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## **LEGAL ISSUES IN SOCIAL MEDIA FOR CHARITIES AND NOT-FOR-PROFITS**

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*By Terrance S. Carter\**

### **A. INTRODUCTION**

As new advancements and applications continue to develop with regard to the use of social media by charities and not-for-profits (“NFPs”), there are corresponding challenges in the law that should be considered, such as privacy law, intellectual property law, tort law, contract law, and charity law, amongst others. This *Bulletin* discusses a number of these legal issues and suggests that, at a minimum, charities and NFPs should have a robust social media policy in place and should coordinate such policy with other operational policies of the charity or NFP in order to manage the legal risks associated with their use of social media.<sup>1</sup>

### **B. CONTEXT**

In general terms, social media enables users to create online communities where they can network with others and share content, including user-generated content, such as photos, videos and stories. Social media in recent years has become the key advertising, marketing, and public relations platform for charities and NFPs to build their online reputation and brand.

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<sup>1</sup> For more information, see *Corporate and Practice Manual for Charities and Not-For-Profit Corporations* by R Jane Burke-Robertson, Terrance S Carter & Theresa LM Man, (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2019, release 1), ch16: Fundraising Issues For Charities; see also Paul Lomic, *Social Media and Internet Law: Forms and Precedents* (Toronto: LexisNexis, 2018).

Charities and NFPs typically use social media to promote their online presence directly or encourage followers (and “influencers”) to share their donor, volunteer or supporter experience with their own followers (*i.e.*, friends, family and others). Social media may also be used for promoting fundraising campaigns, such as crowdfunding,<sup>2</sup> peer-to-peer (P2P) fundraising,<sup>3</sup> third-party fundraiser campaigns, as well as “text-to-give” campaigns and online auctions. The legal issues in each situation may vary depending upon the platform being used, applicable legislation,<sup>4</sup> the parties involved, and their relationship to the charity or NFP.

Numerous legal issues can arise with regard to the use of different social media platforms and the applicable terms of use, as well as through statutory and common law obligations that may apply to charities and NFPs when using social media. The following non-exhaustive list of legal issues is intended to assist charities and NFPs, as well as their legal counsel, in anticipating and managing those legal issues when they arise.

## C. LEGAL ISSUES IN SOCIAL MEDIA

### 1. Terms of Use (Contracts of Adhesion)

The relationship between a charity or NFP and a social media platform is governed by the terms of use established by the platform and which the charity or NFP will have to accept in order to use the platform. These terms of use should be carefully reviewed by the charity or NFP and its legal counsel. These terms generally cover: the collection, use and storage of personal information, including pictures and videos; the use of intellectual property, including the content created by the charity or NFP; liability for representations made by the charity or NFP; the exclusion of the platform’s liability; the jurisdiction and governing law in case of a dispute;<sup>5</sup> refunds and withdrawals

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<sup>2</sup> Generally speaking, crowdfunding involves fundraising by appealing to a broad group or network of small donors, referred to as the “crowd”, for specific projects and with a time-limited campaign strategy, and often using the Internet and social media. See National Crowdfunding & Fintech Association, “What is Crowdfunding”, online: <http://ncfacanada.org/crowdfunding/>.

<sup>3</sup> Peer-to-peer fundraising, also referred to as social fundraising or personal and/or team fundraising, consists of supporters and volunteers reaching out to friends, family and other members of their respective social networks to raise funds.

<sup>4</sup> For example, Saskatchewan’s *The Informal Public Appeals Act* (“IPAA”) does not apply to registered charities, but does apply to supporter-driven crowdfunding campaigns as well as NFPs. For information on the application of IPAA, see: Jacqueline M Demczur, “Final Order Involving the Humboldt Broncos’ Crowdfunding Campaign”, *Charity & NFP Law Update* (January 2019), online: <http://www.carters.ca/pub/update/charity/19/jan19.pdf#jd2>.

