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Facebook and Its Role in the Litigation Process

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Facebook and Its Role in the Litigation Process

- What is Facebook?
- How is Facebook Relevant to our Practice?
- Review of the Case Law and Pending TR Motion.
- Best Practices for Dealing with Clients and Requests for Facebook Information.
- Other Ethical Issues Associated with Facebook/Social Media as they Apply to Our Practice.

What is Facebook?

- Mark Zuckerberg and friends and the “Social Network.”
- As of July 2011 Facebook has more than 750 million active users, including 16.6 million Canadians.
- Business is valued as worth as much as \$50 Billion. Current revenues are \$2 Billion per year.
- According to Facebook’s “Info Page:”

“Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.”

Primary Content on Facebook

Profile – A page that sets out a user’s personal information.

Friends – Users can “friend” other users, which will give them access to non-public information on their friend’s pages.

Email – A private communication function.

Photographs and Videos – Users can select a profile photograph and upload photos and videos to their profile and tag their “friends”

Chat – Users can instant message each other.

How Does One Get Access to Information on Facebook?

Users select their own privacy settings, there are a myriad of options, with the primary ones being:

- a) **Public Profile:** User allows everyone access to all content.
- b) **Private Profile:** User allows “friends” only to access all content.
- c) **Public/Private Profiles:** Many ways in which content can be limited to various friends, networks, etc.

What the “Other Side” is Searching For

- In personal injury cases where a claim is made for **loss of enjoyment of life**, defence counsel may be looking for any correspondence and photographs to attack credibility.
- The court’s have said that Facebook materials may be directly relevant to assess a claim for damages for loss of enjoyment of life and ability to work.
- In other cases, like potentially family law disputes, litigants may look to Facebook content in an attempt to denigrate the other party’s character.

How Facebook Can Hurt Your Case:

Terry v. Mulowney, [2009] N.J. No. 86.

- **Facts:** A 2009 Newfoundland case involving a 28 year old male plaintiff who had been in 2 separate mva's and had claimed they had left him with little to no social life.
- The Defendants obtained photographs from the Plaintiff's "public" Facebook site, which showed him attending and hosting parties, frequently drinking alcohol and smoking.

Justice Adams spoke about the importance of the Facebook evidence in this case:

“Without this evidence, I would have been left with a very different impression of Mr. Terry’s social life. He admitted as much in cross-examination. After he was confronted with information that is publicly accessible, he shut down his Facebook account saying he did it because he didn’t want “any incriminating evidence” in Court. **I draw an adverse inference against Mr. Terry on account of this statement** and conclude that the Facebook account which he shut down and some particular messages which he deleted prior to shutting down the account entirely contained information which would have damaged his claim.”

Murphy v. Perger, [2007] O.J. No. 5511 (Ont. S.C.J) per Rady J.

- **Facts:** Claim for damages involving MVA related injuries to the Plaintiff which included a loss of enjoyment of life claim.
- The Plaintiff had posted photographs on her public Facebook page showing her involved in various social activities and the Defendant had moved for production of the private content.
- The Plaintiff had 366 friends on Facebook.
- Production of the entire Facebook page was sought in a motion one month before trial when presumably the Defendants first learned of this site.

Murphy v. Perger, [2007] O.J. No. 5511 (Ont. S.C.J)

- Decision: Rady J. ordered Production. Rady J. at Paragraph 17:

“It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.”

- Rady J. was unsympathetic to arguments about invasion of privacy stating as follows:

“I have concluded that any invasion of privacy is minimal and is outweighed by the defendant’s need to have the photographs in order to assess the case. The Plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.”

Leduc v. Roman (2009), 308 D.L.R. (4th) Ontario Superior Court (Decision of Master Dash Reversed by Justice Brown)

Facts:

- Plaintiff injured in an MVA and claiming damages for loss of enjoyment of life.
- Defendant learned about the Plaintiff's Facebook site after Discovery's had been completed.
- The Plaintiff's public Facebook page showed **only his name and picture**.

Defence Counsel moved for:

1. Interim preservation Order.
2. All information on the Plaintiff's Facebook Page.
3. Alternatively, a sworn Supplementary Affidavit of documents with leave to cross-examine on the Affidavit of Documents.

