



STAYING AHEAD OF THE CURVE
BULL HOUSSER 'S ANNUAL SEMINAR FOR CHARITIES AND NOT-FOR-PROFITS

Monday • October 24, 2016



PRESENTERS

Margaret Mason

Taryn Mackie

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Michael Blatchford (Moderator)



Charities and Non-Profit Organizations: The State of the Sector

- in force November 28, 2016
- opportunity to refresh or update governance, bylaws

- membership issues
 - membership structure and classes
 - new membership rights
 - > notice of meetings
 - > member proposals
 - > oppression action
 - > access to documents

- transparency
 - public access to financial statements
 - disclosure of remuneration to directors and certain employees/contractors
- senior managers
- member funded status

Political Activities and CRA

- since about 2009 political activities has been a hot-button issue for registered charities
- new administrative rules, disclosure and reporting, CRA audits and proposed sanctions
- JT included promises of “sunnier ways” by the CRA relating to charities
- some hope that this is forthcoming

Political Activities (cont.)

- **PM mandate letter:**
- Minister of Finance to “work with the Minister of National Revenue to allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and non-for-profit sectors. This will include clarifying the rules governing ‘political activity’.”
- audit project winding down. No new audits, but existing audits to continue until resolved

Political Activities Public Consultation

- September 27- Minister announced consultation on political activities
- charities “key players” in Canadian society whose input is welcomed by the federal government. In a statement, the Canada Revenue Agency said it is “important that charities be allowed to bring their vast experience” to the public forum. (Minister of National revenue)

Political Activities cont.

- 3 consultation areas for public input
 - carrying out political activities
 - clarity of current guidance
 - future policy development
- e-mail comments to consultation-policy-politique@cra-arc.gc.ca
- All comments are requested by November 25, 2016.

CRA Changing of the Guard

- new Director General as of July 25
 - Tony Marconi
 - federal government since 1988
 - most recently Director General of the Collections Directorate of CRA
- several other senior positions changed in past year

Tax Issues with Social Enterprise

- social enterprise continues to be hot
- correct structuring is key
 - different rules for non-profits and registered charities
- lack of compliance can result in loss of tax-exempt status

Bull Housser's merger with Norton Rose Fulbright

- effective January 1, 2017
 - yes – we are changing the name
 - same team available to assist clients
 - new resources for issues outside BC





The (Inter)Net Result – Managing Social Media Use in the Workplace



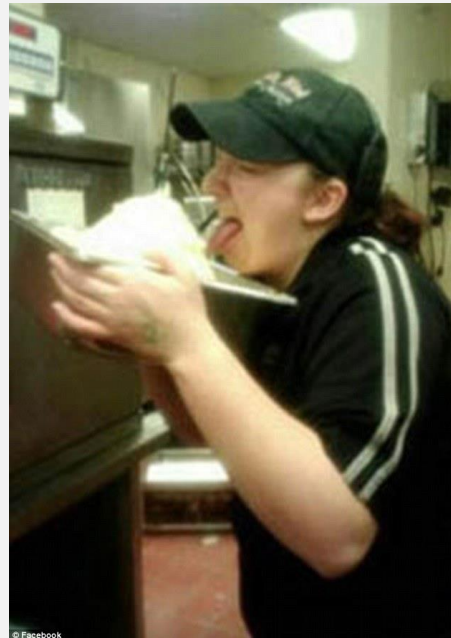
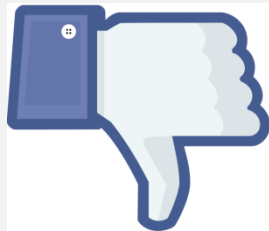
Taryn Mackie

October 24, 2016

Workplace Social Media Headlines...

“KFC Employee Fired After Mashed Potato-Licking Photos Hit Facebook”

- Employee posts a pic on Facebook of her licking a tub of mashed potatoes
- KFC fires the “potato licker” and the amateur photographer



Workplace Social Media Headlines...