<sup>5</sup> Forum selection clauses in social media and crowdfunding platforms may give rise to important jurisdictional issues. The Supreme Court of Canada decision of *Douez v Facebook, Inc.*, 2017 SCC 33 established an important precedent regarding the jurisdiction of Canadian courts to review the terms of use of social media platforms domiciled outside Canada.

of funds from an account; service fees as a percentage of each donation; and the assignment of the contract by the platform to a third party.

## 2. Privacy and Data Sharing Issues

Charities and NFPs need to be aware that they are responsible for the personal information of donors, supporters and employees, including personal information that is obtained through social media platforms, where that personal information is under the control of the charity or NFP. Personal information is defined by the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)<sup>6</sup> as “information about an identifiable individual”,<sup>7</sup> e.g. name, address, social insurance number, as well as photos or videos of individuals. However, personal information does not include information that has been de-identified or anonymized data that cannot be linked back to individual records.

Federal private-sector legislation, such as PIPEDA, and “substantially similar” provincial legislation may apply depending on the circumstances of each case. PIPEDA applies to any private sector organization that collects, uses, or discloses personal information in the course of commercial activities. If a particular activity is determined to be a “commercial activity”, then charities could be caught within the scope of PIPEDA. As well, for example, BC’s *Personal Information Protection Act*<sup>8</sup> applies to charities and NFPs in British Columbia. In this regard, some questions that need to be considered include:

- What personal information is the charity or NFP collecting, using or disclosing on social media and is it for a purpose that “a reasonable person would consider appropriate in the circumstances”?<sup>9</sup>
- Is donor information being disclosed and how is it being used?;

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<sup>6</sup> SC 2000, c 5, s 2(1) [“PIPEDA”].

<sup>7</sup> *Ibid*, s 2(1).

<sup>8</sup> SBC 2003, c 63.

<sup>9</sup> PIPEDA, *supra* note 6, s 5(3) reads: “An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.”

- Has the charity or NFP identified the purposes for which personal information is collected at or before the time of the collection?;<sup>10</sup>
- Has it obtained the knowledge and consent of the individual for the collection, use, or disclosure of personal information?;<sup>11</sup>
- What security safeguards does the charity or NFP have in place to protect the personal information under its control and are they appropriate to the sensitivity of the personal information?;<sup>12</sup>
- Has the charity or NFP considered the risks of posting videos and photos of children on social media?; and
- Does the charity or NFP process personal data of European Union residents to offer them goods or services or to monitor their behaviour within the EU (“GDPR”)<sup>13</sup>?

On May 24, 2018, the Office of the Privacy Commissioner of Canada (“OPC”) published two new guidance documents designed to help organizations comply with their privacy obligations in an online environment:<sup>14</sup> i) the “Guidelines for obtaining meaningful consent”,<sup>15</sup> which became effective on January 1, 2019, and ii) the “Guidance on inappropriate data practices: Interpretation and application of subsection 5(3)”,<sup>16</sup> which became effective on July 1, 2018. Charities and NFPs that are collecting, using or disclosing personal information through digital means should review and revise their privacy policies and consent processes in order to ensure compliance with these

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<sup>10</sup> *Ibid*, Schedule 1, Principle 2 — Identifying Purposes.

<sup>11</sup> *Ibid*, Schedule 1, Principle 3 – Consent.

<sup>12</sup> On November 1, 2018 several provisions of the *Digital Privacy Act*, amending PIPEDA to add Division 1.1, came into force, along with *Breach of Security Safeguards Regulations*. These provisions impose certain obligations on organizations that experience a “breach of security safeguards”. In particular, such organizations will be required to notify affected individuals and report to the Privacy Commissioner of Canada if the breach poses a “real risk of significant harm to an individual.”

<sup>13</sup> Regulation (EU) 2016/679 of the European Parliament and of the council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation) [“GDPR”].

<sup>14</sup> Office of the Privacy Commissioner of Canada, News Release (May 24, 2018), online: [https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/nr-c\\_180524/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/nr-c_180524/).

