framed using social media?
- How social media profiles for different departments and initiatives may impact each other
- Public records laws, freedom of information requests, public disclosure rules, records retention rules and how the terms of reference need to address these (if at all)

THE ROLE OF PRIVACY LEGISLATION

Municipal governments must be especially careful to abide by any provincial or federal privacy legislation that applies to their social media activities, or to any comments made by City staff or elected officials. Social media by its very nature relies on the willingness of individuals to post their own personal information. There is a distinct difference between

what an individual chooses to say or disclose about themselves and what a trusted public entity may divulge about that individual.

In British Columbia, the collection and disclosure of personal information by government entities is legislated by *The Freedom of Information and Protection of Privacy Act (FOIPPA)*. The Act refers to personal information as “recorded information about an identifiable individual other than contact information”. This would include any data obtained as a result of research, polling, information provided in confidence to a municipal department such as licensing or even financial information such as property tax rates.

Governments and elected officials cannot disclose the personal information of any citizen without demonstrated need for disclosure or permission of the Information and Privacy Commissioner. This includes references in any verbal or online commentary.

It is generally advisable to avoid referring to individuals by name unless stating a fact, to avoid disclosing any identifiable information and to avoid posting photos of people online without their permission. Postings on municipal social media profiles/pages that disclose personal information should be removed and, if necessary, reported to the proper authorities.

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