Facebook in Litigation:
Taking a Poke at Discovery

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by Louise Vrebosch

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Municipalities are increasingly charged with defending a variety of claims. Defending these claims is becoming more cumbersome and expensive. Where claims include damages for soft tissue injuries and loss of enjoyment of life, it is often difficult to contradict the plaintiff's evidence. Recently, defendants' counsel across Canada have successfully challenged plaintiffs' claims using evidence from social networking sites such as Facebook. This paper discusses how Facebook has been used in Canadian litigation and reviews the recent case law on Facebook and discoverability.

Introduction[1]

Recently, Internet applications such as Facebook, MySpace, YouTube and Twitter have changed social interaction. These applications allow everyday people to promote themselves. Thanks to the viral video phenomenon, YouTube[2] has made celebrities of the likes of Gary Brolsma whose Numa Numa Dance video has been viewed at least 700 million times[3]. MySpace has allowed thousands of independent bands exposure to a world-wide fan base. Twitter seems to think we want to know what you're thinking… at all times.

Facebook, the focus of this paper, is another such application, that allows for "social networking" on the Internet. According to Facebook's "Info page":

> Facebook's mission is to give people the power to share and make the world more open and connected.
>
> 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.[4]

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[1] I would like to thank Christine Carter, Clay Hunter, Abbie Moscovich, Anna Solomon, Nihan Keser and Tom Peters for their contributions and advice.

[2] See *R. v. A.P.P.*, [2008] O.J. No. 1584 (Ct. J.), where two youths were charged with assault for setting a third youth on fire for the purpose of creating a YouTube video in order to become 'Stars.'

[3] You may not recognize the name Gary Brolsma, but you may recognize the image of a man sitting at a computer web cam with headphones on, lip-syncing the song "Dragostea din tei" as performed by the Moldovan pop group O-Zone now popularized by pop star Rihanna in the song "Live your life."

[4] Facebook's Information page (May 13, 2009) , online: <http://www.facebook.com/facebook?ref=pf#/facebook?v=info&viewas=0>.

Mark Zuckerberg[5] and co-founders Dustin Moskovitz, Chris Hughes and Eduardo Saverin launched Facebook in February 2004 from their Harvard dorm room. Initially, only Harvard University students had access. Eventually, that access was extended to other university students, high school students, etc… Today, according to its own statistics, Facebook boasts:

- More than 200 million active users
- More than 100 million users log on to Facebook at least once each day
- More than two-thirds of Facebook users are outside of college
- The fastest growing demographic is those 35 years old and older
- Average user has 120 friends on the site
- More than 850 million photos uploaded to the site each month
- More than 8 million videos uploaded each month
- More than 1 billion pieces of content (web links, news stories, blog posts, notes, photos, etc.) shared each week.[6]

What content is available on Facebook?

Profile: Facebook users create a profile, in which they can list their name, birth date, religion, occupation, education and work information, etc… For the purposes of this paper, 'profile' will refer to the entirety of a user's Facebook pages. A 'profile' will include the user's personal information, photographs, videos, wall, etc…

Network: Users can choose to belong to a network. A network is a subset of the Facebook community. Networks can be associated to cities, universities, employers, etc… A user's network is important for the purposes of this paper since some users will choose to allow access to their profile to other users within their network.

Email: Users have three methods of communicating within Facebook. The first is similar to regular email. The user can send email to one or several users. The correspondence back and forth can only be seen by the user and recipients.

Chat: Facebook has recently introduced an instant messaging feature. Users can communicate with other online users. Messages sent back and forth are only seen by the user and the recipient.

Wall: A user's Facebook wall is akin to having a whiteboard outside your dorm room door. Other users can post public messages, links, etc… on a user's wall. Access to a user's wall will depend on the user's privacy settings.

Photographs and Videos: Users can choose to have a profile photograph. Photographs of the user can be seen by either clicking on the user's profile photograph, or by clicking

[5] Currently the CEO of Facebook, Zuckerberg was born May 14, 1984.

[6] Facebook's Press Room page (May 13, 2009), online: <http://www.facebook.com/press/info.php?statistics>.

the link below the profile photo. Users can upload photo albums and videos to their profile. A user and a user's 'friends' can tag the user in photographs. 'Tagging' a photograph means identifying the subjects in a photograph. Once a photograph is tagged, if done properly, the subjects' names will appear beneath the photograph as links to the subject.

Other: There are of course, a myriad of other applications available to Facebook users. In conducting a search, you might consider searching a user's posted "Notes."