<sup>15</sup> Office of the Privacy Commissioner of Canada, “Guidelines for obtaining meaning consent” (May 24, 2018), online: [https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl\\_omc\\_201805/](https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/).

<sup>16</sup> Office of the Privacy Commissioner of Canada, “Guidance on inappropriate data practices: Interpretation and application of subsection 5(3), online: [https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gd\\_53\\_201805/](https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gd_53_201805/).

OPC guidance documents. Further, they should be ready to revisit them on an ongoing basis as technological advancements and best practices continue to evolve and re-shape the expectations of regulators, such as the OPC.

Data sharing issues are intrinsically related to privacy issues, particularly as new technologies, such as learning algorithms (*e.g.* artificial intelligence) are in some cases capable of re-identifying previously anonymized information by building profiles of individuals from multiple datasets, where donors, volunteers and supporters, as well as employees, have not given meaningful consent.

### 3. Issues Related to Canada's Anti-Spam Legislation

Charities and NFPs also need to be conversant with Canada's Anti-Spam Legislation ("CASL")<sup>17</sup> with regard to their use of social media. CASL includes a prohibition against sending commercial electronic messages ("CEMs") unless the sender has the express or implied consent of the receiver and the message contains prescribed information. A CEM is generally an electronic message that encourages participation in broadly defined "commercial activity."

Generally, CASL does not apply to social media, *e.g.* tweets or posts on a Facebook profile, but can apply where the communication is caught by the definition of "electronic address", *e.g.*, direct messaging on Twitter, Facebook messenger, LinkedIn messenger, WhatsApp, *etc.* Although regulations under CASL exclude CEMs that are sent by or on behalf of a registered charity where the "primary purpose" is raising funds for the charity,<sup>18</sup> since some electronic messages sent by a charity may have other competing purposes, it is generally prudent to assume compliance with CASL will be required.

Express consent under CASL can be obtained either in writing or orally. Written express consent includes both paper and electronic forms of writing as long as the electronic information can subsequently be verified. Examples of acceptable means of obtaining express consent in writing include checking a box on a web page and filling out a consent form at a point of purchase. Express

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<sup>17</sup> *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, SC 2010, c 23 [CASL].

<sup>18</sup> *Electronic Commerce Protection Regulations*, SOR 2013-221, s 3(g).

consent can also be validly obtained through opt-in consent mechanisms but not through opt-out mechanisms.<sup>19</sup>

Implied consent may currently be found only in the following limited circumstances: i) the sender of the CEM has an “existing business relationship” or “existing non-business relationship” with the recipient; ii) the recipient has “conspicuously published” his or her electronic address, for example, on a website or in a trade magazine, without any restrictions on receiving unsolicited CEMs; or iii) the recipient’s email address was disclosed to the sender, such as through a business card, without any restrictions on receiving unsolicited CEMs, and the CEM relates to the recipient’s business, role, function or duties.<sup>20</sup> Implied consent based on an existing business or non-business relationship may only be relied upon for a maximum of two years before the day on which the CEM was sent.<sup>21</sup> Once given, express consent does not expire. However, consent, either express or implied, may be revoked at any time.<sup>22</sup>

CASL also provides an exception for CEMs sent by an individual to another individual with whom the sender has a “personal or family relationship”<sup>23</sup> as defined under CASL regulations.<sup>24</sup> However, the Canadian Radio-television and Telecommunications Commission has stated that: “Using social media or sharing the same network does not necessarily reveal a personal relationship between individuals. The mere use of buttons available on social media websites – such as clicking “like”, voting for or against a link or post, accepting someone as a “Friend”, or clicking “Follow” – will generally be insufficient to constitute a personal relationship”.<sup>25</sup>

#### 4. Intellectual Property Issues

A charity’s or a NFP’s brand, which is often publicized on social media in the form of its name and associated trademarks, as well as the reputation earned from social media content, can be one of the

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<sup>19</sup> See Canadian Radio-television and Telecommunications Commission Bulletin 2012-548, “Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC)” (October 10, 2012), online: <https://crtc.gc.ca/eng/archive/2012/2012-548.htm>. See also Canadian Radio-television and Telecommunications Commission Bulletin 2012-549, “Guidelines on the use of toggling as a means of obtaining express consent under Canada’s anti-spam legislation” (October 10, 2012), online: <https://crtc.gc.ca/eng/archive/2012/2012-549.htm>.

