
Social Media, Free Speech and Parliamentary Service

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The Senate Administration has, in the last few years, adopted a Statement of Values and Ethics, a Code of Conduct for Staff of the Senate Administration and, very recently, a set of Social Media Guidelines for Staff of the Senate Administration. This article looks at certain provisions of these documents and related issues involving parliamentary service.

Modern technology has been getting employees into trouble for years, decades even. Social media can be seen as simply the latest challenge evolving technology has introduced to the workplace. In their early stages of adoption, photocopiers, fax machines and email all provided avenues for inappropriate expressions and behaviour, or were used for non work-related matters. Internal guidelines and processes had to be put in place to address issues that arose.

The *Social Media Guidelines for Staff of the Senate Administration* recently adopted by the Clerk of the Senate distinguishes among official use, professional networking, work-related use and personal use. Official use may involve providing content to or responses within an institutional social media tool like Twitter or Facebook. Work-related use may involve passive monitoring of issues related to one's professional responsibilities using a social media account. Staff are reminded in the Guidelines that they are to conduct themselves with the professionalism and integrity expected of Senate personnel, as well as those of any professional organization to which they may belong.

Privacy settings on various sites change frequently, as do the features. On Facebook, social readers share with everyone who has access to your page your history of online reading. From that history, perceptions can be formed about your political views. Tagging of photos by friends of yours on their own pages can bring to public light events you might prefer remained private. The other reality of social media platforms is that their features and personal settings change often, and sometimes without warning.

But how does this relate to professional lives? How should parliamentary employers and employees accommodate this new reality? How should parliamentary employers react to different degrees of questionable behaviour online?

There do not appear to be any black and white answers to these questions. Context is a variable that plays an important element in judging behaviour. It is virtually impossible to predict all the possible scenarios that might occur, and equally difficult, therefore, to dictate hard and fast rules.

As an easy, accessible means of self-expression, social media is also blurring the lines between public and private, citizen and employee. Because they are not technically or physically on corporate "territory", employees can convince themselves that their actions online can be divorced from their professional accountabilities. The false sense of anonymity that is sometimes involved in online environments can add to this sense of distance. Finally, the immediacy of interaction, the emotional intensity and the competitiveness of certain situations can also provoke strong, intemperate reactions or statements from participants in online dialogue.

Managing our reputations against perceptions of unprofessional behaviour or perceptions of partisan bias has always been a feature of parliamentary service. With respect to social media, self-interest would suggest not only paying careful attention to who is able to see personal content, but also the wisdom of having that content committed to the digital universe for all time. There are two simple rules of thumb for online behaviour: if you would not say or do something in a public location, or write a letter to an editor about it, do not do it online; there is no such thing as guaranteed privacy or anonymity in the online universe.

Staff should be very mindful that all information they post is ultimately traceable and leaves a permanent digital footprint online. They should also

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be aware of what Google says about them. Staff can have a colleague search for them online and assess if they are comfortable with what their colleague finds. Pay attention to privacy settings on the various sites and understand that these settings may not protect information from becoming public.

One recent development in the features of online search engines is image recognition (try using the terms “reverse image search” to see current possibilities). Pictures of oneself posted online or pictures that colleagues have posted may soon be easily sought out and found using this technology. Because sites can cache information from a specific point in time, attempts to remove photographs may be fruitless. We need to make clear to our respective social online networks our desire to maintain a professional public profile and also be mindful of how our actions might inadvertently affect other people.

Many have likely set up social media accounts for various reasons relatively early in their evolution: maybe to keep in contact with family, or subscribe to an interesting source of information. Some may have used a work email address, or included information about a professional affiliation that is not necessary for its use. We must carefully consider the image we are creating online, including who is part of our network, and how anything posted there might impact on one’s reputation. Even subtle choices such as who you follow on Twitter might leave an impression that you have a particular bias in one way or another.

Free Speech and the Duty of Loyalty

Beyond the issue of social media (although related to it) is the issue of free speech and parliamentary employment. The freedom of speech is a cornerstone of liberal democracy. The right of an individual to speak his or her mind lies at the heart of the freedoms we celebrate and so many have fought to protect. In Canada, freedom of expression is protected by the *Charter of Rights and Freedoms*. But it is not without limits.

On June 3, 2011, a Senate page left her post in the Senate Chamber during the reading of the Speech from the Throne in order to disrupt that ceremony and protest against her perception of the newly-elected Government’s “agenda”. In so doing, this page broke her employment contract and the oath she swore, and acted contrary to the training she received. She was immediately dismissed. In addition to the political ramifications of her actions, the impact it had on her peers was equally significant. Many among her fellow pages spoke of the disappointment and shame they felt in being associated with someone who so completely betrayed the basic principles of their program and of

parliamentary service. That same sense of betrayal and shock was shared throughout the Senate Administration.