Leduc v. Roman (2009), 308 D.L.R. (4th) Ontario Superior Court (Decision of Master Dash Reversed by Justice Brown)

- Master Dash found that the Facebook profile pages were “documents” as defined under Rule 30.01, which lay within the control of the Plaintiff and that the Facebook page: “might have some relevance to demonstrating the Plaintiff’s physical and social activities, enjoyment of life and psychological well-being.
- Master Dash held that the Plaintiff has a **positive obligation** to produce all relevant documents including those on his private Facebook profile demonstrating activities and enjoyment of life.
- Master Dash stated that where no documents are produced the defendant:
“bore the onus to demonstrate the this Plaintiff has relevant materials on this Plaintiff’s website.”
- Master Dash refused to order production on the basis that that the Defendant had failed to meet this onus but nevertheless ordered that the Plaintiff deliver a supplementary affidavit of documents and preserve his Facebook postings.

The Law – *Leduc v. Roman* (2009), 308 D.L.R. (4th) Ontario Superior Court (Justice Brown)

➤ On appeal, Justice Brown **agreed** with Master Dash in almost all respects:

1) Justice Brown said that:

“a party who maintains a private or limited access Facebook profile 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 matter in issue in an action.”

2) Justice Brown found that Master Dash correctly stated that:

“it is incumbent on a party’s counsel 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.”

3) Justice Brown noted that proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site and that Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a Court can order production.

The Law – *Leduc v. Roman* (2009), 308 D.L.R. (4th) Ontario Superior Court (Justice Brown)

- Justice Brown **disagreed** with Master Dash, however, in that he was prepared to accept (relying on the *Murphy v. Perger* decision):

“General evidence about Facebook and infer from the nature of the Facebook service the likely existence of photographs on the Plaintiff’s private profile.”

- Justice Brown held that Master Dash erred by refusing to order production of the Facebook materials without giving the Defendant an opportunity to cross-examine the Plaintiff on a supplementary Affidavit of Documents.
- Justice Brown ordered the Plaintiff to:
 - serve a supplementary Affidavit of Documents;
 - ordered that the Facebook postings be preserved pending production; and,
 - granted leave to the Defendant to cross-examine Mr. Leduc about the nature of the content posted on his Facebook site.

Schuster v. Sun Alliance Insurance Company of Canada
(2009), 93 C.P.C. (6th) 365.

Facts:

- Personal injury damages claim arising out of an MVA.
- The Plaintiff was examined for discovery on August 14, 2007. Affidavit of documents **did not disclose Facebook materials.**
- The Facebook page was discovered during post-discovery surveillance.
- Plaintiff had a **private Facebook** account and 67 “friends”
- Insurer brought an ex parte motion for an interim order for preservation of documents on the Plaintiff’s Facebook page.
- There was no evidence of relevant documents/photographs. The relief was denied.

Schuster v. Sun Alliance Insurance Company of Canada
(2009), 93 C.P.C. (6th) 365.

- Court applied RJR MacDonald test re: *Ex parte* interim injunctive relief. There was a serious issues to be tried.
- Defendant was unable to establish that it would suffer irreparable harm. There was no evidence of relevant information or that the Plaintiff was likely to delete evidence from Facebook account.
- With respect to balance of convenience. Justice Price held that:

“The proper balance of convenience between the Plaintiff’s privacy interest and the Defendant’s disclosure interest is struck by presuming from the Plaintiff’s failure to list Facebook documents in her Affidavit of Documents that these documents do not contain relevant information, but by giving the Defendant’s a reasonable opportunity to rebut this presumption by cross examining the Plaintiff on her Affidavit of Documents to ensure that she has complied with obligations in relation to it.”

“The Defendant should not seek to by-pass the need to make these inquiries by prematurely seeking an order for delivery of a Supplementary Affidavit of Documents or preservation or production of documents by asking the Court to speculate as to the content of the Plaintiff’s Facebook Account.”

Schuster v. Sun Alliance Insurance Company of Canada
(2009), 93 C.P.C. (6th) 365.

- Justice Price would not infer relevance:

“I do not regard the mere nature of Facebook as social networking platform or the fact that the Plaintiff possesses a Facebook account as evidence that it contains information relevant to her claim or that she has omitted relevant documents from her Affidavit of Documents.”

- Defence counsel was free to have questioned the Plaintiff about Facebook at her examination for discovery.

- An interim preservation order was not granted. As per Justice Price:

“There are many good reasons unrelated to litigation that people may have to withdraw documents from their friends’ view. Their right to do so should not be lightly interfered with.”

- Because Facebook was still a “**relatively recent phenomenon**,” the Court granted the Defendant leave to cross-examine the Plaintiff on her Affidavit of Documents.

Daniel Prete v. State Farm Mutual Automobile Insurance Company (FSCO A09-002996, January 13, 2011)

Facts:

The applicant was seeking IRB's and payment of housekeeping and home maintenance expense. The insurer was seeking disclosure of photographs from the date of the accident.