<sup>20</sup> CASL, *supra* note 17, s 10(9).

<sup>21</sup> *Ibid*, ss 10(10) to (14).

<sup>22</sup> See Canadian Radio-television and Telecommunications Commission, “Frequently Asked Questions about Canada’s Anti-Spam Legislation” (February 1, 2019), online: Government of Canada <https://crtc.gc.ca/eng/com500/faq500.htm>.

<sup>23</sup> CASL, *supra* note 17, s 6(5).

<sup>24</sup> *Supra* note 18, s 2.

<sup>25</sup> *Supra* note 22.

charity's or NFP's most important assets because it helps to distinguish the charity or NFP from other organizations. This in turn can become critical in securing donations, sponsorships, as well as volunteers. Trademarks of the charity or NFP that are used on social media should be protected by trademark registration. In some instances, hashtags (*e.g.* #YourCharityorCampaign) may also need to be protected as registered trademarks in order to prevent third parties from poaching and registering social media identities prior to that of the rightful owner. As well, the charity or NFP should determine what trademark licences need to be in place with third parties before launching a campaign on social media. In addition, it is essential to determine who owns the copyright in the content used on social media and obtain the requisite assignments and/or licences as necessary.

The terms of use of the social media or crowdfunding platform should also be carefully reviewed for issues dealing with the charity's or NFP's intellectual property, as there can be unexpected and unreasonable grants of rights in both copyright and trademarks being used in a particular social media platform.<sup>26</sup>

## 5. CRA Compliance

In the course of a charity audit by the Canada Revenue Agency ("CRA") to determine compliance with the requirements under the *Income Tax Act* ("ITA"), as well as CRA administrative requirements, and whether to impose sanctions or revoke the charitable status of a charity, CRA auditors, not surprisingly, will often review the use of social media by a charity to determine, for example:

- Whether the charity's social media content refers to programs outside the stated charitable purposes of the charity, contains problematic materials, or engages in prohibited activities, such as direct or indirect support of, or opposition to, any political party or candidate for public office;
- Whether a social media fundraising campaign results in an undue private benefit, *e.g.* an excessive payment to a celebrity, or directs gifts to a specific person, family, or other instances of private benevolence;

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<sup>26</sup> A typical intellectual property clause in a platform's terms of use will read as follows: "If you provide material or post content onto [the platform] website, you are hereby waiving all moral rights you may have in the material you have provided or posted. By providing or posting this material onto [the platform], you hereby grant to [the platform] a nonexclusive, royalty free, perpetual, and irrevocable license which allows [the platform] the right to use, edit, modify, adapt, reproduce, publish, distribute and display such material."

- Whether the social media fundraising campaign is illegal or contrary to public policy, such as whether it is criminally fraudulent or facilitates an abusive tax shelter or terrorism; and
- Whether the social media fundraising campaign might be seen as promoting an unrelated business activity.

## 6. Employment Issues

A number of employment issues may arise from the use of social media by a charity or NFP. For example, an employee should not be permitted to post any statements or other information on their personal social media sites which may be defamatory or damaging to the charity or NFP and/or those it serves, may constitute harassment against other employees, or may disclose confidential, personal or proprietary information.

There have been several court and arbitration decisions in Canada where the discipline or dismissal of employees has been upheld as a result of inappropriate social media activity which is contrary to the employer policies, including both on-duty and off-duty conduct of the employee on social media.<sup>27</sup> As such, it is important for charities and NFPs to clearly set out their expectations for employees with respect to social media use, whether or not the use is related to the workplace using the employer's information systems, or on the employees' personal devices and time.

