

Social Media: An Emerging Issue in the Workplace

*By Barry W. Kwasniewski**

A. INTRODUCTION

In recent years, Canada has seen a phenomenal increase in the use of social media, such as personal blogs, Facebook and Twitter. Canadians are now among the world's most prolific social media users. Whatever our personal beliefs, social networking is not simply a technological fad. So are charities and not-for-profit organizations to embrace social networking, fear it, or ignore it? While your donors, volunteers and employees over a certain age might not care whether your organization has a social media presence, you can be assured that the younger generation will. It has always been the nature of the law to lag behind social and technological developments. But, as the law catches up to what has been happening in the digital world, employers should expect that they will have to confront the issue of social media use by their employees sooner rather than later.

This article discusses some of the risk management implications of social media, focusing on the risks associated with employee use of social media, and guidelines/strategies for employers to deal with inappropriate social media use and regulate its use in the workplace.

B. WHAT IS SOCIAL MEDIA?

Broadly defined, social media is an online social structure made up of individuals or organizations, which permits easy online interaction by users. Social networking websites allow users to upload profiles, post comments, join networks and add 'friends'. Social media also gives users the opportunity to form links between each other based on friendships, hobbies, personal interests, faith, and business sector or academic affiliations. Most social networking systems are available to all users, but some are available only by invitation or special qualification only. Several examples of the most popular social networking sites are discussed in more detail below.

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Kate Robertson, B.A. LL.B., Student-At-Law, for her assistance in the preparation of this article. This article is reproduced with permission from *Charity Law Bulletin* No. 246, March 30, 2011.

1. Facebook

The most popular social networking site is “Facebook”. Currently, there are over 500 million active users in the world. To put this into perspective, if Facebook were a country, it would be the third largest in the world, after China and India. It is estimated that people spend over 700 billion minutes per month on this social networking site.

2. Twitter

Twitter is another very popular social networking site, which was launched in 2006 and now has approximately 175 million users. Twitter is designed as a real time information network that allows users to send and read messages called “tweets”, which can be up to 140 characters in length. Those who have been following recent events in Tunisia and Egypt have heard how Twitter has been used as a mass communication device to organize protests and anti-government demonstrations. This type of use exemplifies the potential power of online mass communication.

3. LinkedIn

While not quite as well known as Facebook or Twitter, the social networking site “LinkedIn” is gaining in popularity. With now over 85 million users in 200 countries, it is sometimes called “Facebook for professionals”. The idea behind this site is to connect business people and allow them to exchange ideas and opportunities through online networking.

C. SOCIAL MEDIA AND THE LAW

There have been several decisions in recent years where postings on social networking sites have become relevant in the courts. In the context of personal injury and insurance law, a recent Ontario Superior Court of Justice decision found that postings on a Facebook profile constitute ‘data and information in electronic form’ producible as ‘documents’ within the meaning of the Ontario Rules of Civil Procedure, such that this online personal information may have to be produced as evidence in some cases.¹ This means that in any lawsuit where a person’s health or the extent of injuries is an issue, the

¹ *Leduc v. Roman* [2009] O.J. No. 681 (Ontario Superior Court of Justice).

insurance adjuster or the lawyer hired to defend the claim could be reviewing the person's online profiles. In the area of tax law, the Tax Court of Canada recently ruled² that a Facebook profile was relevant evidence as to whether a person providing services to a spa did so as an employee or an independent contractor. In this decision, the CRA had ruled that the business where that person worked owed unpaid E.I. and CPP premiums, on the basis that the person was an employee. However, the Tax Court, with the benefit of the description of the person as self employed on his Facebook page, ruled that the CRA was incorrect in its characterization.

