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**LEGAL CHALLENGES INVOLVING
SOCIAL MEDIA FOR CHURCHES
& CHARITIES**

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>26th Annual Church & Charity Law Seminar™ Toronto – November 7, 2019</p>
<p>Legal Challenges Involving Social Media For Churches & Charities</p> <p>By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent tcarter@carters.ca 1-877-942-0001</p> <p>© 2019 Carters Professional Corporation</p>	
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<p>OVERVIEW</p> <ul style="list-style-type: none">• What is Social Media?• Legal Challenges involving Social Media<ul style="list-style-type: none">– Privacy and Data Challenges– CASL Challenges– Fundraising Challenges– Advertising and Influencer Marketing Challenges– Intellectual Property Challenges– Defamation Law Challenges– CRA Regulatory Challenges– Employment Challenges• Managing the Legal Challenges• For more information, see <i>Charity & NFP Bulletin No. 441</i> at http://www.carters.ca/pub/bulletin/charity/2019/chylb441.pdf	
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A. 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, subject to the platform's terms of use



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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 churches and charities
- Social media is an advertising, marketing and public relations tool, and is in an ongoing state of flux
- Churches and charities often use social media to:
 - promote their presence and brand directly or encourage followers (as well as “influencers”) to share their user 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:

The infographic provides the following statistics for each platform:

- PINTEREST:** Social site that is all about discovery; largest opportunities; 50%+ of new signups are men; 250 million monthly active users.
- TWITTER:** Micro blogging social site that limits each post to 280 characters; there are over 69 million Twitter users; 6,000 tweets on average happen every second; 326 million monthly active users.
- FACEBOOK:** Mobile is Facebook's cash cow; 1.57 billion daily active mobile users; 25% of U.S. Facebook users are age 25 to 34; users share 1 million links every 20 minutes; 2.23 billion monthly active users.
- INSTAGRAM:** Social sharing app all around pictures and 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; 1 billion monthly active users.
- SNAPCHAT:** App for sending videos and pictures that disappear after being viewed; 10+ billion video views daily; roughly 70% of users are female; most used platform among 12-24 year olds; 300+ million monthly active users.
- LINKEDIN:** Business oriented social networking site; brands that are participating are corporate brands giving potential and current associates a place to network & connect; 70%+ users are outside the U.S.; 260 million monthly active users.

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

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B. LEGAL CHALLENGES INVOLVING SOCIAL MEDIA

1. Privacy and Data Challenges

a) Personal Information, Data and Social Media

- “Personal information” is defined under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) as “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
- Social media can give 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 may become virtually impossible to erase

The illustration shows a padlock, a search icon, and various symbols representing data and security, with the text 'ONLINE PRIVACY' and 'PROTECTION DATA'.

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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 individual's privacy
- The information posted on social media by a church or charity may not comply with applicable privacy law
- Also, large data sets are often collected without meaningful consent and later monetized



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- Information that has been stripped of identifiable markers and anonymized data that cannot be linked back to individual records are treated as non-personal information that are not subject to privacy protection
- However, risk of re-identification always exists
- Also, aggregated or group-level information could become personal information depending on the sample size



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- Facebook’s Terms of Service (last updated July 31, 2019) suggest that you own the content that you post:
“You own the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook...”
- However, it also includes a number of concerning “consents” and “permissions” to use the service:
“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”



- 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”



b) Donor Information

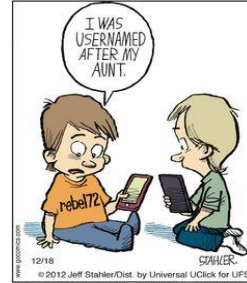
- Donor information constitutes personal information that must be respected and protected by the charity, especially in the context of fundraising on social media
- Donor information may include the donor's name, mailing address, email address, phone numbers, birthdate, name of family members, photos, videos, financial information, name of business, place of employment, preferred donation restrictions and even health information
- PIPEDA requires consent for "selling, bartering or leasing of donor, membership or other fundraising lists"
- When using a third party provided donor list, obtain a robust covenant that proper consent from everyone on the list was obtained by the third party and no computer program was used for scraping websites or generating a list of electronic addresses, contravening PIPEDA

c) Posting Photos/Videos of Children on Social Media

- Images of identifiable individuals, including children, are personal information
- Churches and charities often use pictures of children to promote their programs and campaigns, or to share with parents and other stakeholders on 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
- As such, charities and churches may want to reconsider posting pictures or video of children on social media