Live, from the Termination Room



What's Being "Posted": Social Media Statistics...

The news headlines and examples are not surprising given the 2013 statistics:

- 1 out of 3 Canadians surveyed reported to checking their social media feeds at least once per day;
- 63% of internet users, and 93% of social media users have a Facebook page; and
- Nearly 7 out of 10 Canadians surveyed identified themselves as regular users of social media generally

Source: Media Technology Monitor



The (Inter)Net Result....

- Social media use, and misuse, significantly affects today's workplace and raises a number of questions for employers, including:
 - **Can I use a social media background check?**
 - **When is off-duty social media use by an employee disciplinable?**
 - **Do I need a workplace social media policy, and, if so, what are the best practices?**

Social Media & Background Checks

- **Two legal factors** should guide your way:
 - **Human Rights Legislation**
 - > **Prohibits** discrimination on a number of grounds.
 - **Privacy Legislation**
 - > **Restricts** the **collection** of personal information to what a reasonable person would consider appropriate in the circumstances, **regardless of whether you had consent.**
- **Meaning: (a) Be reasonable with your search/check; and, (b) know you may not be able to make a hiring decision based on what you find in social media**

Social Media & Background Checks

- October 2011 - BC's Privacy Commissioner **published guidelines for organizations and public bodies using social media sites for background checks** of prospective employees, volunteers and candidates
- Guidelines are not, strictly speaking, binding...but...
- Employers in BC are still expected to act **reasonably**, and following guidelines generally part of that expectation

BC Privacy Commissioner Guidelines...

- Recommend employers conduct a **privacy impact assessment**, including:
 - **Identify the purposes** for collecting personal info via social media;
 - Determine **whether the purposes are valid, justifiable and authorized** by privacy or human rights legislation;
 - **Consider other, less intrusive measures** to fulfill your purposes;
 - **Identify risks** (e.g. over collecting or collecting inaccurate info) and put plan together to **minimize risk**;
 - **Provide notice** to individuals you may check what's publically available
- Remember individuals **can complain** to Privacy Commissioner...

Making Sense of Social Media Checks...

- The governing test will always be reasonableness
- Always remember W.W.W.:
 - Why am I accessing this social media site?
 - What am I doing with the information that I collect from this site (purpose and retention)?
 - Where have I notified candidates I will be “Googling”?
- As social media checks become more common, so too will challenges to an employer’s reasonableness
 - Therefore, be ready to respond to human rights and privacy allegations. **Show you are the reasonable employer!**

Social Media & Misconduct

- Several categories of misconduct, including:
 - Improper use of company time and equipment
 - > Including “stealing time” or “fraudulent sick leave”
 - Harassment (both personal harassment and discriminatory harassment)
 - Insolent or insubordinate behaviour
 - Breach of confidentiality
 - Cyber-bullying
 - Defamation



Basic Employment Principles Still Apply to Cyberspace

- Employees owe **duties** of **loyalty**, **fidelity**, and **confidentiality** to their employer
- Social media activities in breach of those duties are grounds for discipline up to and including termination of employment
- The fact the misconduct was done on the employee's personal time and/or using the employee's personal computer or equipment is **no excuse**

The Line...When off-Duty Conduct Becomes a Workplace Issue...

- Employers generally cannot regulate what employees do **off-duty**, on their own time... BUT...
- Canadian Courts and arbitrators have consistently found that off-duty conduct becomes a workplace issue if:
 - (a) There is “...a real and material connection to the workplace”; and,
 - (b) Employer suffers some kind of harm.

When off-Duty Conduct Becomes a Workplace Issue...

- Links to an employer can be made through social media in many ways, including:
 - > Profile listing the **employer's name or logo**

The screenshot shows a Facebook group profile for "I Work(ed) at McDonald's and I Hate(ed) it!". The group is categorized as "Business - Employment & Work". The description reads: "This is for all of you people who, like me, are working (or have worked) at McDonald's and HATE(D) it! Also, feel free to complain about your job as much as you want. We're all here for eachother." A red prohibition sign is overlaid on the McDonald's logo in the group's cover photo. The group is set to "Global" and is an open group where anyone can join and invite others.