Parliamentary employees enjoy rare access to moments of great ceremony, to the inner workings of the chamber and committees, in camera deliberations and planning meetings. They advise on matters ranging from legal drafting and parliamentary procedure to financial reporting and employment practices. The parliamentarians expect to be served according to tenets of integrity, respect and ethical behaviour. The moment an individual in the non-partisan employ of a parliamentary legislature reaches a point where their personal convictions outweigh their obligations to their job, they have a duty to leave that employment if they wish to actively promote and act upon their personal convictions. To take advantage of their privileged position to make a showy splash is not only a violation of their own employment contract, it can also have a wide impact on those with whom they work.

In our non-partisan model of parliamentary administration, parliamentarians delegate to the administration the responsibility for hiring and organizing the personnel required to provide the range of procedural, legal, administrative, custodial and security services necessary to the functioning of the legislature. Essential to this model is the expectation that the staff of the legislature’s administration will serve all members of the legislature equally and impartially, and without partisan consideration. Without this faith, how can parliamentarians allow staffers to be present at in camera meetings? How can they rely on institutional staff when they have confidential requests for procedural advice or submit their declarations of private interests?

Among the unwritten implications of parliamentary service is that you must trust the system, believe in the legitimacy of the choices made by the people, and accept that those within the system are acting in good faith and in the best interests of the country. The role of the staff of a parliamentary administration is to support the parliamentarians in doing their work, not to oppose, applaud or champion it. It takes an incredible amount of hubris to substitute one’s personal opinion on any matter for that of the hundreds of parliamentarians chosen to represent the country and to subvert that system from within.

In Canada, the duty of loyalty from an employee to an employer is a well-established common law principle. It has been the subject of useful case law with respect to public servants. The Chief Human Resources Officer of the Treasury Board Secretariat has posted a related summary and more extensive background paper online.¹ Although about the duty of

loyalty owed by members of the federal public service to the federal government, the message is relevant to parliamentary employees. The core of the summary is as follows:

- The duty of loyalty owed by public servants to the Government of Canada encompasses a duty to refrain from public criticism of the Government of Canada.
- Failure to observe the duty of loyalty may justify disciplinary action, including dismissal.
- However, the duty of loyalty is not absolute, and public criticism may be justified in certain circumstances.
- In determining whether any particular public criticism is justified and therefore not subject to disciplinary action, the duty of loyalty must be balanced with other interests such as the public servant's freedom of expression.

Three situations in which the balancing of these interests is likely to result in an exception are where:

- the Government is engaged in illegal acts;
- Government policies jeopardize life, health or safety;
- the public servant's criticism has no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.

Criticism may impair a public servant's ability to perform his or her specific job or to perform any public service job and hence justify disciplinary action. Public perception of that ability is as important as actual ability. An inference of impairment can be drawn in both cases, based on the principles and qualifications set out above, without the need for direct evidence. Criticism that is not related to the job or department of the public servant may still be found to be subject to the duty of loyalty.²

Canadian case law is growing with respect to employee online behaviour. Based on an article summarizing the facts of recent cases and the subsequent outcomes, *Canada: Facing Discipline for Facebook Postings*³, a number of early observations can be made:

- Facebook postings are considered public, not private communications
- The absence of a policy respecting employee behaviour online, while a useful and important element taken into consideration, may not be entirely fatal to an employer's case against an offending employee.
- If the comments reflect badly on, or contradict the values of the employer, the employer has a right to take action. The severity of the action can be mitigated by the nature of the comments, the degree of injury to the reputation of the employer, subsequent acceptance of responsibility and expression of remorse by the employee.

Internationally, case law from the United States and from the Commonwealth indicates variations in

interpretation, including differences over the degree of privacy one can expect based on privacy settings employed. It is worth reviewing relevant case law from other jurisdictions to get a firm understanding where the lines are being drawn.

To avoid being involved in a test case, the best course for an employer is to act before it is too late to adopt the necessary policies and guidelines, to articulate values and expectations for employee behavior, to alert employees to the dangers related to using social media to their reputations and potentially to their employment. Employers should have regular, ongoing conversations with employees and create a common sense of what is appropriate and inappropriate and where the grey areas are so they can be better understood and pitfalls avoided.

While traditionally the common law and existing jurisprudence in Canada on the duty of loyalty would be sufficient in establishing the standards of conduct expected of an employee, the ground may be shifting. Paradoxically, with the emergence of new policies on various subjects and the degree of detail and scope increases in individual policies within the Public Service, such "codification" has the effect of weakening the standing of existing interpretations of rights and obligations within that same overall environment. Influenced by this trend of setting out long established rights and obligations in policies and guidelines, arbitrators, tribunals and other adjudicators may be more inclined to be sympathetic to arguments made by employees saying, in effect, that in the absence of a clear policy or guideline the employee was unaware of the expectation of the employer.