- Arbitrator Ashby said production requirements in court proceedings are very different than FSCO proceedings. Rule 32.2 of the Dispute Resolution Code, states that:

“Subject to the time lines under Rule 39, the parties have an ongoing responsibility to ensure the prompt and complete exchange of documents that are **reasonably necessary** to determine the issues being Arbitrated....”

- Arbitrator Ashby found that the requirement to produce such photographs would be burdensome in the context of administrative tribunal.

- In conclusion, Arbitrator Ashby stated that:

“I find the potential relevance of images posted on a social networking forum to be too remote when weighted against factors such as sensitivity and practicality.”

Birka v. Haramina

- TR Motion involving Facebook and disclosure issues.
- Case involves a young woman, Romana Birka (17 at the time of the accident), who was injured in an MVA in 2006.
- The accident resulted in the death of Romana's mother. Romana developed serious psychological issues and attempted suicide on 2 occasions following the accident:
- Defendant's Motion involved 2 parts:
 - 1) Request for "Facebook Materials."
 - 2) Request to obtain personal journal of Romana Birka.

Birka Continued (Facebook)

- TR produced no Facebook materials. The Plaintiff has a limited public profile with approximately 100 friends.
- A request for “Facebook Materials” was refused at discovery. Plaintiff gave evidence at discovery that she uses Facebook to make plans with her friends and share funny stories.
- Defendant’s were successful on Motion before Master Glustein who ordered production of:
 - “Facebook information and material **relating to** the plaintiff’s enjoyment of life and ability to engage in day-to-day activities.”
- Appeal Pending. Suggestions welcome.

Birka Appeal (Facebook)

The Appeal is primarily on the following grounds, that:

- 1) Master Glustein failed to take proper account of the New Rule 30.02 by ordering all materials, “related” to the Plaintiff’s loss of enjoyment of life and ability to engage in day to day activities.”
- 2) The Order is impossible to comply with, short of producing all Facebook materials, which is certain to result in the production of irrelevant materials.
- 3) The Order will require Plaintiff’s counsel to monitor the Plaintiff’s Facebook site, an effort that will be disproportionate to the probative value of any potential evidence.

Birka (Journal)

- Relied on common law privilege of private communications.
- Supreme Court (Justice McLachlin) said in *M(A) v. Ryan*, [1997] 1 S.C.R. 157 that private communications may be protected by privilege where:
 - a) The communication originates in confidence;
 - b) The confidence is essential to the relationship in which the communication arises;
 - c) The relationship is one that should be “sedulously fostered” in the public good; and,
 - d) The interests by protecting the communication from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.
- Evidence was filed by the Plaintiff’s psychologist indicating that journal was used for therapeutic purposes and disclosure could be harmful to the Plaintiff.
- While the Defendant withdrew this request on the morning of the Motion Master Glustein indicated that he would have been prepared to find in the Plaintiff’s favor on this issue.

Best Practices for Facebook

- Speak with clients about social networking at the initial client meeting.
- Advise clients of potentially relevant materials.
- Review social networking sites when compiling Affidavit of Documents.
- Include relevant Documents in the Affidavit of Documents.
- Prepare your clients for questions about their Facebook page in pre-discovery briefing.
- Where undertakings are requested ensure a proper foundation has been set out.
- Provide narrow undertakings only (i.e. specific photos or correspondence as opposed to “giving away the farm”)

Ethical Issues – Query:

1. Is it appropriate to ask clients to: Remove themselves from social networks such as Facebook?
2. Is it appropriate to advise clients to: Limit use of social networking sites while litigation is ongoing?
3. What should you do if a client asks whether they can delete their Facebook account?
4. If a Facebook account is deleted should this be listed under Schedule “C” of the Affidavit of Documents?
5. Is it sufficient to rely on the client to identify relevant documents on their social network or should clerks get involved?
6. Communicating with clients directly on social media (i.e. what if a client “friends” you on Facebook)

Rules of Professional Conduct 4.01(4)

- Where the rules of a tribunal require a party to produce documents or attend on examinations for discovery, a lawyer when acting as an advocate:
 - a) Shall explain to his or her client:
 - i) the necessity of making full disclosure of all documents relating to any matter in issue, and,
 - ii) the duty to answer to the best of his or her knowledge, information, or belief, any proper question relating to any issue in the issue or made discoverable by the rules of court or the rules of the tribunal.
 - b) Shall assist the client in fulfilling his or her obligations to make full disclosure, and,
 - c) Shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

THANK YOU

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