When off-Duty Conduct Becomes a Workplace Issue...

- Links to an employer can be made through social media in many ways, including:
 - > Postings that include employer identifiers



Sunith Baheerathan @Sunith_DB8R

Any dealers in Vaughan wanna make a 20sac chop? Come to Keele/Langstaff Mr. Lube, need a spliff or two to help me last this open to close.

[Details](#)

- NOTE ALSO, postings can be from the “page owner” or from “friends” that identify owner’s employer

When off-Duty Conduct Becomes a Workplace Issue...

- Links to an employer can be made through social media in many ways, including:
 - Pictures showing signage, uniforms, product, etc.



When off-Duty Conduct Becomes a Workplace Issue...

- Other forms of “harm” an Employer can suffer include:
 - Variety of consequences of Cyber-bullying
 - > WorkSafeBC obligates employers to prevent workplace bullying and harassment
 - > Increased workers’ compensation claims under Bill 14
 - > “Poisonous workplace” could lead to constructive dismissal
 - > Cyber-bullying Case Example:
 - > Falsely accusing an employee of “stealing her job” and cyber-bullying: ***Re Walder, [2010] B.C.E.S.T.D. No. 113***

Cases from the Trenches...

- Calling the employer a “crook” and a “scumbag”, and recommending Facebook friends go to the competitor:
Lougheed Imports
- Posting confidential information: ***Chatham-Kent; Credit Valley Hospital***
- Posting about creating supervisor voodoo dolls and “lovin’ my indefinite suspension”:
Canada Post Corp.
- Posting racist comments on Facebook:
Moreno v. Kulczycki
- Derogatory postings about employer and their primary client group (First Nations):
Wasaya Airways

Effective Social Media Policies

- Reminds employees that employment duties and **all** policies still apply to social media use.
- Employees:
 - > **Must adhere to all policies** (Codes of Conduct, Conflict of Interest, Respectful Workplace etc.)
 - > **Are responsible** for use and for content on their page, profile etc.
 - > Social networking **not on work time** or on work computers unless required for the job (OR **set personal use boundaries** that fit your workplace)

Effective Social Media Policies

- > Should be reminded that social media is **rarely** “**private**”
- > **Employers may monitor** work equipment (e.g. computer, device, etc.) or internet activity (with appropriate “forewarning policy”)
- > Should not disclose **confidential** or **personal** information unless required to do so as part of job and appropriate protections are in place

Effective Social Media Policies

- > Should not, expressly or impliedly, say that they are **representing** the Employer (unless they have an obligation to do so);
- > May be **disciplined** (including having their employment terminated for just cause) for breaching the policy
- > Should sign an **acknowledgement** form indicating that they have read, understand, and agree to comply with the policy

Effective Social Media Policies

- Be clear on **who can “speak”, “tweet”, “post” etc.** on behalf of the employer
- ALSO, ensure clear controls on:
 - > Who has access to employer social media accounts
 - > Ensure organization is “password administrator”
- Carefully consider procedures for **securing** social media accounts before terminating employees who have access

Social Media is Not *all* Bad

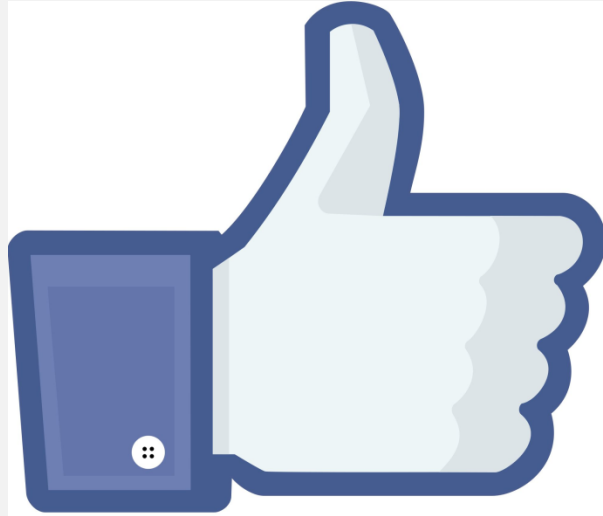
- Social Media can be a very useful tool for:
 - > Recruitment
 - > Communication with employees (e.g. scheduling)
 - > Workplace investigations
 - > Remember to **print** or **capture screenshot**