How can the information contained on Facebook be used in legal proceedings?

As of the writing of this paper[7], there were 50 Canadian decisions reported on Quicklaw mentioning the word "Facebook," dating back to June 12, 2007.[8] Of these cases, 16 are Family Law cases and 7 were Criminal Law cases where "Facebook" was mentioned as part of the facts.[9] The bulk of the remainder are summarized below.

In many cases, discoverability has not been an issue. Whether that was because the profiles were public, or whether the parties had access in some other fashion is not clear. A review of these cases shows the variety of ways in which Facebook content has been used in litigation.

To attack credibility

In an action for unlawful arrest, the plaintiff claimed "that he had never been intoxicated and that he is a very responsible person"[10]. In cross examination, counsel for the defendant police services board introduced entries from the plaintiff's Facebook profile wherein the plaintiff described "publicly how he became extremely intoxicated on prior occasions"[11].

To denigrate a party's character

Facebook content is used repeatedly in family law disputes where one party will present content in an attempt to denigrate the other party's character. In some cases, the Court has

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[7] May 13, 2009.

[8] *Kourtesis v. Joris, Infra* is the earliest decision, decided on June 12, 2007.

[9] Bans on Facebook usage have also been included as part of criminal sentences. See for example, *R v. S.G.Z.*, [2009] B.C.J. No. 601 (Prov. Ct.), *R. v. B.S.B.*, [2008] B.C.J. No. 2227 (Sup. Ct.) at para. 2.

[10] *Hollingsworth v. Ottawa Police Services Board*, [2007] O.J. No. 5134 (S.C.J. (Sm. Cl. Ct.)) at para. 31.

[11] *Hollingsworth, Ibid.*

accepted the content as evidence of character flaws. For example, in denying a father's application for access to his child, R. J. Williams J. referred simply to a crude joke posted as the caption to one of the father's Facebook photographs to demonstrate that the father had "poor judgment."[12] In another family law application where a father sought a guardianship and parenting order for his 12 year old daughter, the Court referred extensively to postings the father made on his Facebook page about his ex-wife. The Court found that the postings showed a lack of respect for his wife, and further, that posting the child's photograph on his profile exposed the child to risk.[13]

The content of a child's Facebook profile has also been at issue in custody disputes. In some cases, non-custodial parents have used photographs posted on their child's Facebook profile to discredit the custodial parent's parenting skills.[14]

To dispute damages claimed

Facebook photographs have been used to demonstrate that facial scarring resulting from a motor vehicle accident did not constitute a "serious impairment of an important physical, mental or psychological function within the meaning of s. 267.5(5) of the *Insurance Act*, since the Court found that, the plaintiff herself, gave evidence that "she socializes, dates, and has even gone to the extent of providing her picture on the computer program Facebook"[15].

In another case, photographs posted on Facebook, depicting the plaintiff "participating in golf, snowboarding, rock-climbing, travel and other social activities all of which have a cost", assisted the Court in finding that denying a plaintiff's request for an advance of damages pending trial would not work a hardship.[16]

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[12] *Westhaver v. Howard*, [2007] N.S.J. No. 499 (Sup. Ct. (Fam. Div.)) at para. 26.

[13] See also *M.A.C. v. M.K.*, [2009] O.J. No. 368 (Ct. J.) at para. 17, where a mother complained that a father's posting of his child's photograph on Facebook and a dating site showed a "failure to respect boundaries."

[14] *W.R.V. v. S.L.V.*, [2007] N.S.J. No. 354 (Sup. Ct.) at para. 31, *T. K. B. v. P.M.S.*, [2008] B.C.J. No. 1923 (Sup. Ct.) at para. 16.

[15] *Goodridge (Litigation guardian of) v. King*, [2007] O.J. NO. 4611 (S.C.J.) at para. 128.

[16] *Cikojevic v. Timm*, [2008] B.C.J. No. 72 (Sup. Ct.) at para. 47.

In *Bagasbas v. Atwal*[17] where the plaintiff claimed $40,000 for pain, suffering and loss of enjoyment resulting from a motor vehicle collision, the defendant used her Facebook profile photographs to show the plaintiff engaging in the very activities she claimed she could no longer do. These photographs went a long way in persuading the judge that the plaintiff took "an inflated view"[18] of her injuries. The plaintiff was awarded a nominal amount of $3,500 in non-pecuniary damages.

