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**THE OTTAWA REGION  
Charity & Not-for-Profit Law Seminar**

**Ottawa – February 16, 2011**

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**Social Media: An Emerging Issue  
in the Work Place**

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**By Barry W. Kwasniewski, B.A., LL.B.**

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**Social Media: An Emerging Issue  
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**A. Social Media: What is it?**

- An online social structure made up of individuals and/or organizations that are tied by one or more specific type of interdependency, such as values, visions, ideas, financial exchange, friendship, business operations, professional exchange, etc.
- Social networking sites provide users with the ability to upload profiles, post comments, join 'networks' and add 'friends'
- Used both personally (to reconnect with old friends and classmates) and professionally (to search for employment opportunities or collaborate with colleagues)
- Some social networking site profiles can only be accessed by invitation, while others are open to anyone in the general public
- Examples: Facebook, LinkedIn, Twitter, personal blogs, etc

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**B. Facebook**

- Launched in 2004 in a Harvard dorm room by Mark Zuckerberg
- Most popular social networking site in North America
- There are users in over 170 countries (10.6 million in Canada)
- Allows users to connect with friends, family, and colleagues to share information about their personal and work lives
- There are more than 500 million active users
- 50% of active users log onto Facebook in any given day
- The average user has 130 friends
- People spend over 700 billion minutes per month on Facebook
- More than 70 translations are available on the website
- About 70% of Facebook users are outside of the United States

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**C. LinkedIn**

- World's largest 'professional' network officially founded in 2003
- Membership has grown from 4,500 members in its first week to over 85 millions users in 200 countries
- Sometimes called 'Facebook for professionals'
- Members include Executives from all Fortune 500 companies
- Connects members and allows them to exchange ideas and opportunities with a broad range of professionals, through networking and establishing and maintaining connections
- Profiles focus on education and business experiences

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**D. Twitter/Personal blogging**

- Twitter was launched in 2006 and has grown to 175 million users
- A real-time information network that allows users to send and read messages called 'tweets', which connect users to the hot topics that others are sharing and discussing
- "TWEETS": can be up to 140 characters in length; small bursts of information that are displayed on the user's profile
- Users can choose to 'tweet' or simply contribute to or read other users' posts
- 95 million 'tweets' are written per day

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**E. Potential Benefits of Social Media Use by Employees/Employers**

- Allows information to be shared more quickly and with a wider audience
- Improves efficiency through the spread of low cost marketing messages
- Is an effective tool for research and communication
- Can be used before hiring new employees, or as a recruitment method
- Aids collaboration within the business amongst employees, and creates a more collegial environment
- Strengthens relationships with clients/customers
- Allows easier access for consumers, clients and the general public to information
- Allows employers to keep up to date with current developments in their area of expertise
- Can help to enhance a professional's online reputation

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**F. Social Media and the Law**

- There have been several decisions in recent years where postings on social networking sites have become relevant in the courts
- Recent Ontario Superior Court of Justice decision found that postings on a Facebook profile constitute 'data and information in electronic form' producible as 'documents' within the meaning of the Ontario Rules of Civil Procedure such that this online personal information may have to be produced as evidence in some cases (*Leduc v. Roman [2009] O.J. No. 681*)

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- Regardless of the privacy settings of a Facebook user, both private and public profiles are obliged to be identified if there are any postings relevant to the matter in issue
- In a recent decision of the Tax Court of Canada, (*Shonn's Makeovers & Spa v. Canada (M.N.R.) [2010] T.C.J. No. 415 October 2010*) a Facebook profile was used as evidence to prove that a person working at the Appellant's spa was in fact self-employed and not an employee of the spa
- The fact that this person had voluntarily described himself as 'self-employed' on his Facebook page led the judge to regard this as evidence as probative on the issue as to whether the person was an employee or not

