

Litigation and online social networking sites

The law has finally noticed that tens of millions of people – many young, some not so young – participate in online social networking sites such as Facebook, MySpace, and Twitter.

Anyone with an incentive to dig can obtain a wealth of information about the participants in these networking sites. The courts now recognize that relevant information about litigants and the lawsuits they bring may be obtained in this way.

On a number of occasions, courts have ordered litigants to produce information from their Facebook profiles, or have allowed the police access to them. Some of these cases are tragic, for instance *R. v. Todorovic*.¹ After the female defendant was convicted of arranging to have her boyfriend stab a young woman to death, the court was obliged to consider whether the defendant should be sentenced as an adult. The sentencing judge referred to the large volume of communications about murdering the young woman between the defendant and her boyfriend through text messages and through Facebook. Facebook helped to prove that the murder was extensively discussed and planned in advance.

On a lighter note, British solicitor Donal Blaney found out that an imposter was sending out tweets in his name. Blaney obtained an injunction from the British High court on October 1 ordering the tweeter to stop posting, and to immediately identify him or herself. The court ordered that the injunction be served on the imposter via Twitter.

Facebook and MySpace are cropping up in the context of more mundane litigation, especially personal injury actions. It has come to the attention of defence counsel that plaintiffs sometimes post photographs on Facebook and MySpace. These photographs may

suggest that plaintiffs are living much more active lives than their testimony in the litigation indicates.

Facebook photos in litigation

For instance, in *Skusek v. Horning*,² where the extent of the plaintiff's disability was in issue, photographs from the plaintiff's postings on Facebook showed her white water rafting, wearing the uniform of a soccer team, appearing at a golf driving range, and rock climbing.

In a Newfoundland case, the defendant learned of the existence of the plaintiff's publicly available Facebook profile. The profile showed that, contrary to the plaintiff's evidence, he had a very active social life. After being confronted with this evidence on cross-examination, the plaintiff shut down his Facebook account. The judge drew adverse inferences against the plaintiff.³ Other recently reported judgments also illustrate how diligent defence counsel can use plaintiffs' Facebook accounts to the defendants' advantage.⁴

Facebook photographs do not always have a dramatic impact on the court. In *Mayenburg v. Lu*,⁵ the defendants sought to introduce 273 photographs which they obtained from Facebook "walls" belonging

to the plaintiff's friends. The bulk of these photographs simply showed the plaintiff enjoying herself with her friends – for example, having a drink in a bar or pub. The court held that unless photographs showed the plaintiff doing a specific activity which she claimed to have difficulty performing, the photographs had no probative value and were inadmissible. This left a subset of approximately 69 photographs. These showed the plaintiff doing things such as hiking, dancing, or bending. However, even these photographs did not undercut the plaintiff's credibility, because she never said that she could not do these activities. Rather, she said she felt the consequences afterwards. Nevertheless, the court found that the plaintiff's injuries had minimal effect on her ability to engage in the activities she enjoyed before the accident.

Accessing online accounts

How does one get access to the information contained in a litigant's Facebook account? An excellent discussion of this issue may be found in Facebook in Litigation: Taking a Poke at Discovery by Louise Vrebosch, B.A., LL.B. dated June 4, 2009. This article was presented at the IMLA in Canada 2009 Conference: Critical Issues in a Time of Change. It is available on the Internet.⁶



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