Finally, in the most recent decision from Newfoundland, J. P. Adams J. was asked to assess damages for injuries sustained by the 28-year old male plaintiff in two separate motor vehicle accidents. The plaintiff claimed that, as a result of the accidents, "his social life had been severely curtailed" and that "he was no longer able to play pool with his friends and he essentially had little or no social life, except the occasional weekend outing."[19]

The plaintiff was cross examined on photographs from his Facebook profile which showed his "rather full and active social life."[20] The photographs showed the plaintiff attending and hosting parties, attending weekend outings at summer cabins, frequently drinking alcohol, smoking marijuana daily and he appeared "to have a number of friends with whom he communicated and socialized on a regular basis."[21] J. P. Adams J. stated:

> [w]ithout 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 this information which is publicly accessible, he shut down his Facebook account saying he did it because he didn't want "any incriminating information" 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

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[17] [2009] B.C.J. No. 758 (Sup. Ct.).

[18] *Bagabas v. Atwal*, *Ibid* at para. 8.

[19] *Terry v. Mulowney*, [2009] N.J. No. 86 (S.C. (T.D.)) at para. 102.

[20] *Terry v. Mulowney, Ibid* at para. 104.

[21] *Terry v. Mulowney, Ibid* at para. 104.

> entirely contained information which would have damaged his claim.[22]

How can I get access to the information contained on Facebook?

Facebook users can apply varying degrees of privacy controls over the content contained on their profiles. A truly 'public' profile is one where the user allows everyone to access all content on their page. A 'private' profile is one where the user only allows 'friends' to access all content. Between these two extremes, lie the majority of most users' Facebook profile settings. Users can opt to allow access to "friends of friends" and "my networks and friends." There are a myriad of other privacy options available to users, too many to discuss in this paper. Suffice it to say that access to the profile will depend on which privacy settings the user has enabled.

Accessing 'Public' Profiles

Accessing a public profile is easily done in one of two ways. Without using your own Facebook profile, you can access the user's public search listing by using an Internet search engine, such as Google. This listing will normally display the user's profile photo, a random listing of Facebook friends, and a listing of groups of which the user is a "fan." Using the public listing, you can view the user's "friends" list. If the user's profile is set to public, you can also access the user's profile by clicking on their name.

If logged into Facebook, you can use the Facebook search at the top right corner of every Facebook page. Facebook will search all profiles containing the key terms either in the profile name, or in the contents of the profile's Info section. For example, if you search "Michael Jackson," Facebook will return results showing individuals named "Michael Jackson," fan sites dedicated to "Michael Jackson" and individuals who list "Michael Jackson" in their interests.

Accessing 'Private' Profiles

It is generally accepted that asking to be the user's friend, "poking" the user or writing on the user's wall raises ethical concerns and would be akin to contacting the party.

Accessing a 'private' profile will depend on the privacy settings set by the user. As noted above, Facebook users have a myriad of ways to control who has access to the content on their profiles. At one extreme, users can choose not to appear in searches, or in their friends' list of

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[22] *Terry v. Mulowney, Ibid* at para. 105.

'friends.' In this case, their profile would seem non-existent to anyone other than their 'friends.' More commonly, users' names will appear in Facebook searches; however their profiles will be inaccessible to anyone outside of their privacy settings. Before requesting disclosure, consider the possibility that the user may have left access to their profile open to users in their network. A user's network will often be posted on their public listing.

If a user's profile is inaccessible, parties may consider requesting disclosure. As we will see in the cases below, Facebook profiles have been found to be "documents" that should be disclosed to the extent that they are relevant, pursuant to the *Rules of Civil Procedure.*

In *Kourtesis v. Joris,*[23] in the middle of a trial for damages resulting from a motor vehicle accident, E.R. Browne J. ruled that Facebook photographs of the plaintiff were admissible, and granted leave to recall the plaintiff. The plaintiff claimed that her soft tissue injuries affected her enjoyment of life, such that she did not participate in activities such as Greek dancing, and further, that she did not have many friends. A staff member of the defendant's counsel came upon photographs of the plaintiff on her cousin's Facebook after the second week of trial. The photographs depicted the plaintiff dancing and enjoying life.

Between the time defendants' counsel found the Facebook profile and hearing the motion, the plaintiff's Facebook profile was essentially deleted. E. R. Browne J. immediately ordered "that the website be maintained without change until after trial."[24] Judge Browne found eventually that "I do find, however, that the issue of her enjoyment of life is, as stated, a material element in assessing damages. In fairness, balance is in favour of the photos being introduced, subject to technicalities dealing with admissibility."[25]

In *Murphy v. Perger*[26], a 2007 action wherein the plaintiff sought damages allegedly arising from a motor vehicle accident, H. A. Rady J. was asked to determine whether access to

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[23] [2007] O.J. No. 5539 (S.C.J.).

