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**The Annual 2020  
Church & Charity Law™ Webinar  
Goes *Virtual* - November 5, 2020**

**LEGAL ISSUES IN FUNDRAISING  
IN A VIRTUAL WORLD**

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Annual <b>Church &amp; Charity Law™ Webinar</b> <i>Goes Virtual – November 5, 2020</i></p>
<p><b>Legal Issues in Fundraising in a Virtual World</b></p> <p>By <b>Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent</b> tcarter@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <ul style="list-style-type: none"><li>• As a result of COVID-19, many fundraising events and campaigns that have traditionally been carried out in person are now being either cancelled or becoming virtual</li><li>• Imagine Canada’s released a report in late May, 2020 indicating that charities in general have experienced significant declines in revenue as a result of COVID-19</li><li>• Many churches and charities are more than ever having to rely on the use of internet websites and social media to raise funds</li><li>• This presentation identifies legal issues that can arise when fundraising in a “virtual world”, as well as some of the risk management policies and procedures that boards of directors should consider</li></ul>
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## B. EXAMPLES OF VIRTUAL FUNDRAISING

- Association of Fundraising Professionals recently reported that the most popular areas where charities are expanding their fundraising activities include:

Donor retention and stewardship activity → 88%

Social media → 83%

Virtual events → 81%

Online fundraising → 79%

Fundraising through e-mail → 71%

- Most churches and charities will have their own website and many will use e-mail to reach out to their members and supporters for fundraising appeals

- Some charities may use social media and third party platforms, such as crowdfunding sites (e.g. CanadaHelps.org, CrowdFund.ca, GoFundMe.com) to do fundraising
- Other charities may rely on their supporters to raise funds on behalf of the charity through peer-to-peer and third-party campaigns (e.g. a social media challenge)
- Virtual fundraising can also includes Text-to-Give, Online Auctions and Virtual Events, such as live stream “Galas”, virtual charity runs, and online contests through the use of YouTube or Facebook Live, etc.

## C. LEGAL ISSUES IN VIRTUAL FUNDRAISING

### 1. Direct Fundraising on a Charity's Website

- The charity's own website must establish clear Terms and Conditions of Use, particularly when the charity is accepting online donations
- The Terms and Conditions of Use should, at a minimum:
  - Provide its charitable registration details
  - State how financial information will be collected and used by the charity or other third parties, such as third-party payment processing providers
  - Include instructions for how donors can make or request changes to pre-authorized recurring donations
  - Indicate how and when donation receipts are issued and/or available for download
  - Whether data is stored in Canada or elsewhere

- Other general provisions that should be in the Terms and Conditions of Use for a website accepting online donations should explain:
  - Minimum conditions for access (e.g., age, geographic location, membership) and list of prohibited activities, in coordination with a stand-alone Privacy Policy on the charity's website
  - Ownership and permitted use of trademarks and other intellectual property of the church or charity, including use on social media
- If the church or charity uses a third-party payment processing provider, prospective donors accessing the charity's website must also be made aware of the Terms and Conditions of Use of that provider

## 2. Privacy and Data Issues

### 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)
- PIPEDA generally applies only to commercial activities
- Images of identifiable individuals, including children, are personal information – Children must be protected
- Several provinces have enacted privacy legislation that replaces PIPEDA; Ontario only has health-related privacy legislation substantially similar to PIPEDA with respect to health information

### b) Donor Information

- Donor information constitutes personal information that must be protected by the charity, especially in the context of fundraising on the internet and 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 requires consent for “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) Blackbaud Data Breach

In July 2020, Blackbaud, a popular cloud services platform used by thousands of charities for online fundraising, reported it had been a victim of a cyberattack in May 2020

The data accessed by the cyber criminals included donors' personal information, such as name, date of birth, address, telephone number and, as more recently reported by Blackbaud, certain financial information

Although PIPEDA may or may not apply to a particular church or charity affected by the Blackbaud breach, many organizations chose to disclose the breach to their donors in the interest of transparency

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## 3. CASL Issues

- 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” or “existing non-business relationship” (e.g., donors within 2 years)
  - The receiver has “conspicuously published” his or her address or his or her address was otherwise disclosed to the sender, such as by a business card
  - As provided for in regulations or elsewhere in CASL
- Consent by parents on behalf of minor children to receive email or text messages may not be enforceable
- CASL prescribes significant monetary penalties of up to \$10,000,000 for violations