As employers, the administration of a parliamentary assembly has to work out what its position is on neutrality among its staff, the degree to which its members are sensitive to employees' impartiality and how best to address the matter. In the case of the Senate, the Clerk has adopted a *Statement of Values and Ethics* as well as a *Code of Conduct for Staff of the Senate Administration*. Both documents are relevant to the terms of employment in the Senate Administration.

In the *Statement of Values and Ethics*, under professional values, staff are expected to serve with impartiality. In the *Code of Conduct*, staff are reminded that conduct within and outside the workplace that could affect their ability to fully carry out their workplace responsibilities are governed by the Code. They are further reminded that they are to conduct themselves not only within written rules and policies, but also within the values and best practices of the institution and that they should always consult with supervisors or the Corporate Officer for Values and Ethics when they are unsure of

how to behave in a given circumstance.

The Code includes behavioural qualities, based partially on the *Statement of Values and Ethics*. In it, impartiality is referenced and described as referring to non-partisanship. It goes on to say that “The Senate is a political institution where political parties compete; staff of the Senate Administration must be perceived at all times by Senators to be non-partisan in order to function effectively within the institution.”

The Senate management team intends to have an ongoing conversation with staff to underscore the importance it places on its core service values and to continue to improve the mutual understanding of how individuals can continue to enjoy the benefits of social media activities, while avoiding misperceptions regarding their professionalism and neutrality.

Conclusion

The entire purpose of the staff of a parliamentary administration is to serve and support the members’ efforts to make the parliamentary process work. How the politicians conduct their business is dictated by certain rules, conventions and practices adopted by the legislatures as well as the constitution and relevant statutes. The role of parliamentary employees is to assist and facilitate the members’ work within those constitutional, legal and conventional parameters and to keep separate their personal opinions about their work and the issues they face.

Collectively, parliamentary employees and employers should be exploring these issues in an ongoing conversation about how social media tools are being used, how they are changing, and how their use might compromise our interests.

Consider these hypothetical examples of behavior. What do you think is the risk involved? Is it potentially personally embarrassing for the employee, but not a big deal? Is it inappropriate, but caught in time to delete it and of negligible likelihood to become more widely known? Is it damaging to the individual’s reputation? Is it clearly a violation of the terms and conditions of employment and beyond redemption? What impact does it have on the overall reputation of their colleagues? Imagine a colleague has:

- Tweeted derogatory remarks about a parliamentarian, using foul language, and using his own name.
- Links on his Facebook page to news articles on a hot button social issue. The link includes a personal editorial remark indicating where his sympathies lie. His “friends” include staff from other administration offices and parliamentarians.
- Submitted an observation, using her real name but without disclosing her position, under a blog posting belonging to a national news outlet on an issue related to parliamentary proceedings.

- Been discovered using a pseudonym in order to participate in vigorous debate online over the merits of a bill before Parliament. Her in-depth knowledge of procedure betrays her probable working relationship to the institution but you only discover her identity accidentally.
- Used a Twitter-related GPS feature called Foursquare to alert followers to his whereabouts at any given time. He uses his own name for the Twitter feed. Some of the locations cited outside of working hours are of a disreputable sort. Some of the locations mentioned are during working hours.
- Posted a wall photo of himself in an obvious state of impairment, with a joint in his hand, and declares just how high he was when it was taken. After a few days of comments, the photo is quietly deleted.
- Posted a photo on her Facebook wall taken with a parliamentarian while at an official dinner in a recognizable location in a world capital.
- Tweeted about enjoying free drinks in the first class lounge to an international conference.

In each case, what would you expect as a response from the employer if it is brought to their attention: tolerance and a blind eye; a casual conversation and warning; a verbal reprimand and instruction to make changes; a written reprimand; dismissal?

Do your responses change depending on the job position involved in the case study? In other words, is there an order of hierarchy where the degree of perceived severity changes depending on where the person is in the hierarchy? When does online interest in a topic morph into a perception that you are biased on that topic? When does bias on one issue become ascribed to party affiliation or sympathy? How might it affect your reputation if one of your direct colleagues were involved?

There is a gulf between what may be philosophically proper for a citizen to do and say, as compared to the formal and informal impacts exercising those options may have on one’s career. The grey zone, so to speak, is immense and governed by variables that are often difficult to codify. Social media may be new in terms of our understanding of how it works and how it might be used. There is nothing new, however, about ensuring that our personal comportment reflects the paramount virtues of parliamentary service: integrity, neutrality and professionalism.

Notes

- 1 <http://www.tbs-sct.gc.ca/rp/icg01-eng.asp>
- 2 <http://www.tbs-sct.gc.ca/rp/icg01-eng.asp>
- 3 Nikfarjam, Parisa: *Canada: Facing Discipline for Facebook Postings* edited by Jennifer Fantini and Naomi Calla, <http://www.mondaq.com/canada/article.asp?articleid=176406&login=true&nogo=1>