[24] *Kourtesis, Ibid* at para. 13.

[25] *Kourtesis, Ibid* at para. 23.

[26] [2007] O.J. No. 5511 (S.C.J.).

the plaintiff's private Facebook profile should be given to the plaintiff. The defendant was not seeking access to the email communication contained on the site.[27]

The defendant had access to a publicly available site called "The Jill Murphy Fan Club" (Jill Murphy being the plaintiff) which contained photographs of the plaintiff engaged in social activities, but requested access to her private Facebook profile, wherein the plaintiff had 366 friends. The site also contained messages from her family and friends, describing the plaintiff as "the life of the party."

The defendant successfully brought an ex parte motion for preservation of the Facebook profile. Defendant's counsel brought the motion ex parte to avoid spoliation of evidence.

The defendant also brought a motion before Rady J. for production of the documents contained on the profile. The defendant relied on the decision in *Kourtesis v. Joris*, referred to above. The plaintiff claimed that the defendant was on a "fishing expedition" and that a higher degree of privacy was to be expected since the plaintiff could not control who tagged her in photographs.[28]

The Court found that the photographs contained on the Facebook site were documents pursuant to Rule 30.01(1)(a) that must be disclosed to the extent that they relate to any matter in issue, pursuant to Rule 30.02(1), and must be disclosed for inspection if requested.[29] The Court also found that the photos could be relevant to impeach the plaintiff's credibility as well as a means to assess the value of her claim for damages.

With respect to the plaintiff's claim that this was but a mere "fishing expedition," the Court found that given the nature of Facebook, as "a social networking site where [...] a very large number of photographs are deposited by its audience" and "given that the public site [to which the defendant had access,] includes photographs, it seems reasonable to conclude the private site would as well."[30] Finally, the Court found that "any invasion of privacy is minimal

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[27] *Murphy v. Perger, Ibid* at para. 1.

[28] *Murphy v. Perger*, *Ibid* at para. 7.

[29] *Murphy v. Perger, Ibid* at para. 9.

[30] *Murphy v. Perger, Ibid* at para. 17.

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"[31].

In a case from the New Brunswick Court of Queen's Bench, H.H. McLellan J. was very critical of the use that the defendant intended for the plaintiff's own Facebook photographs. During the course of ongoing discovery, the defendant obtained printouts of the plaintiff's Facebook profile. Counsel for the defendant objected to the plaintiff's questions on discovery regarding the origin of the photographs. The Court found no fault on the part of the plaintiff for not disclosing the Facebook profile since "the concept of Facebook pages is relatively new in our society."[32] Interestingly, H. H. McLellan J. was wary of the defendants attempting to "ambush the Plaintiff by his own Facebook." Defendant's counsel was ordered to disclose the origin of the Facebook material.

In *Leduc v. Roman,*[33] the most recent court decision dealing with the production of Facebook information, D. M. Brown J. ordered that the plaintiff's entire Facebook profile should be disclosed. The parties were involved in a motor vehicle accident. As a result, the plaintiff claimed loss of enjoyment of life and limitations to his personal life.[34] The defendants became aware of the plaintiff's Facebook profile when the plaintiff claimed to Dr. Bruun-Meyer during his defence medical that "he did not have friends in his current area, although he had 'a lot on Facebook.'"[35]

The defendants' counsel conducted a Facebook search of the plaintiff's profile, however found that he had limited his profile to his Facebook 'friends.' Counsel thus moved for:

> (i) the interim preservation of all information contained on Mr. Leduc's Facebook profile

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[31] *Murphy v. Perger, Ibid* at para. 20.

[32] *Knight v. Barrett*, [2008] N.B.J. No. 102 (Q.B.(T.D.)) at para. 7.

[33] [2009] O.J. No. 681 (S.C.J.).

[34] *Leduc v. Roman, Ibid* at para. 2.

[35] *Leduc v. Roman, Ibid* at para. 3.