## 4. Intellectual Property Issues

- Protecting intellectual property (“IP”):

→ There are different types of IP, but the primary focus for virtual fundraising is on trademarks and copyrights

→ 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

→ Churches and charities need to be pro-active in protecting their marks

→ Trademark registration of the brand can protect against poaching of a Charity’s brand



- Registration of a corporate name or business name does not by itself give trademark protection
- Ensure marks are properly used on website or social media e.g. train staff on proper usage, proper markings, and consistent usage, such as ™ or ®
- Need to secure and identify ownership of Copyright (see presentation by Sepal Bonni)
- Ensure IP of others is not infringed
  - The internet and 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

## 5. Issues with Using Third-Party Platforms

- Third-party platforms, including social media or crowdfunding, are governed by their own “take-it-or-leave-it” Terms and Conditions
- These one-sided Terms and Conditions generally cover:
  - Collection, use and storage of personal information, including pictures, videos and financial information
  - Use and ownership by the provider of IP
  - Liability for representations made by the campaigner, and the exclusion the platform’s liability
  - Governing law and jurisdiction in case of a dispute
  - Refunds and withdrawal of funds from an account
  - Service fees as a percentage of each donation
  - Assignment of contract by platform to a third party



- Before accepting the Terms and Conditions of a third party platform, churches and charities should consider:
  - Is the provider complying with applicable privacy legislation to which the charity is subject with regard to the personal information of donors and volunteers ?
  - Who owns the donor’s information?
  - Can the provider send communications to donors on behalf of the church or charity?
  - Can fundraising be done without charity consent
  - Is the IP being used or shared on the platform protected?
  - What is the governing law and jurisdiction applicable in case of a dispute with the third party provider?
  - What are the rules with regard to refunds, withdrawals, fees, pre-authorized recurring donations?

## 6. CRA Regulatory Issues

- CRA will review online content, including sites to which a charity links, to see if content accords with the info provided in an application for charitable status
- Possible considerations by CRA as the regulator:

Does online fundraising promote programs outside of the stated charitable purposes of the charity?

Does the charity’s online fundraising provide a link to, and by implication agree or endorse, problematic materials or prohibited activities? e.g. partisan political activities

Does a virtual fundraising campaign direct gifts to a specific person as an undue private benefit?



Canada Revenue Agency

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## 7. Fundraising Through Influencer Marketing

- Influencer marketing falls under the scope of the *Competition Act*, which prohibits false and misleading advertising, and failure to disclose material information
- On January 13, 2020, the Competition Bureau published new guidance for influencers to provide adequate disclosures when they are being paid by advertisers (which can include charities)
  - These disclosures need to be as clear as possible and contextually adequate
- Additionally, *Ad Standards*’ published “Disclosure Guidelines”, which were last updated in January 2019, 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 any compensation given to an influencer

## 8. Cryptocurrency Donations

- Cryptocurrencies are virtual currencies that use distributed ledger technology (e.g. Blockchain networks) to facilitate payments without financial intermediaries, and for transparency, such as to trace donations and the beneficiaries involved, increasing donor confidence
- Receipting issues:
  - They are considered a commodity for income tax purposes (not “money” or “currency”) (see CRA’s “Guide for cryptocurrency users and tax professionals”, June 27, 2019)
  - Donations in cryptocurrencies are, therefore, subject to the rules for gifts-in-kind, and determination of fair market value (“FMV”) on the date of the donation is necessary for receipting purposes, including the deemed fair market value rule

- Mining cryptocurrencies by a charity, either directly or through a pooled fund, might not meet the “prudent investor standard” or, alternatively, may not constitute a permitted “related business”
- Initial Coin Offerings (“ICOs”), which involve the charity creating its own cryptocurrency may be subject to provincial securities legislation
- Cybersecurity issues:

→ Possible increased risk of hacking and real world crime (extortion and violence)

→ Costly mistakes if incorrect transfer because transactions are not reversible

→ Potential greater exposure of director and officer liability for possible mismanagement of assets

## D. WHAT CAN BE DONE TO MANAGE THE ISSUES?

- In order to help understand and minimize the legal risks associated with fundraising in a virtual world, some policies and practices that a church or charity may want to implement include, amongst others:

A Privacy Policy

A CASL Compliance Policy

An Intellectual Property Policy

A Social Media Policy

An Online Fundraising Policy

- These policies should be approved by the board of directors of a church or charity and reviewed on a regular basis