

Fake News Now Legal in Canada! (*Not so fast...*)

It's all the rage. Politicians jump on it to label opposing views. Hard-working journalists cringe at it, and frustration grows over the public's apparent blind acceptance of it. Is fake news "legal"? It can be. Can it be stopped? Yes.

A provocative headline. A smartly-written article about real people, places and issues of current public interest. No hint of satire or irony with just enough truth sprinkled about. And, it pops up in your online news feed alongside reputable and well-known news sources.

The problem? This "news" is made from whole cloth. A fabricated and unadulterated lie designed to change your mind, your politics or act as "clickbait" to make its author rich. Welcome to the new world of "fake news."

Given heightened prominence during the recent U.S. election, it has since become a growing concern in Europe and even Canada, where a campaign manager for a federal Conservative Party leadership candidate admitted recently to publishing a fake article online to rile the "left" about the supposed "billions" the Liberal Party was spending on international aid.

Particularly disconcerting about today's "fake news" is that, thanks to the Internet's ability to indiscriminately aggregate articles, it can gain equal footing with legitimate sources such as newspapers, wire services, TV networks and the like. Also, many people can have a tough time online figuring out if some websites or links are legitimate news sources.

Blended in with regular news feeds, no one is immune to the lure of fake news, including me. A few months ago, for example, I spotted a headline in Google's daily news feed that read: "Mississauga condo developer forgets to put 120 bathrooms in brand new building." Google assigned it a CBC byline so I clicked through thinking this was likely strange but true.

What followed was a perfectly well-written "news story" on CBC.ca about a new condominium project and its purchasers locked into deals for units without any washrooms. It took a few moments to realize, though, the "story" was courtesy of CBC Radio's satirical writers for the radio show "This is That." Brilliant comedy but it certainly didn't belong in a daily news feed.

All this concern is leading to governments and others fretting about how to control "fake news" and what limits could be imposed on the Internet. Some are talking about legislation and this has big social media companies, such as Google and Facebook, trying to figure out how to stamp out fakery on their own without suppressing free speech. While social media and other websites are in part responsible for the rise in fake news and do need to exercise more control, it is important to know we already have plenty of legal remedies available in Canada to deal adequately with authors of fake news.

Our Long History of Lies

At its core, fake news is really not that new. Traditionally, it has been called "false news" in court cases and laws over time, and has been around since the printing press (and as long as people have been lying). "Pamphleteers" — opinion writers who often hand-circulated news of their own making during French and U.S. revolutionary times — contributed to the birth of early defamation and criminal laws against the spread of false news about the nobility and others.

Fast forward to today and you might be surprised to learn how many laws we have against the spread of false news. In Canada, for example, the *Criminal Code's* "false news and public mischief" section 372(1) makes it a potentially indictable offence (up to two years in jail) for anyone with provable intent to "injure or alarm" a person with false information via a letter or "telecommunication." Section 372(2) also makes it an offence to convey an "indecent communication" that might "alarm or annoy" a person via any telecommunication.

Section 140 of the *Code* creates an offence of public mischief for anyone who, with intent to mislead, causes a police officer to investigate a false statement that accuses some other person of having committed an offence or otherwise mislead justice.

Long before today's fake news concerns, though, the courts recognized not all fakery needs to answer to the law if we are to value free speech (even when it is misguided or intentional). Up to 1992, *Criminal Code* section 181 made it an offence to knowingly publish a false "statement, tale or news" that causes or was likely to cause injury or mischief "to a public interest." In a case involving Holocaust denier Ernst Zundel, the Supreme Court of Canada ruled that specific section was an unreasonable infringement on our Charter of Rights guarantee of freedom of expression, carried too stiff a penalty, and the reference to "a public interest" was too broad and might stifle public debate.

For this reason and others, criminal laws are likely to be reserved for the most extreme examples of fake news. That said, there are many other legal remedies. For instance, some of the most scurrilous fake news events leading up to the recent U.S. election would be unlikely to go unpunished in Canada. Take, for example, the fake news stories that tried to sully Hillary Clinton in days leading up to the vote. In Canada, federal and many provincial *Elections Acts* state that anyone who, before or during an election, knowingly makes or publishes a "false statement of fact" designed to affect the results of the election in relation to the personal character or conduct of a candidate is guilty of an offence.

In the civil courts, it has been defamation law and threatening injunctions that has more often kept false news from spreading unchecked. Apart from being useful in stamping out blatantly false stories by requiring direct proof, defamation laws can also take aim at stories that use innuendo and sensationalism to suggest defamatory meanings.

