 BARRISTERS SOLICITORS TRADEMARK AGENTS	The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar™ February 14, 2019
Legal Challenges in Social Media For Charities and NFPs	
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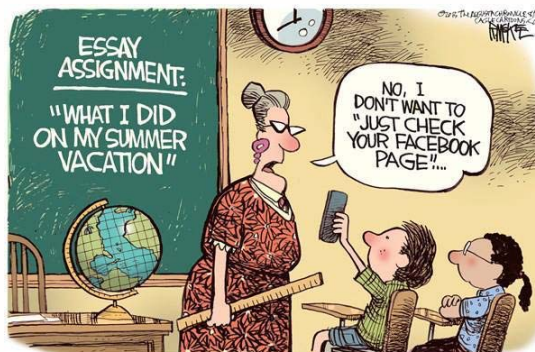
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A. OVERVIEW	
<ul style="list-style-type: none">• The topics in this presentation include:<ul style="list-style-type: none">– What is Social Media?– Legal Challenges in Social Media<ul style="list-style-type: none">▪ Privacy and Data Challenges▪ CASL Challenges▪ Intellectual Property Challenges▪ CRA Regulatory Challenges▪ Employment Challenges▪ Advertising and Influencer Marketing Challenges▪ Crowdfunding Challenges– Managing the Legal Challenges	
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B. WHAT IS SOCIAL MEDIA?

1. Setting The Stage

- Social media consists of websites and internet applications that enable users to create online communities where they can share content, including user-generated content, or network with others



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2. Social Media Enables Social Networking

- Social media builds on and encompasses the full breadth of online communication, creating new business models and becoming a key method for building a brand for any organization, including charities and NFPs
- Social media is an advertising, marketing and public relations tool, and is in an ongoing state of flux
- Charities and NFPs typically use social media to:
 - promote their brand directly or encourage followers (and “influencers”) to share their customer or supporter experience with their own followers (*i.e.*, friends, family and others)
 - promote a campaign to raise funds for a particular project or cause (*e.g.*, crowdfunding)

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Examples of popular social media:

Platform	Description	Key Statistics	Demographics
Pinterest	Social site that is all about discovery	Largest opportunities	Users are: 20% male, 80% female
Twitter	Micro blogging social site that limits each post to 140 characters	There are over 67 million Twitter users	6,000 tweets on average happen every second
Facebook	Mobile is Facebook's cash cow	1.15 billion daily active mobile users	Age 25 to 34 at 29.7% is the most common age demographic
Instagram	Social sharing app all around pictures and now 60 second videos	Many brands are participating through the use of #hashtags and posting pictures consumers can relate to	Most followed brand is National Geographic
Snapchat	App for sending videos and pictures that disappear after being viewed	10+ billion video views daily	Roughly 70% of users are female
LinkedIn	Business oriented social networking site	Brands that are participating are corporate brands	70% of users are outside the U.S.

Others are: Instagram, Youtube, Reddit, Google+, Tumblr, Flickr, WhatsApp, Digg, Vimeo, Delicious, Yelp, etc.

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C. LEGAL CHALLENGES IN SOCIAL MEDIA

1. Privacy and Data Challenges


a) Personal Information, Data and Social Media

- “Personal information” is defined by the Personal Information Protection and Electronic Documents Act (“PIPEDA”) as “any information about an identifiable individual” (e.g. name, address, social insurance number, as well as photos or videos of individuals)
- It does not include anonymous or non-personal information (i.e. big data)
- Social media gives a false sense of security, a perception that “it is just me and my online friends”
- The reality is that whatever is posted on the Internet could become virtually impossible to erase

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- The privacy issues that arise with the use of social media are a significant concern
- The rapid pace of online sharing of information has called into question how social media impacts an individuals' privacy
- The information posted on social media may breach applicable privacy law
- Also, large data sets are often collected without meaningful consent and later monetized



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- Facebook's Terms of Service (April 19, 2018) state:
"You own the content you create and share on Facebook"
- However, it also includes a number of necessary "consents" and "permissions" to use the service:
 "To provide our services,... you give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook."



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- Further, Facebook's Data Policy (April 19, 2018) states:



"We use the information we have about you -including information about your interests, actions and connections- to select and personalize ads, offers and other sponsored content that we show you"

"We use the information we have (including your activity off our Products, such as the websites you visit and ads you see) to help advertisers and other partners measure the effectiveness and distribution of their ads and services"

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b) Donor Information

- Donor information constitutes personal information that must be protected by the charity, specially in the context of using social media
- Donor information may include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, videos, financial information, name of business, place of employment, preferred donation restrictions and even health information
- PIPEDA specifically prohibits "the selling, bartering or leasing of donor, membership or other fundraising lists"
- If a donor list is obtained from a third party, ensure no computer program was used for scraping websites or generating a list of electronic addresses (address harvesting) in contravention of PIPEDA

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c) Posting Photos/Videos of Children on Social Media