Final Thoughts on Social Media

- What's uploaded or posted is typically:
 - > Permanent (even if supposedly deleted)
 - > Search-able
 - > Spread-able (re-tweet, re-post, forwarded...)
 - > Revive-able (can be re-ignited, spun or popularized)
- We should all **keep this in mind** AND make sure this is **ALSO top of mind for our employees**

Any Questions?





Transitioning to the new Societies Act: How and When?



Bryan Millman

October 24, 2016

New legislation approaching...

- *Societies Act* will come into force on:
 - **November 28, 2016**
- applies to all societies **as of that date**
 - five sections deferred until November 28, 2018
- 2 year “transition” period to follow date of proclamation
 - transition not related to application of new rules
 - refers to re-registration of information
- How to prepare?

Prepare to “onboard”

- societies must “*onboard*” before “*transition*”
 - “*onboarding*” means the BC Corporate Registry’s process for a society to create and log into its own account on the new online filing system

- Each society must:
 - receive a letter from BC Corporate Registry containing:
 - > a website address to access the online Transition Application
 - > a KEY *unique* for each society
 - obtain a BCeID to login to the URL
- once onboarding complete, can link other BCeIDs to a society's account
 - *Caution:* unlink BCeIDs of persons no longer associated with society

- Transition Application completed online
 - type or cut-paste and file:
 - > constitution (new form)
 - > bylaws that contain
 - > pre-transition bylaws
 - > other clauses from constitution, incl. unalterable
 - > reporting society provisions (if applicable)
 - > notice of current directors and registered address

Transition (cont.)

- failure to transition may result in dissolution after November 28, 2016
- member approval not required to transition unless:
 - > seeking member funded society status, or
 - > amending bylaws as part of transition
- board approval recommended

What to do now?

- consolidate bylaws into one electronic document
- confirm society's registered address is correct
- ensure all annual maintenance filings up to date
 - ex. changes in directors, annual reports, fees, and any unfiled special resolutions
- decide who will be responsible to onboard and transition society

What to do now? (cont.)

- decide when to transition and if you want/need to amend your bylaws and/or constitution
 - **important - current bylaws “of no effect” if non-compliant with new legislation**
- **3 options**
 - > current bylaws compliant – no changes required (unlikely)
 - > amend bylaws at transition
 - > approve before transition on November 28, 2016 and hold for filing
 - > amend a.s.a.p. after transition (some risk)

- BC Corporate Registry's website on the new Societies Act:
 - <http://www2.gov.bc.ca/gov/content/employment-business/business/not-for-profit-organizations/societies/new-societies-act>
- BCeID:
 - <https://www.bceid.ca/register/>

Questions



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Dealing with Donors: How Much is Too Much?

- defining the problem
- technical issues
- permissible restrictions
- failure of purpose and cy-pres
- solutions

Defining the Problem

- individual donors who place unacceptable or inappropriate demands on a charity
- charities unable to determine and hold the line in a principled way
 - mission creep
 - expense and potential for turmoil

The Problem in Context

- donors who
 - want to fund only their pet project
 - want to really buy a goat
 - want to control charity operations
 - want detailed financial reporting that is time consuming and requires special procedures
 - are dismissive of expertise of those running charitable programs

The Problem (cont.)

- charities can be their own worst enemy
 - allowing donors to dictate operational matters
 - agreeing to restrictions or reporting that can't be easily incorporated into operations
 - fundraising campaigns that create unreasonable expectations
 - poor documentation which limits flexibility
 - blinded by the funds on offer

How does it go wrong?