- The Office of the Privacy Commissioner of Canada (“OPC”) has guidelines regarding the personal information of minors
- OPC guidelines 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



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 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
- Implied consent may be found when:
 - There is an existing business or non-business relationship with the recipient
 - The recipient has “conspicuously published” his or her address or disclosed it, 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
- Implied consent based on an existing business or non-business relationship may be relied upon only for 2 years
- Once given, express consent does not expire
 - However, consent, either express or implied, may be revoked at any time
- Consent by parents on behalf of minor children to receive email or text messages may also be unenforceable



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- Directors, officers and agents of a corporation are liable for a violation of CASL unless they can demonstrate that they exercised due diligence to prevent the commission of the violation
- CASL prescribes monetary penalties of up to \$1 million for individuals and \$10 million for corporations for a violation of CASL
- Canadian Radio-television and Telecommunications Commission’s (“CRTC”) Decision 2019-111: CRTC found nCrowd and its former President liable for not obtaining proper consent in sending commercial electronic messages, and issued an administrative monetary penalty of \$100,000 against the President
- Employers are also vicariously liable for violations committed by their employees or agents
- Private right of action was also to come into force on July 1, 2017 but has been delayed

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3. Fundraising Challenges

a) Digital Fundraising

- Social media enables churches and charities to reach donors for fundraising purposes, such as through “text-to-give” or “mobile giving” programs, crowdfunding, “retweets” on Twitter, and “donation stickers” on Instagram
- Digital fundraising creates challenges, involving privacy and CASL issues, relating to consent and collection of donors’ personal information, e.g. by gathering of cell phone numbers, that can become complex when third party providers and monthly donations are added into the equation
- Churches and charities may also engage in digital fundraising through PayPal, Apple Pay, Venmo, crypto-enabled wallets, *etc*

b) Crowdfunding



- 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 donor-based, reward-based, equity-based, debt-based or even software value token, and may involve an initial coin offering

- Crowdfunding platforms establish their own terms of use and the church's or charity'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 other than by charities may be subject to informal public appeals legislation (e.g. Saskatchewan's *Informal Public Appeals Act*)
 - This legislation was applied to crowdfunding campaigns (e.g. Humbolt Broncos)
 - The Uniform Law Conference of Canada's ("ULCC") model legislation from 2011 has only been adopted in Saskatchewan
 - The ULCC recently released a Consultation Paper for a proposed *Uniform Informal Public Appeals and Crowdfunding Act* to revise the model legislation

4. Advertising and Influencer Marketing Challenges

- Social media marketing terms and policies are constantly changing and evolving
- "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
- *Ad Standards'* published Disclosure Guidelines (last updated in January 2019) contain 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 church or charity relying on social media influencers should ensure that these guidelines are met in order to better protect the church's or charity's reputation

5. Intellectual Property Challenges

- Churches and charities need to identify and protect intellectual property (“IP”)
 - There are different types of IP, including patents, trademarks, copyrights and industrial designs
 - A church’s or charity’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
 - Churches and charities should be pro-active in protecting their marks



- 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 church or charity 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

6. Defamation Law Challenges

- A good reputation for a church or charity takes years to build, but it can be destroyed very quickly by defamatory statements spread or shared publicly (including on social media)
- In this regard, defamation law, as established in legislation (e.g. Ontario's *Libel and Slander Act*) and common law, may restrict freedom of speech and attach liability to any person spreading defamatory materials on social media
- For example, in a recent decision dated March 4, 2019, the Court of Appeal for Ontario in *Lascares v B'nai Brith Canada*, 2019 ONCA 163 ("*Lascares*"), held that a defamation lawsuit against a charity could proceed