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- An appeal of a decision of the British Columbia Court of Appeal will soon be released by the Supreme Court of Canada (*Crookes v. Newton 2009 BCCA 392*)
- In this decision, the defendant linked to the content of an allegedly defamatory article about the plaintiff from his website, but did not reproduce the contents of the article or comment on it in any way
- The defendant was not held liable for linking to the defamatory article
- Reasoning of the court:
  - Mere hyperlinking does not give rise to a presumption of publication
  - The hyperlinking did not encourage the reader to follow the link
  - The amount of hits to a website is an insufficient basis for inferring that users followed the hyperlink provided

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- Implications of the decision
  - The SCC now has the opportunity to clarify and determine the nature and scope of liability for hyperlinking to third party content
  - Could have a chilling effect on Internet speech and bloggers since it is still possible (depending on the circumstances) that someone providing hyperlinks to third party content could be liable for defamation

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- Other relevant appeals being heard in the SCC this year include *Black v. Breeden 2010 ONCA 547*, which discussed postings on a company's website (including press releases and reports) that were potentially defamatory to the plaintiff Conrad Black
- The Ontario Court of Appeal ruled that the Ontario Court had jurisdiction to hear several defamation actions launched by Conrad Black, regarding allegedly defamatory statements which appeared on the Hollinger International website
- Hollinger is an Illinois-based corporation, and until January 2004, Conrad Black was its Chairman

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**G. Why Social Media is Relevant in the Employment Context**

- The lines between personal and professional life have been blurred
- A recent survey (found at [http://www.deloitte.com/view/en\\_US/us/About/Ethics-Independence/8aa3cb51ed812210VgnVCM100000ba42f00aRCRD.htm](http://www.deloitte.com/view/en_US/us/About/Ethics-Independence/8aa3cb51ed812210VgnVCM100000ba42f00aRCRD.htm)) by Deloitte LLP found most executives believe they have a right to know how employees portray themselves and the company online
- However, 63 percent of 18-to-34-year-olds surveyed do not believe their social networking pages are any of the employer's business

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- The survey also found that employees have a clear understanding of the risks involved in using social networks, yet nearly a third of respondents did not worry about what their boss or customers might think before posting
- The growth of social networks has increased the potential risks to a company's reputation since so many customers are now using these sites to assess an organization, hence the need for regulations/policies to guide employees in their social media use

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**H. Potential Risks of Social Media Use by Employees**

- Many employees have the false impression that their personal social network pages and blogs are protected from public viewing, but this is often not the case
- Many employees do not consider the ethical consequences of what they post online in terms of their individual reputation and the reputation of their employer
- One single posting of a video, picture, thought or experience can damage a company's reputation

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- Other risks
  - Degree of employee time being wasted on these sites could amount to theft of an employer's time
  - An employee may reveal confidential or proprietary information either intentionally or inadvertently
  - Employers and employees may be subject to harassment or discrimination complaints if employees post anything offensive about fellow employees/employers
  - Information and communication on these sites can now be used as evidence in litigation

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**I. Improper Social Media Use Can Result in Termination for Cause (Examples in the Case Law)**

- In the case of *EV Logistics v. Retain Wholesale Union, Local 580 [2008] B.C.C.A.A. No. 22*, the grievor was discharged by the employer as a result of the contents of a blog that was created (many comments on this blog were of a racist nature). The employer felt the views and the content expressed on the website and the association of those views with the employer's identity made the employee unsuitable for continuing employment
- Even though the blogging was done outside of employment hours, the arbitrator held that there was a connection between the blogging activities of the grievor and the legitimate business interests of the employer, in that it adversely impacted that employer

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- Despite these findings the arbitrator ruled that termination was an excessive response, and ordered the employee to be reinstated
- In a case dealing with a breach of confidentiality of information (*Chatham-Kent v. National Automobile, Aerospace, Transportation and General Workers Union of Canada [2007] O.L.A.A. No. 135*), the employer discovered that an employee, who was a personal care-giver at a home for the aged, had created a website accessible to the general public that published resident information and pictures, and made inappropriate comments about residents
- The employee was terminated on the grounds of breach of confidentiality and making inappropriate remarks about management