- demand for return of funds
- demand for distribution of funds to another entity
- breach of pledge
- negative publicity

How does it go wrong? (cont.)

- steps taken to damage charity and its credibility
- “proxy” war
- steps taken to sour relationships with other donors
- reports to regulators
- can be very costly

What do Donors Want?

- a spectrum:
 - to be thanked
 - external/formal recognition
 - results
 - detailed reporting on results
 - consultation on program delivery and results
 - involvement in program delivery
 - consent/approval to be sought for certain actions
 - to be appointed to the board

What Can be Receipted?

- to be receiptable under the *Income Tax Act*:
 - must be a gift
 - must be property

- what is a gift?
 - a voluntary transfer without consideration (common law)
 - combined gift and sale may be receipted (*Income Tax Act* s. 248(30) – (33) split receipting rules)

What is Not a Gift?

- a gift/contribution of time, skill or effort
- a contribution made pursuant to a legal obligation
 - municipality provides incentive to developer if developer makes charitable contribution
 - charitable contribution required as part of sentencing in a criminal conviction
- a gift subject to certain restrictions that inhibit a charity from freely using the funds

What is Not a Gift? (cont.)

- an admission or membership fee
- funds contributed with the intention that they be directed or given to a particular family or person
 - churches and refugee families
 - scholarships

Donor Advised Funds

- a donor advised fund is:
 - typically a named fund created inside an existing charity
 - terms of the fund are set in a Deed of Gift
 - marketed/intended as a private foundation “substitute”
 - charity agrees to receive ongoing grant recommendations from the donor
 - charity may agree to receive investment recommendations from donor

Common DAF Issues

- originating documentation is poor and suggests that donor has the ability to *direct* the charity
- donor misapprehends the relationship
- charity misapprehends the relationship
- documentation concerning grants and investments appears to factually support a situation where the donor is deciding on the grants/investments, not the charity

- what are permissible restrictions?
 - purpose
 - > kidney research
 - > for the construction of a new church
 - > bursaries for mature students
 - geography
 - > in BC
 - > in the DTES

Restrictions (cont.)

- what is not permissible (all in the drafting)?
 - with respect to donated property (shares/real property)
 - > cannot sell without my consent
 - > can only sell to certain individuals
 - conditions precedent or subsequent requiring return of donated funds in certain scenarios
 - > gift is valid at common law
 - > cannot be receipted under *Income Tax Act*

- what is not permissible? (cont.)
 - creation of Human Rights Code issue
 - consent of donor to be sought prior to a program being terminated

Failure of Purpose / Cy-Pres

- frequently a drafting issue
 - purpose is too narrow
 - no amending provision in gift documentation
- if the restriction is tight, greater chance of failure
- *Re Mulgrave School Foundation (2015)*
 - confounding result

Failure of Purpose / Cy-Pres

- failure of object of capital campaign either because of insufficient funds raised or change in circumstances
 - to preserve an historic building
 - to build a new church
 - to purchase an MRI unit

Failure of Purpose / Cy-Pres

- profound wish that all capital campaign literature would provide for an alternate purpose if the original purpose cannot be achieved – otherwise funds must be returned
- returning funds
 - complex
 - embarrassing
 - sometimes impossible

- deed of gift v. agreement
 - clear statement of purpose
 - “pour over” purpose in the event of failure/completion of original purpose
 - broad amendment clause
 - > include personal representative as potential signatory
 - clarity with respect to what is distributable from the fund (interest, dividends, realized gains)

- donor advised fund deeds
 - grant *recommendations* only
 - clear process with respect to how recommendations are made
 - > forms
 - > timing
 - > internal process of receiving, evaluating and then acting on recommendations – and document it
 - successor advisors

Secondary Solution – Control Donor Expectations

- takes resolve
- clear internal policy direction
- leadership from board
- leadership from senior management

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