- In *Lascares*, the dispute arose out of an article and a social media "tweet" published by the charity stating that the appellant, a then-candidate in the 2015 federal election for the Green Party of Canada, had advocated on behalf of terrorists on social media
- The Court of Appeal held that accusing any person of supporting terrorists is a serious and damaging allegation which is likely to cause harm to that person's reputation
- Churches and charities need to take appropriate steps to ensure that their social media presence does not give rise to liability under defamation law

7. CRA Regulatory Challenges

- CRA will review online content, including the materials to which a charity links and references on social media, 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”, or terrorist groups



Canada Revenue Agency

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8. Employment Challenges

- Employees might reveal confidential information intentionally or inadvertently
- Employees might use trademarks incorrectly, leading to dilution and weakening of a church’s or charity’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



- Social media background checks
 - Generally, what an employee or job 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
 - Social media checks are problematic from a privacy standpoint and could expose organizations to liability for privacy breach
 - 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



C. MANAGING THE LEGAL CHALLENGES

1. Implementing a Social Media Policy

- There is no “one size fits all” policy; policy must be adapted to the needs of the church or charity, including posting rules, advertising, employees’ and other stakeholders’ use of social media
- Amongst other things, a social media policy may include:
 - A broad definition of social media which captures the use of email, text messages, and Internet for sharing content
 - Designation of authorized individuals with access to the church’s or charity’s social media accounts and who is permitted to post “official” content
 - A requirement that authorized individuals posting on social media on behalf of the church or charity 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 “retweeting”, “hyperlinking” and “liking” without attracting liability
- As a general rule, prohibit the use of images of identifiable children or, at the very least, obtain written 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



- A prohibition against postings that are obscene, racist, sexist, harassing, bullying, offensive, derogatory, defamatory, sexually explicit or otherwise inappropriate and which could discredit or cause embarrassment to the church or charity
- Rules for the use of proprietary information belonging to the church or charity on social media
- Clear indication that content creators grant the church or charity a world-wide, royalty-free, non-exclusive licence to publish, display, reproduce, modify, edit or otherwise use materials they share on the church’s or charity’s social media page

- A provision regarding the church's or charity's record retention policy for the collection, use and disclosure of donor information in its privacy policy
- A protocol for correcting and clarifying inaccurate comments made on behalf of the church or charity and for responding to comments made to the church or charity on its social media page;
- Rules for personal social media activities by employees (e.g. update profiles on professional networking sites if employment is terminated as well as personal disclaimers indicating that the views and opinions expressed are not those of the church or charity)



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2. Implementing a Technology Use Policy

- Outline acceptable practices regarding using the church's or charity's IT systems for accessing social media and cross reference with other policies as appropriate
- For example, the policy may provide that:
 - The church or charity reserves the right to monitor the use of its IT systems and as such, there is no expectation of privacy by the employee or volunteer
 - Employees and volunteers should not use the church's or charity's technology for personal purposes



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



3. Implementing a Privacy Policy

- Churches and charities should comply with PIPEDA and the 10 fair information principles whether or not they are technically subject to PIPEDA
- They should have a privacy policy that includes:
 - Identifies the purposes for which personal information is collected at or before collection (e.g. disclosure)
 - That the church/charity will obtain consent for the collection, use, or disclosure of personal information
 - That the church/charity will limit the collection of personal information to what is necessary for the purposes identified, and will take reasonable care to ensure that it is accurate, complete and up-to-date
 - That the church/charity will protect personal information
 - That the church/charity will give individuals access to the information about them



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 an effective CASL compliance policy include?
 - Good record keeping practices to keep records of consent and to establish a due diligence defence
 - Effective training of staff at all levels – due to vicarious liability under CASL
 - Ongoing auditing and monitoring processes to prevent/detect misconduct and assess program effectiveness
 - Regular risk assessments and updates of the policy



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



D. 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 church or charity embarks on any social media campaign, including a review of applicable terms of use, preferably by legal counsel
- 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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