- Images of identifiable individuals, including children, are personal information
- Charities and NFPs use pictures of children to promote their programs and campaigns or to share with parents and other stakeholders in social media
- It is usual practice to request the consent from the child's parent or guardian
- However, there is no definitive case law yet on whether a waiver signed by a parent is binding on a minor as a matter of public policy, so best to assume that it does not
- Charities and NFPs are expected to have effective procedures to protect the personal information of children



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- The Office of the Privacy Commissioner of Canada ("OPC") has guidelines regarding the personal information of minors
- Examples from the OPC include:
 - Limit/avoid collection from children
 - Obtain consent from parents of children under 13
 - Make sure default privacy settings are appropriate for the age of users
 - Verify that real names are not used as usernames
 - Have contractual protections in place with online advertisers to prevent the tracking of users and monitor those online advertisers
- However, any consent by parents on behalf of a minor for the collection of personal information may be unenforceable



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2. CASL Challenges



- Canada's Anti-Spam Legislation ("CASL") includes a prohibition on sending commercial electronic messages ("CEM") 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, *i.e.*, tweets or posts on a Facebook profile
 - However, it can apply if caught by the definition of "electronic address", *e.g.*, Direct Messaging on Twitter, Facebook messenger, LinkedIn, *etc.*

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- Consent under CASL - express or implied
- Express consent does not expire. However, consent may be withdrawn at any time
- Implied consent may be found when:
 - There is an "existing business relationship"
 - The receiver has "conspicuously published" his or her address or was otherwise disclosed to the sender, such as through a business card, without prohibiting CEMs and the CEM relates to the recipient's business
 - As provided for in regulations or elsewhere in CASL
- Consent by parents on behalf of minor children to receive email or text messages may also be unenforceable
- CASL prescribes significant monetary penalties of up to \$10,000,000 for violations



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3. Intellectual Property Challenges

- Register and enforce intellectual property (“IP”)
 - There are different types of IP, including patents, trademarks, copyrights and industrial designs
 - A charity’s or NFP’s brand is one of its most important assets
 - With social media, branding reaches a large audience around the world in an instant
 - Failing to register trademarks prior to using them online can lead to third parties poaching and registering those marks prior to the owner
 - Charities and NFPs should be pro-active in protecting their marks



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- Registration of a corporate name or business name does not by itself give trademark protection
- Once registered, ensure marks are properly used on social media
 - e.g. train staff on proper usage, proper markings, and consistent usage
- Ensure IP of others is not infringed
 - Social media can expose a charity or NFP to liability for infringing the IP rights of others, due to postings by employees and third parties, which may include trademarked or copyrighted material
 - Essential to identify and secure copyright of social media content through assignments and/or licences

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4. CRA Regulatory Challenges

- CRA will review online content, including the materials to which a charity links, to see if it accords with the information provided in its application
- Relevant considerations for charities:
 - Does social media content indicate programs outside of the stated charitable purposes of the charity?
 - Does the charity's social media provide a link to, and by implication agree or endorse, problematic materials or prohibited activities? e.g. "direct or indirect support of, or opposition to, any political party or candidate for public office"



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5. Employment Challenges

- Employees might reveal confidential information intentionally or inadvertently
- Employees might use trademarks incorrectly, leading to dilution and weakening of a charity's or NFP's brand
- Employees might infringe the IP of others, breach CASL or other contractual obligations
- Both on-duty and off-duty conduct may justify discipline and dismissal of an employee
 - Connecting a personal mobile device on a workplace computer may allow the employer to access the employee's personal information



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- Social media background checks
 - 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
 - An employer accessing information that is not reasonably appropriate in the circumstances may raise the question of whether the decision not to hire an individual was based on grounds of discrimination under provincial human rights legislation
 - Therefore, use caution when conducting social media background checks



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6. Advertising and Influencer Marketing Challenges

- Social media marketing terms and policies are constantly changing and adapting
- “Viral” marketing techniques in social media present a number of challenges in terms of privacy and CASL
 - For example, “refer-a-friend” campaigns where followers share personal information of their friends
- 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

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7. Crowdfunding Challenges

- Crowdfunding involves raising funds by appealing to a “crowd” (broad group or network) of small donors or customers, using the Internet and social media
- Crowdfunding is more commonly used for specific projects with a time-limited campaign strategy
- Crowdfunding generally involves three elements: the campaigner, the crowd, and the platform
- There are a variety of types of crowdfunding, including reward-based, equity-based, debt-based or even software value token (initial coin offerings)



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- Crowdfunding platforms establish their own terms of use and the charity's or NFP's only option is to either accept those terms or not, with no bargaining power
- Some popular crowdfunding platforms are: www.gofundme.com and www.canadahelps.com
- Crowdfunding may also be subject to informal public appeals legislation (e.g. Saskatchewan's *Informal Public Appeals Act*)
 - This legislation has been applied to crowdfunding campaigns (e.g. Humbolt Broncos)
 - It does not apply, however, to registered charities
 - The Uniform Law Conference of Canada's model legislation from 2012 has only been adopted in Saskatchewan