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- Given the nature and extent of the misconduct, the arbitrator upheld the decision to terminate
- In *Wasaya Airways LP v. Air Line Pilots Assn., International [2010] C.L.A.D. No. 297 May 12, 2010*, the employee posted comments on his Facebook page that publicly degraded and belittled the customers and the company. His employment was terminated
- The company's concerns about the potential harm to its reputation and its ability to carry out business as a result of the comments were found to be substantial and warranted
- Outcome of the decision: regardless of the fact that these statements were made off-duty, they created potential harm to the company's reputation and its ability to efficiently manage its business, so the termination was upheld

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- In the case of *Alberta v. Alberta Union of Provincial Employees [2008] A.G.A.A. No. 20*, the grievor was dismissed after the employer became aware of the contents of her personal blogging site, which contained unflattering comments about co-workers and management
- Outcome of the decision: the Board denied the grievance on the basis that the comments on her blog were considered serious misconduct that irreparably severed the employment relationship and justified discharge
- The most recent case dealing with social media in the employment context is *Lougheed Imports Ltd. [2010] B.C.L.R.B.D. No. 190*

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- In this case, an unhappy employee posted negative and demeaning comments on their Facebook page about the company and its management
- Outcome of the decision: the comments were proper cause for termination of the employee
- This decision confirmed that an employee should not have a serious expectation of privacy for these kind of postings

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**J. Regulating Social Media Use: What Can Employers Do?**

- If an employer decides to ban the use of social media in the workplace completely:
  - Block access to all forms of social media on work devices during work hours, and restrict use to only non-work hours on non-work devices
  - Prohibit discussions of work, discussions of other employees, and the identification of the employer when using social media outside of work hours
  - Be sure to set out the social media restrictions for employees in a written policy and make sure these policies are communicated to employees

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- If an employer decides to allow access to social media in the workplace:
  - Encourage the use of social media in the workplace for business purposes only
  - Manage expectations by designing a social media policy that reflects the employer's expectations in terms of social media use at work, as well as outside of the office
  - Encourage the ethical use of social media inside and outside of the office
  - Stay informed and up to date with any changes in the law

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**K. Social Media Policies: To Ban or Not to Ban?**

- Many companies have a complete ban on employee access to social networking sites, while others encourage the use of it for business development
- Drawbacks of a complete ban:
  - Employees may continue using social media through other 'back door' methods, so the actions an employer takes to completely ban social media may be unproductive and unrealistic
  - May imply that employers do not trust employees to practice responsible social media use and damage morale
  - A policy that does not fit the actual needs/circumstances of the company may be ignored and end up doing more harm than good

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- Suggestions to consider before creating a policy:
  - Start with some form of survey or assessment of current social networking practices within the organization and the needs of the organization going forward
  - Focus on the fundamental framework and guiding principles behind an anticipated social media policy for the organization
  - Involve all departments, so their various concerns can be addressed in a social media policy

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**L. Social Media Policies: Guidelines for Employers**

- Keep in mind that there is no 'one size fits all' social media policy; it will need to be adapted to fit the needs of the organization and its employees
- Potential topics to include in a policy:
  - Explain what social media is and what the policy covers
  - Remind employees of the nature of social media (risks involved, public nature of postings, etc)
  - Include prohibitions on speaking on behalf of the employer
  - Consider including specific provisions regarding the use of social media in a business capacity –what are 'appropriate business purposes'?

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- If the employer will be monitoring employee use of social media at work, disclose this
- Include restrictions on the use of social media outside of work hours
- Clearly define the amount of access an employee is allowed during work hours/on work devices
- Include prohibitions on disclosure of the employer's confidential, trade secret or proprietary information
- Encourage the use of disclaimers for information that an employee writes to ensure it is clear that it is their personal opinion, and not that of the company
- Provide general instructions that employees use good judgment and take personal and professional responsibility for what they decide to publish online

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- Advise of the consequences of breaching the policy/How it will be enforced
- Provide covenants about confidentiality and the repercussions of divulging this kind of information
- Provide definitions of any social media terminology – ensure that employees are not using social media unless they really understand how it works
- Outline the restricted behaviours, such as posting work-related information that would compromise the business practices of an organization, engaging in any form of harassment or racist/derogatory remarks, and/or violating copyright or trademark laws

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