With regard to hiring, generally, what a potential candidate has shared "publicly" online is also available to the employer and it may include Google search results, social media, personal websites and other content, even if not job-related. However, employers need to be careful in documenting what information they are accessing and considering in the hiring process. For example, an employer which has accessed online information concerning a candidate who was not hired may be faced with allegations that the decision was based on inappropriate criteria and was discriminatory under provincial or federal human rights legislation.

## 7. Advertising and Influencer Marketing Challenges

Social media marketing terms and policies are constantly changing and adapting. For example, "viral" marketing techniques in social media, such as "refer-a-friend" campaigns where followers

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<sup>27</sup> See, for example, the recent decision in *Estée Lauder Cosmetics Limited v. Deciem Beauty Group Inc.*, 2018 ONSC 6079, regarding an interlocutory injunction to remove a director and officer of a corporation for "destructive social media behaviour".

share personal information of their friends, present a number of challenges in terms of privacy and CASL.

Other associated legal issues have to do with social media “influencers.” On September 13, 2018, *Ad Standards* updated its Disclosure Guidelines with a list of Do’s and Don’ts for “Influencer Marketing”, including the use of disclosure hashtags such as #ad or #sponsored and the disclosure of compensation given to an influencer. A charity or NFP relying on a social media influencer should ensure that these guidelines are met in order to better protect the charity’s or NFP’s reputation.

#### **D. SOCIAL MEDIA AND OTHER OPERATIONAL POLICIES TO MANAGE RISKS**

The operational policies of a charity or NFP serve to instruct employees, as well as volunteers and other supporters, how to manage and reduce legal risks before they occur. Operational policies also constitute evidence of the board of directors of a charity or NFP exercising appropriate due diligence in fulfilling their duty of care.

A robust social media policy needs to be coordinated with other operational policies of the charity or NFP that address the legal issues identified in this Bulletin, including privacy, intellectual property, CASL and employee technology use, among other issues, and may include matters such as:

- A broad definition of social media which captures the use of different online tools for sharing content through the Internet;
- Designation of authorized individuals with access to the charity’s or NFP’s social media accounts and who are permitted to post “official” content;
- A requirement that authorized individuals posting on social media on behalf of the charity or NFP comply with all other policies on matters of privacy, intellectual property, and CASL;
- A requirement that no social media posting may include personal information, including images of identifiable individuals, without the consent of the appropriate individuals;
- Rules for “re-tweeting”, “hyperlinking” and “liking” by the charity or NFP without attracting liability;

- As a general rule, prohibiting the use of images of identifiable children or, at the very least, obtaining consent from the child's parents or guardians;
- A provision to reserve the right to edit or delete content that does not adhere to the social media policy and a prohibition against postings which are obscene, harassing, bullying, offensive, derogatory, defamatory, or which may contain otherwise potentially scandalous comments, inappropriate language or images including sexually explicit or other material or links deemed inappropriate and which could discredit or cause embarrassment to the charity or NFP;
- Rules for the use of proprietary information belonging to the charity or NFP on social media, such as preventing the unauthorized use by employees of a charity or NFP's intellectual property, including trademarks or copyright-protected works; and
- Clear indication that content creators grant the charity or NFP a world-wide, royalty-free, non-exclusive licence to publish, display, reproduce, modify, edit or otherwise use materials they share on the charity's or NFP's social media page.

## E. CONCLUSION

In order to effectively manage the expanding legal risks associated with using social media, charities and NFPs need to be proactive in understanding the legal risks, and then developing and implementing a robust social media policy in conjunction with other operational policies as may be necessary. As well, given the complexities with the risks involved, the charity or NFP should work in conjunction with their legal counsel to carefully evaluate the legal risks involved in using social media before embarking on a new or revised social media program.