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D. MANAGING THE LEGAL CHALLENGES

1. Implementing a Social Media Policy

- There is no “one size fits all” policy; it will need to be adapted to the needs of the charity or NFP, including posting rules, advertising, employee’s and other stakeholder’s use of social media
- In some cases, a short paragraph with a hyperlink to the full policy may be appropriate
- Amongst other things, a social media policy may include:
 - A broad definition of social media which captures the use of email and Internet for sharing of content
 - Designation of authorized individuals with access to the charity’s or NFP’s social media accounts and who are permitted to post “official” content

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- A requirement that authorized individuals posting on social media on behalf of the charity or NFP comply with all other policies on Privacy, IP, and CASL
- A requirement that no social media posting may include personal information without consent, including images of identifiable individuals
- Rules for “re-tweeting”, “hyperlinking” and “liking” without attracting liability
- As a general rule, prohibit the use of images of identifiable children or, at the very least, obtain 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 or the terms of use of the website, as applicable



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- A prohibition against postings which are obscene, harassing, bullying, offensive, derogatory, defamatory or otherwise potentially scandalous comments and/or 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
- Clear indication that content creators grant your charity or NFP a world-wide, royalty-free, non-exclusive licence to publish, display, reproduce, modify, edit or otherwise use materials they share on your page

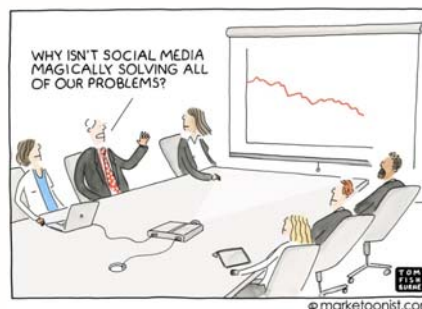


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- Regarding the use of personal social media by employees or volunteers encourage the use of a personal disclaimer such as, *"The views expressed on this website (or page) are mine alone and do not necessarily reflect the views of [name of particular charity or NFP]"*
- Charities and NFPs should take inventory of their existing online presence and how they can take control of their data, including IP and personal information of employees, donors, supporters and volunteers



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2. Implementing a Technology Use Policy

- Outline acceptable practices regarding using the charity or NFP's IT systems for accessing social media and cross reference with other policies as appropriate
- For example, the policy may provide that:
 - The charity or NFP may monitor the use of its IT systems and as such, should not be used for personal purposes
 - If the IT systems are used for personal use, then the individual acknowledges that they have no expectation of privacy in connection with that use
 - Use of personal IT systems is not subject to monitoring, so it is clearly the preferred means of personal communication for employees



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- Use of personal IT systems (such as personal cell phones) for accessing social media during work hours, should be limited to pressing circumstances
- If the charity or NFP reimburses the employee for the cost of a cell phone or laptop, the device should be deemed to be owned by the charity or NFP and, as such, subject to being monitored or searched
- As well, when such device is no longer needed by the employee for "business" purposes, it should be returned to the charity or NFP and none of its content should be copied



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3. Implementing a Privacy Policy

- Organizations that are subject to PIPEDA should reflect the 10 principles in the Model Code as well as GDPR
- Amongst other things, the public privacy policy should outline the following:



- How personal information will be used, collected, and disclosed, including a document retention policy
- How personal information is safeguarded
- The process for making and handling complaints and requests for personal information
- The process for dealing with, reporting and communicating data breaches
- Identify the Privacy Officer and include contact information

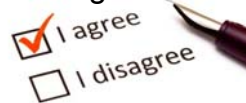
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4. Implementing a CASL Compliance Policy

- Due diligence defence under CASL will help mitigate against liability, or reduce the imposition of a penalty by the CRTC
- What should a CASL compliant policy include?
 - Establish internal procedures for compliance with CASL, including training and record keeping, specially as it pertains to consent;
 - Establish auditing and monitoring mechanisms for the compliance program(s), including a process for employees to provide feedback to compliance officer;
 - Establish procedures for dealing with third parties



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5. Implementing an Intellectual Property Policy

- Protect IP before posting it online
 - Avoid a costly branding blunder by completing the necessary due diligence ahead of time
 - Conduct trademark clearance searches to ensure marks are not encroaching on others' marks before using them on social media
 - Register all trademarks, copyrights, and domain names to avoid poaching by third parties
 - Ensure that all posts on social media comply with the appropriate agreements regarding any assignment or licence over IP-protected content



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E. CONCLUSION

- Although social media has many benefits, it is important to remember that discretion and common sense should be used when posting on social media
- A proactive approach to minimize potential risks should be taken before a charity or NFP embarks on any social media campaign, including a review of applicable terms of use
- The primary way to manage the risks associated with social media is to ensure that the various policies discussed above are implemented and reviewed on a regular basis



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