

The author discusses accessing both “public” and “private” profiles. She gives advice on what should be done if a Facebook profile is deleted before production. Vrebosch makes the following suggestions:

1. Conduct an Internet search for the user. An Internet search will pull up the user’s friends’ profiles, as well as the user. Note any networks that the user is associated with.
2. Conduct a Facebook search for the user and any associated family members or friends.
3. If the user profile is public, consider the ruling in *Knight v. Barrett*,⁷ where defendant’s counsel was ordered to disclose the origin of the material to the plaintiff.
4. If the user profile is private, or has limited access, try a Facebook search within the user’s network.
5. On discovery, examine the user to determine whether the content of the profile is relevant to the action.
6. If a profile was not found, consider the possibility that the profile is hidden. In this case, ask the user on discovery whether or not they have a Facebook profile.
7. Content on the site should be listed in a Supplementary Affidavit of Documents, if not in the original Affidavit of Documents. Plaintiff’s counsel has a duty “to explain to the client, in appropriate cases, that documents posted on the party’s Facebook profile may be relevant to allegations made in the pleadings.” If the content is not listed in the Affidavit of Documents, request a Supplementary Affidavit of Documents listing the Facebook profile contents.⁸

Where a Facebook profile is “private”, it is important for a party seeking access to

the profile to take all available steps to demonstrate that the profile exists, and that it likely contains information relevant to the lawsuit.

In *Leduc v. Roman*, *supra*,⁹ Justice Brown held that where a party maintains a private or limited-access Facebook profile, it stands in no different position than one who sets up a publicly available profile. Both are obliged to identify and produce any postings that relate to any matter at issue in an action. Justice Brown noted that mere proof of the existence of a Facebook site would not entitle a party to gain access to all of the material placed on that site. Some material on the profile might be relevant to the action, some might not. The level of proof required to show that the information may be relevant must take into account the fact that one party has access to the documents and the other party does not. A defendant will normally have the opportunity to ask about the existence and content of a Facebook profile during the examination for discovery, and where the answers reveal that the Facebook page may contain relevant content, a court can order that those portions be produced.

In the most recent Ontario case dealing with the production of Facebook profiles, *Wice v. Dominion of Canada General Insurance Company*,¹⁰ the defendant was able to establish to the satisfaction of the court that the plaintiff had a Facebook profile, and that profile included photographs depicting his participation in social activities. The plaintiff was ordered to produce a further and better affidavit of documents, and the defendant was given leave to cross-examine on that affidavit.

Rules issues

Additional advice to the profession is given by Pamela D. Pengelley, B.Sc., LL.B., LL.M., in an article entitled Facebook

Litigation Grows published at the *Canadian Insurance* magazine website.¹¹

Pengelley writes that lawyers’ rules of professional conduct strictly prohibit them from making direct contact with parties who are represented by counsel, and this includes contact by way of Facebook. It would be a breach of a lawyer’s duties of honesty and candour to create a false profile in an attempt to elicit information from another party’s private Facebook profile. Attempts to elicit Facebook information through surreptitious means would be looked upon unfavourably by a court and may constitute a breach of Facebook’s Terms of Use.

In *Knight v. Barrett*, *supra*, it was unclear how a defendant had obtained information from the plaintiff’s private Facebook profile, so the court ordered the party who had obtained this information to include it in their affidavit of documents, and allow cross-examination on that affidavit so that it could be determined how they obtained the information. It was not appropriate for the defendants to seek to ambush the plaintiff with his or her Facebook page.

Pengelley also makes the point that Facebook pages are dynamic – where relevant material is discovered, the material needs to be preserved. Web pages should be downloaded, saved and dated. High-quality colour copies of these pages should be printed out for future use.

Facebook and other online social networking sites may furnish a gold mine of information to counsel diligent enough to seek it out. Counsel must not, however, lose sight of their ethical obligations in accessing, or protecting a client from, information contained on these sites.

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1 2009 CanLII 40313 (ON.S.C.)

2 2009 BCSC 893 (CanLII)

3 *Terry v. Mulowney*, [2009] N.J. No. 86 (S.C.(T.D.)).

4 *Bagabas v. Atwal* [2009] B.C.J. No. 758 (Sup.Ct.); *Kourtesis v. Joris*, [2007] O.J. No. 5539 (S.C.J.); *Goodridge (Litigation guardian of) v. King*, [2007] O.J. No. 4611 (S.C.J.); *Cikojevic v. Timm*, [2008] B.C.J. No. 72 (Sup.Ct.)

5 2009 BCSC 1308 (CanLII)

6 http://www.pmlaw.com/pmlaw_pdfs/Facebook.pdf

7 [2008] N.B.J. No. 102 (Q.B.(T.D.)),

8 *Leduc v. Roman*, [2009] O.J. No. 681 (S.C. J.) para 28.

9 [2009] O.J. No. 681 (S.C.J.)

10 2009 CanLII 36310 (ON S.C.)

11 http://www.cdnews.com/claimsandlegal/claimsandlegal_080909_05.html