(ii) production of all information on the Facebook profile, and

(iii) the production of a sworn Supplementary Affidavit of Documents.[36]

At first instance, Master Dash found that the Facebook profile pages were "documents" that "might have some relevance to demonstrating the Plaintiff's physical and social activities, enjoyment of life and psychological well being." However, he found that the defendant had to do more than merely prove that the plaintiff had a profile. He found that "speculation of what may be on the Plaintiff's site or what is on a 'typical' site is insufficient." Master Dash concluded that the Defendants were "clearly" on a "fishing expedition" and dismissed the motion.

D. M. Brown J. reversed Master Dash's decision. He referred extensively to Rady J's reasons in *Murphy v. Perger,* above and came to some very important enunciations. First, he found that where a user has both a public and a private profile, in ordering production of the content on the private profile, it is reasonable to infer from the content on the public profile that similar content exists on the private profile.[37] Secondly, he found that where the user only has a private profile, a court can infer from the social networking purpose of Facebook, and its applications "that users intend to take advantage of Facebook's applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others."[38]

D. M. Brown J. went so far as eliminating the distinction between a private site and a public site in the following way: "[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 any matter in issue in an action."[39]

Judge Brown found that it was reasonable in this case to infer that the plaintiff's "social networking site likely contains some content relevant to the issue of how Mr. Leduc has been

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[36] *Leduc v. Roman, Ibid* at para. 6.

[37] *Leduc v. Roman, Ibid* at para. 30.

[38] *Leduc v. Roman, Ibid* at para. 31.

[39] *Leduc v. Roman, Ibid* at para. 32.

able to lead his life since the accident."[40] He determined that the defendant's request was not merely a fishing expedition, but noted that some evidence of relevant content was required to compel disclosure. He thus ordered the plaintiff to re-attend for a cross examination to allow the defendant the opportunity to ascertain the relevance of the content posted on the plaintiff's Facebook profile.

Leduc v. Roman was referred to by Master Haberman in *Kent v. Laverdiere,*[41] where, four weeks before trial, the defendant moved for production of a Supplementary Affidavit of Documents listing the plaintiffs' Facebook documents. The plaintiffs claimed that there were more than 1,500 pages of content on the three plaintiffs' Facebook profiles, which would take approximately 75 hours to review. Master Haberman refused the defendants' request based on her lack of jurisdiction to make an order that would interfere with a fixed trial date.

Master Haberman also stated that, even if she had the required jurisdiction, she would have dismissed the motion. She found that the rendering of the *Leduc v. Roman* decision did not represent a "substantial or unexpected change in circumstances" that would justify delaying the trial. In referring to *Leduc v. Roman*, Master Haberman made the following comments: "[w]hile at first sight, the appeal decision seems to have reversed a decision of the master, the approach adopted by Brown J. is, in fact, more of a modification of the master's approach than a reversal of it."[42]

Further, Master Haberman stated "Before *Leduc* can be invoked, there must be something to suggest at least some possible connection between the matters in issue and the documents sought." She continued in *obiter* that even if she had the jurisdiction to make the order, she found nothing in the pleadings of the *Family Law Act* for the claimants "to suggest that there could possibly be anything in the Facebook or MySpace pages [...] that could possibly be relevant."[43] She did, however, find that there may exist content relevant to the main plaintiff's claims with

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[40] *Leduc v. Roman, Ibid* at para. 32.

[41] [2009] O.J. No. 1522 (S.C.J.).

[42] *Kent v. Laverdiere, Ibid* at para. 26.

[43] *Kent v. Laverdiere, Ibid* at para. 33.

respect to her lessened enjoyment of life, and the negative effect on her ability to earn income or find romantic companionship.

What if the Facebook profile is deleted before production?

Where there is evidence of spoliation of evidence, a request can be made to Facebook for third party production. Facebook's privacy policy contains the following clause:

> We may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws. We do not reveal information until we have a good faith belief that an information request by law enforcement or private litigants meets applicable legal standards. Additionally, we may share account or other information when we believe it is necessary to comply with law, to protect our interests or property, to prevent fraud or other illegal activity perpetrated through the Facebook service or using the Facebook name, or to prevent imminent bodily harm. This may include sharing information with other companies, lawyers, agents or government agencies.[44]

As of May 1, 2009, Facebook's Data Retention policy is as follows:

> Facebook users may modify or delete any of their profile information at any time by logging into their account. Information will be updated immediately. Individuals who wish to deactivate their Facebook account may do so on the My Account page. Removed information may persist in backup copies for a reasonable period of time but will not be generally available to members of Facebook.
>
> Where you make use of the communication features of the service to share information with other individuals on Facebook, however, (e.g., sending a personal message to another Facebook user) you generally cannot remove such communications.[45]

Practical Suggestions based on the Case Law

What we can take from the case law is the following procedure:

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[44] Facebook Principles (May 13, 2009), online: <http://www.facebook.com/facebook?ref=pf#/policy.php?ref=pf>.