Defamation claims are an area where social media and the law will likely cross paths frequently in the future. Given the tendency for people to feel they have the licence to say whatever they want on the internet, without consequences, defamatory comments online are not in short supply. Late last year the Supreme Court of Canada heard an appeal in the *Crookes v. Newton*³ decision, which involved the legal question as to whether a person may be liable for defamation on the basis that his own website provided a hyperlink to an alleged defamatory article on another website. The defendant's website did not reproduce the contents of the article or comment upon it in any way. The British Columbia Court of Appeal ruled that the hyperlink did not encourage the reader to follow the link, nor did it find that the number of hits on the defendant's website a basis for inferring that users followed that hyperlink, so the defamation action was dismissed. The decision of the Supreme Court of Canada, which will be released in the coming months, should clarify the scope of any liability for hyper-linking third party content. Those who maintain hyperlinks on their websites should be aware of the Supreme Court of Canada decision in this case, particularly if their own sites hyperlink to anything controversial that could possibly lead to a defamation claim.

D. WHY SOCIAL MEDIA IS RELEVANT IN THE EMPLOYMENT CONTEXT

A recent Deloitte LLP survey⁴ of executives and employees indicated that there is a disconnect between what executives believe they have the right to know in terms of what

² *Shonn's Makeovers & Spa v. Canada* (M.N.R.) [2010] T.C.J. No. 415 October 2010.

³ 2009 BCCA 392.

⁴ http://www.deloitte.com/view/en_US/us/About/Ethics-Independence/8aa3cb51ed812210VgnVCM100000ba42f00aRCRD.htm

employees say on their social media sites, and their employee's views on that point. Notably, the survey indicated that 63% of 18-34 year olds do not believe that their social networking pages are any of the employer's business. Another disconcerting fact for employers from that survey is that nearly a third of employees claim that they do not worry about what their boss or customers might think before posting comments on social network sites. What this survey indicates is summarized in a statement from Sharon Allen, chairman of the board of Deloitte LLP. She stated, "While the decision to post videos, pictures, thoughts, experiences and observations to social networking sites is personal, a single act can create far reaching ethical consequences for individuals as well as organizations. Therefore it is important for executives to be mindful of the implications and to elevate the discussions about the risks associated with it to the highest levels of leadership."

E. POTENTIAL RISKS OF SOCIAL MEDIA USE BY EMPLOYEES

There is no doubt that employers face risks when their employees engage in social networking, either on or off the job. Examples of these potential risks are listed below.

- Many employees have the false impression that their personal social network pages and blogs are protected from public viewing, but this is often not the case;
- Many employees do not consider the ethical consequences of what they post online in terms of their individual reputation and the reputation of their employer;
- An employee may reveal confidential or proprietary information either intentionally or inadvertently;
- Employers and employees may be subject to harassment or discrimination complaints if employees post anything offensive about fellow employees/employers; and
- Information and communication on these sites can now be used as evidence in litigation.

F. IMPROPER SOCIAL MEDIA USE CAN RESULT IN TERMINATION FOR CAUSE

In light of the fact that social media use by employees can create risky situations for employers, it isn't surprising that there have been several recent cases where improper

social media use by employees has led to termination. In *E.V Logistics v. Retail Wholesale Union Local 580*⁵, a B.C labour arbitrator overturned the dismissal of an employee for hateful comments he posted on a publicly accessible blog. On the blog the employee professed his adoration of Adolph Hitler, fantasized about violence and killing, and made racial slurs. The employee also very clearly identified that he worked for the employer. When the employer confronted him, he immediately deleted his postings and posted an apology online. He was also quick to write a letter of apology to the employer, where he expressed remorse and embarrassment for his conduct. In deciding that the penalty of discharge was too severe, the arbitrator was influenced by the fact that the employee was only twenty two and emotionally immature, he did not make any hostile remarks about his employer or colleagues, and he made an apology. He also had a prior clean disciplinary record.

Other employees have not been so fortunate. In an Ontario case⁶ dealing with a breach of confidentiality of information, the employer discovered that an employee, who was a personal care-giver at a home for the aged, had created a website accessible to the general public that published resident information and pictures, and made inappropriate comments about residents of a home for the aged. The employee was terminated on the grounds of breach of confidentiality and making inappropriate remarks about management. The arbitrator upheld the termination.