For example, one famously defamatory story reported police had seized documents from a lawyer's office, he was unavailable for comment and went on to suggest the police investigation was why he resigned from public office weeks earlier. In reality, the police were searching the lawyer's office to find documents belonging to a company he represented, the lawyer was not involved in any crime, he truly was unavailable for comment, and he had resigned from his public position for unrelated reasons.

How Do Fakers Get Away With It?

Successful purveyors of fake news appear to be clever in knowing the fine line to walk between risking a lawsuit and profiting from the public's interest in scandalous or provocative news. There are at least three ways a fake news author might skirt lawsuits:

- 1. Focus on Public Figures:** In the U.S., when it comes to public figures, defamation law has taken a different path from most other civilized countries. As far back as 1964, U.S. courts have allowed relatively unlimited criticism of public officials and prominent people except where there is evidence of malice, such as a reckless disregard for the truth. This heavy evidentiary burden of proving malice has made it tough to sue there.

Judges have debated who is a “public official,” but it is usually someone who has the opportunity to easily counter views in the media and is the focus of public interest. That explains why so much U.S. fake news is about politicians and other public figures. In Canada and most other Western countries, one can comment fairly on the public acts of people, but the private life or moral character of a public figure is regarded in the same manner as a private individual. In fact, our courts have awarded higher damages to public officials because they are more “sensitive to attack than the ordinary man.”

2. Fair Comment: Opinion writers are given wide latitude in courts when it comes to opining on people's public actions or matters of public interest. The defence of fair comment, however, does require specific elements: 1) the opinion must be on a matter of true public interest and not just prurient; 2) it must be based on provable facts; 3) if there are inferences of fact, they must be recognizable as comment; 4) there must be no actual or express malice; and 5) while not everyone has to agree with the opinion, it must be one someone could honestly express based on the facts. Most important for anyone relying on fair comment is that it must be clear what is fact and what is opinion.

3. Satire: As in the CBC example above, there is nothing wrong with fake news with an obviously humorous or satirical bent. Courts generally allow the defence of fair comment to be used for satirical stories and cartoons. There are limits, though. For example, a popular magazine columnist once wrote a satirical article in which it was noted two lawyers were rising quickly through their Vancouver law firm, and were “cementing their connections through the lawn tennis circuits and wife-swapping brigades.” Satire attacking an individual's morality or alleging criminal conduct is unlikely to be protected.

Fake News Is As Risky As Ever

Hearing of the big bucks being made by Internet creators of fake news had a writer-friend of mine half-jokingly suggesting he might go into the business since he could easily whip up a good sensationalist yarn. Thankfully, he dismissed the idea.

Despite the growth in fake news on the Internet and lure of income, there is no escaping the fact it is a risky business in Canada, at least, and most other legal jurisdictions. Defamation laws can put a stop to the most egregious fake news and damage awards can be high. The *Criminal Code* also stands ready to step in, if needed. These remedies, though, may not be enough.

Aggregators of news, such as social media platforms and other websites, need to step up and do their part. Google and Facebook announced recently they are testing online tools in the U.S., U.K. and soon Canada to crack down on fake news. It remains to be seen how well they work. It may require aggregators to take a more hands-on, rather than automated, approach to choosing news sources for feeds. Some, though, will be suspicious of who does that screening.

Responsible websites of all stripes can also do more by clearly distinguishing between paid or sponsored content, and actual news. A 2016 Stanford University study by its education group found over 80% of 203 middle school to college students surveyed believed an advertisement with the words “sponsored content” above was still a real news story.

As history shows, no one remedy can stop all fake or false news in our society, but we can make it costly for those who go too far and take steps to call-out fakers. Ultimately, though, fake news is the price we may have to pay for allowing freedom of expression.

Michael G. Crawford, LL.B. is a recognized expert in media law, with more than 25 years' experience as a broadcast and print journalist. He is the author of The Journalist's Legal Guide, now in its sixth edition and published by Thomson Reuters.

© Michael G. Crawford

Thomson Reuters Canada, Michael G. Crawford and all persons involved in the preparation and distribution of this publication disclaim any warranty as to accuracy or currency of the publication. This publication is provided on the understanding and basis that none of Thomson Reuters Canada, the author or other persons involved in the creation of this publication shall be responsible for the accuracy or currency of the contents, or for the results of any action taken on the basis of the information contained in this publication, or for any errors or omissions contained herein.

No one involved in this publication is attempting herein to render legal, accounting or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The analysis contained herein should in no way be construed as being either official or unofficial policy of any governmental body.