[45] Facebook's Statement of Rights and Principles (May 13, 2009), online: <http://www.facebook.com/terms/english.php>.

1. Conduct an Internet search of 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, Supra,* 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 their 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."[46] If the content is not listed in the Affidavit of Documents, request a Supplementary Affidavit of Documents listing the Facebook profile contents.

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[46] *Leduc v. Roman, Supra* at para. 28

Appendix A - Other Interesting Facebook Cases

Are comments posted on Facebook "threats" at law?

In *R. v. Sather,*[47] a father was accused of uttering threats to cause death or bodily harm. Mr. Sather created a petition against the Children's Aid Society when they removed his child from the custody of his wife. Mr. Sather admitted to posting the following comments on Facebook:

> "when I find out what nurse called CAS may god have murcey on my soul cuz I'm going straight to hell with a 25 yr pit stop in prison"
>
> "Dan is gonna go suicidal bomb CAS"
>
> "Dan is sick of all the bull shit and in the midst of planning a tacticle strike to get kyle back and disappearing off the face of the earth."
>
> "Dan is plan B is in full operation as of Nov. 23 first the man power was set up then the fire power is obtained now 2 weeks to find out where there keeping him."
>
> "Dan is scared its almost time."[48]

R. Blouin J. found that these postings were not meant to intimidate and acquitted Mr. Sather. In coming to this decision, R. Blouin J. considered expert evidence "called to explain how people use Facebook. [The expert witness,] Jesse Hirch, testified that people who profile themselves embellish their character. They deliberately say provocative things to elicit a response from their Facebook "friends". In a sense they construct an alternate persona."[49]

Facebook's effect on publication bans

In the matter of *R. v. J. S. R.,*[50] the criminal prosecution of one of the accused in the Jane Creba shooting, the Court was asked to order a publication ban of the evidence to be heard at trial. In considering the effectiveness of publication bans, I.V.B. Nordheimer J. considered a

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[47] [2008] O.J. No. 918 (Ct. J.).

[48] *R. v. Sather, Ibid* at para. 6.

[49] *R. v. Sather, Ibid* at para. 9.

[50] [2008] O.J. No. 4160 (S.C.J.).

statement made by then Chief Justice Lamer in *Dagenais v. Canadian Broadcasting Corp.*,[51] wherein he noted that "[i]n the global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult."[52] Nordheimer J continued:

> That concern has only exacerbated in the almost fifteen years since *Dagenais* was decided. We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites such as "YouTube" and "facebook", and the ever increasing number of personal websites. Most, if not all, of these outlets lie outside any effective control by this court.[53]

Facebook Login/Logout records associated with plaintiff's claim of ongoing fatigue

In *Bishop (Litigation guardian of) v. Minichello,*[54] T.J. Melnick J. ordered production of the plaintiff's Facebook login/logout records. The plaintiff alleged a brain injury resulting in ongoing fatigue which prevented him from maintaining employment. The plaintiff claimed to a doctor that "his sleep varies with the time one of his friends goes to bed. This is because he spends a substantial amount of time on Facebook chatting with his friend."[55] The defendant thus brought the motion to have his computer "hard drive analyzed to determine the period of time the plaintiff spends on Facebook between eleven at night and five in the morning each day."[56]

T. J. Melnick J. granted the order, finding that the information sought was sufficiently probative, and limited such that the privacy concerns were not at issue.

Facebook and Election Spending

For an interesting case discussing the use of Facebook in election campaigns, see *British Columbia Teachers' Federation v. British Columbia (Attorney General),*[57] where F.W. Cole J.

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[51] [1994] 3 S.C.R. 835.

[52] *Dagenais, Ibid* at para. 89.

[53] *R. v. J. S. R., Supra* at para. 60.

[54] [2009] B.C.J. No. 692 (Sup. Ct.).

[55] *Bishop v. Minichello, Ibid* at para. 56.

[56] *Bishop v. Minichello, Ibid* at para. 1.

[57] [2009] B.C.J. No. 619 (Sup. Ct.).

discusses at length the effect that Facebook and other Web 2.0 applications such as YouTube, have affected the way politicians campaign.[58]

[58] See in particular, paras. 217-232.