In another decision,⁷ an airline pilot posted comments on his Facebook page publically degrading and belittling the customers and the company. The airlines' primary customers were native peoples whom he targeted in many of his online comments. Regardless of the fact that these statements were made off-duty, they created potential harm to the company's reputation and its ability to efficiently manage its business, so the termination of the employee was upheld.

⁵ [2008] B.C.C.A.A.A. No. 22.

⁶ *Chatham-Kent v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* [2007] O.L.A.A. No. 135.

⁷ *Wasaya Airways LP v. Air Line Pilots Assn., International* [2010] C.L.A.D. No. 297 May 12, 2010.

In another recent decision,⁸ the B.C. labour relations board upheld the dismissal of two employees who had posted disparaging remarks about their employer on Facebook. Together the employees had nearly five hundred Facebook friends. The Facebook postings targeted the employer and its managerial staff in a threatening and explicit manner and discouraged customers from conducting business with the firm. Included in the employees list of friends were coworkers and superiors. In upholding the dismissals, the board was influenced by the fact that the postings were damaging to the employer's reputation and degraded managerial staff. As well, the employees lied about the postings during a disciplinary investigation. In these kinds of circumstances, it is not surprising that the employer chose to terminate these employees.

G. REGULATING SOCIAL MEDIA USE: WHAT CAN EMPLOYERS DO?

In order to reduce the risks of improper social media use by employees, employers have several options. One option is to ban the use of social media in the workplace completely. This would entail blocking access to all forms of social media on work devices during work hours, prohibiting discussions of work, other employees, and the identification of the employer when using social media outside of work hours, and implementing policies clearly stating these rules, making sure they are communicated to employees. However, one may question the utility of a complete ban. Blocking access sends the message that the employer does not trust its employees to use this form of communication responsibly.

Another option that many employers are choosing is to allow social media use through educating their employees as to its proper use by developing and implementing organizational policies. Intel and IBM are good examples of corporations that have adopted the use of social media as part of their business strategies. Both of these companies are motivated to actively encourage employee use of social networking. The policy of Intel⁹ in particular has been held up as an example of a clearly worded, understandable and employee-friendly policy.

⁸ *Lougheed Imports v. United Food and Commercial Workers International* [2010] B.C.L.R.B.D. No. 190.

⁹ Available online at intel.com.

Every organization is different so there is no one size fits all social media policy. However, if you are starting to think about what your organization will need in terms of a policy, it is important to involve all departments, as everyone may have valuable input. Without properly addressing the various interests and concerns and what the employer wants or expects the social media policy to address, the resulting policy will likely be of little value to the employer.

H. SOCIAL MEDIA POLICIES: GUIDELINES FOR EMPLOYERS

Once an organization has determined what they are trying to achieve and it is time to draft the policy, there are some topics which the employer may wish to include. Potential topics to include in a policy are listed below:

- Explain what social media is and what the policy covers
- Provide definitions of any social media terminology – ensure that employees are not using social media unless they really understand how it works
- Outline the restricted behaviours, such as posting work-related information that would compromise the business practices of an organization, engaging in any form of harassment or racist/derogatory remarks, and/or violating copyright or trademark laws
- Remind employees of the nature of social media (risks involved, public nature of postings, etc)
- Include prohibitions on speaking on behalf of the employer
- Disclose if the employer will be monitoring employee use of social media at work
- Include restrictions on the use of social media outside of work hours
- Clearly define the amount of access an employee is allowed during work hours/on work devices
- Include prohibitions on disclosure of the employer's confidential, trade secret or proprietary information

- Encourage the use of disclaimers for information that an employee writes to ensure it is clear that it is their personal opinion, and not that of the company
- Provide general instructions that employees use good judgment and take personal and professional responsibility for what they decide to publish online
- Advise of the consequences of breaching the policy and how it will be enforced
- Provide covenants about confidentiality and the repercussions of divulging this kind of information

I. CONCLUSION

With the rush of social media that has now entered into so many people's daily lives, it is important that employers gain an awareness and knowledge in this area, not only to prevent any negative repercussions that may result from social networking, but also, to embrace this ever-changing and emerging issue in the workplace. With the right approach and proper policies in place, the power of social networking may become a positive force in your organization.